

This decision was not selected for publication in the New Mexico Appellate Reports. Please see Rule 12-405 NMRA for restrictions on the citation of non-precedential dispositions. Please also note that this electronic decision may contain computer-generated errors or other deviations from the official paper version filed by the Supreme Court.

1           **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **LIVING CROSS AMBULANCE SERVICE, INC.,**

3           Appellant,

4 v.

**NO. S-1-SC-35590**

5 **NEW MEXICO PUBLIC REGULATION COMMISSION**  
6 **and AMERICAN MEDICAL RESPONSE AMBULANCE**  
7 **SERVICE, INC., d/b/a AMERICAN MEDICAL RESPONSE,**  
8 **EMERGICARE,**

9           Appellees.

10 **APPEAL FROM THE NEW MEXICO PUBLIC REGULATION**  
11 **COMMISSION**

12 Joseph E. Earnest  
13 Tesuque, NM

14 for Appellant

15 Russell R. Fisk  
16 Santa Fe, NM

17 for Appellee New Mexico Public Regulation Commission

18 Miller Stratvert P.A.  
19 Jennifer Davis Hall  
20 Stephen B. Waller  
21 Albuquerque, NM

1 for Appellee American Medical Response Ambulance Service, Inc.,  
2 d/b/a American Medical Response, Emergicare

3 **DECISION**

4 **CHÁVEZ, Justice.**

5 {1} The New Mexico Public Regulation Commission (PRC) granted Appellee  
6 American Medical Response Ambulance Service, Inc., d/b/a American Medical  
7 Response, Emergicare (AMR) a permanent certificate to provide ambulance service  
8 in Valencia County under the provisions of the Motor Carrier Act, NMSA 1978, §§  
9 65-2A-1 to -41 (2003, as amended through 2013). Valencia County is a rural county  
10 that has recently experienced population growth, with most of its population  
11 concentrated in Los Lunas. Despite this recent growth, patients who live in Valencia  
12 County and require ambulance transportation to a hospital must be transported to  
13 Albuquerque, which can be a 20 to 35 mile trip that occupies an ambulance for two  
14 or more hours.

15 {2} From 1987 until April 5, 2013, Appellant Living Cross Ambulance Service,  
16 Inc. (Living Cross) had been the sole and primary provider of ambulance services in  
17 Valencia County, with the exception of a brief period between 1999 and 2000 when  
18 Superior Ambulance Company (Superior) was granted authority to operate in  
19 Valencia County. In December 2012, Living Cross reduced its fleet from three 24-  
20 hour ambulances and two 12-hour ambulances to three 24-hour ambulances and one

1 12-hour ambulance. Living Cross subsequently reduced its fleet to two 24-hour  
2 ambulances in April 2013 to coincide with a grant of temporary authority from the  
3 PRC allowing AMR to operate in Valencia County.

4 {3} After the administrative proceedings in this case, the hearing examiner  
5 concluded that Living Cross did not provide continuous and adequate service from  
6 2011 through 2013, prior to AMR's entry into Valencia County, and Living Cross  
7 was not able to provide continuous and adequate service at the time of the  
8 proceeding. Section 65-2A-13(D)(1). The hearing examiner further concluded that  
9 Living Cross did not adequately show that it would be able to provide continuous and  
10 adequate service in the future if AMR's application were denied, and also found that  
11 Living Cross did not show that its prior financial difficulties were substantially  
12 impacted by the entry of AMR. *Id.*; § 65-2A-8(D). With respect to AMR, the hearing  
13 examiner concluded that (1) AMR was fit, willing, and able to provide ambulance  
14 services in Valencia County, § 65-2A-8(B)(1); (2) AMR was in compliance with  
15 relevant safety and financial responsibility requirements, § 65-2A-8(B)(2); and (3)  
16 granting AMR permanent authority to provide ambulance services would "meet an  
17 ongoing public demand or need and thereby serve a useful public purpose," § 65-2A-  
18 8(B)(3). The PRC adopted the hearing officer's findings and conclusions in full and

1 issued a certificate allowing AMR “to provide ambulance service from points and  
2 places in Valencia County to points and places in Valencia and Bernalillo Counties,  
3 New Mexico.” Living Cross appealed the PRC’s decision on numerous grounds. We  
4 conclude that Living Cross’s arguments lack merit, and the PRC’s decision in this  
5 case was not arbitrary, capricious, or an abuse of discretion. Accordingly, we affirm  
6 the PRC.

## 7 **DISCUSSION**

### 8 **1. Standard of review**

9 {4} We may only reverse the PRC’s order if we determine that it is “(1) arbitrary,  
10 capricious or an abuse of discretion; (2) not supported by substantial evidence in the  
11 record; or (3) otherwise not in accordance with law.” Section 65-2A-35(C). “[W]e  
12 apply a de novo standard of review to the PRC’s rulings regarding statutory  
13 construction.” *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub.*  
14 *Regulation Comm’n*, 2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494. “With  
15 respect to questions of fact, we look to the whole record to determine whether  
16 substantial evidence supports the [PRC’s] decision.” *N.M. Indus. Energy Consumers*  
17 *v. N.M. Pub. Regulation Comm’n*, 2007-NMSC-053, ¶ 24, 142 N.M. 533, 168 P.3d  
18 105. Although we view the evidence in the light most favorable to the PRC’s

1 decision, we uphold the decision only if it is supported by substantial evidence. *Id.*  
2 “Substantial evidence on the record as a whole is evidence demonstrating the  
3 reasonableness of an agency’s decision, and we neither reweigh the evidence nor  
4 replace the fact finder’s conclusions with our own.” *Albuquerque Bernalillo Cty.*  
5 *Water Util. Auth.*, 2010-NMSC-013, ¶ 24 (internal quotation marks and citation  
6 omitted).

7 **2. The PRC did not err by granting operating authority to AMR for non-**  
8 **emergency service without considering the need for such service**

9 {5} Living Cross contends that the PRC should not have granted AMR the  
10 authority to provide non-emergency ambulance service because AMR did not  
11 introduce evidence supporting the need for such service, a showing which Living  
12 Cross claims is required by the Motor Carrier Act. Under the Motor Carrier Act, an  
13 applicant seeking authority to provide ambulance service has “the burden of proving  
14 that the ambulance service that currently exists in the territory sought in the  
15 application is inadequate and that the proposed service is directly responsive to a  
16 public need and demand for the service proposed.” Section 65-2A-13(C)(1). The  
17 PRC shall not grant an application

18 for a certificate or permit for ambulance service, or for amendment,  
19 lease or transfer of such a certificate or permit, if it finds after hearing  
20 that the existing ambulance service is provided on a reasonably

1 continuous and adequate basis in the territory in which the new service  
2 is sought or that the holder of the certificate or lessee providing the  
3 existing ambulance service in such territory is willing and able to  
4 provide, and does subsequently provide, reasonably continuous and  
5 adequate service within such territory, as specified by commission order.

6 Section 65-2A-13(D)(1). “[A]mbulance service” is “the intrastate transportation of  
7 sick or injured persons in an ambulance meeting the standards established by the  
8 [PRC].” Section 65-2A-3(B). The Motor Carrier Act does not make any distinction  
9 between emergency and non-emergency services.

10 {6} Despite the plain language of the Motor Carrier Act, Living Cross contends  
11 that the PRC has in the past granted authority only for non-emergency ambulance  
12 service, and therefore there is precedent for the practice. Living Cross is correct that  
13 the PRC previously granted an applicant under severe financial stress permission to  
14 provide only non-emergency ambulance service. *See Bernalillo Cty. Health Care*  
15 *Corp. v. N.M. Pub. Regulation Comm’n*, 2014-NMSC-008, ¶ 5, 319 P.3d 1284.  
16 Although we vacated the PRC’s order because it was arbitrary and capricious, we  
17 found substantial evidence to support the PRC’s determination in that case that there  
18 was a public need for additional non-emergency ambulance services only. *Id.* ¶¶ 27-  
19 28.

20 {7} However, our approval of the PRC’s exercise of its discretion in one case

1 involving financial hardship does not require the PRC to reach an identical result in  
2 all such cases. In this case, AMR applied for a certificate to provide ambulance  
3 services. The question was whether AMR met its burden of proving that the  
4 ambulance service provided by Living Cross is inadequate and that AMR's proposed  
5 service is directly responsive to a public need and demand. Section 65-2A-13(C)(1)  
6 & (D)(1). The hearing examiner found that "[N]o party presented evidence indicating  
7 that there [was] not a need for non-emergency service or that the certificate should  
8 be narrowed for any other reason to emergency service," and therefore recommended  
9 that the PRC issue a certificate to AMR for "ambulance service." By contrast, in  
10 *Bernalillo County Health Care*, the applicants provided 39 affidavits and other  
11 testimony to specifically support the need for non-emergency services. 2014-NMSC-  
12 008, ¶ 27. Because there was no specific showing in this case that it was necessary  
13 to conduct distinct analyses of emergency and non-emergency services, and because  
14 the Motor Carrier Act does not require the PRC to conduct such analyses in every  
15 case, the PRC did not err by not distinguishing between emergency and  
16 non-emergency services in considering the public need for ambulance services in this  
17 case.

18 {8} Additionally, we note that the PRC did not abuse its discretion in determining

1 that there was a public need for additional ambulance services in Valencia County.  
2 Indeed, admissions by Living Cross representatives alone suffice to support the  
3 PRC's conclusion that the ambulance service provided by Living Cross was  
4 inadequate. Justin Wood, Living Cross's operations manager, testified that Living  
5 Cross voluntarily reduced the number of ambulances it ran from the equivalent of  
6 four 24-hour ambulances to three and a half 24-hour ambulances in December 2012,  
7 and eventually to only two 24-hour ambulances, when AMR was granted temporary  
8 authority to operate in Valencia County in April 2013. Wood stated that the 2012  
9 decision to reduce the number of Living Cross's operating ambulances was made  
10 despite his requests during the previous summer and the longstanding requests of  
11 numerous local emergency medical services agencies that Living Cross *add*  
12 ambulances to its fleet. For example, former Fire Chief Atilano Chavez of the Village  
13 of Los Lunas Fire Department testified that he attempted to address the shortfall of  
14 ambulances because whenever Living Cross fell short, the department's emergency  
15 medical technicians (EMTs) had to transport patients, which they did at a cost to the  
16 municipality and without an operating license from the PRC. When a 911 call is  
17 placed, the Valencia County Fire Department and a transporting ambulance service  
18 both go out. The fire department is intended to be a first responder to mitigate any



1 potential life-threatening hazards, after which the fire department hands the person  
2 off to the transporting ambulance service. However, when Living Cross does not  
3 arrive, the fire department requests mutual aid from surrounding ambulance carriers  
4 such as Isleta Pueblo, Albuquerque Ambulance, or Superior. If mutual aid is not  
5 forthcoming, and it often is not, the fire department asks for an estimated time of  
6 arrival from Living Cross and begins to transport the patient, sometimes with  
7 volunteer firemen performing the jobs of EMT transporters. The fire department will  
8 either rendezvous with Living Cross at the side of the freeway or elsewhere, which  
9 typically delays the transport process by 5 to 20 minutes, or it must take the patient  
10 all the way to Albuquerque, a task for which the department does not have either  
11 adequate authority or resources. In 2011, the department recorded at least 18  
12 instances where it had to initiate medical transport. The number grew to at least 50  
13 in 2012 and at least 15 in the three months prior to AMR's temporary grant of  
14 authority in 2013. Indeed, the Los Lunas Fire Department had so many issues with  
15 Living Cross's service that it took it upon itself to create a "Living Cross Ambulance  
16 Response Complaint Form" to keep track of delays and no shows by Living Cross.  
17 The record before the PRC included 33 separate complaint forms that were filed by  
18 fire department employees between July 2012 and February 2013. After numerous

1 complaints, Living Cross’s attorney eventually told Fire Chief Chavez to stop calling  
2 Living Cross about his concerns.

3 {9} David Bris, president and director of Living Cross, also admitted that Living  
4 Cross was aware of complaints about its service and did not attempt to address them.  
5 Bris testified that he met with representatives of local fire departments, who requested  
6 that Living Cross deploy additional ambulances, and that Living Cross managerial  
7 employees met internally to discuss the complaints. Yet Living Cross actually  
8 reduced its ambulance fleet during that time, despite having seven additional  
9 ambulances at its disposal. Bris admitted that five or six ambulances might be needed  
10 to meet the public need for ambulance services in Valencia County. Sam Ortega, the  
11 administrator for Living Cross, similarly testified that four to five ambulances are  
12 needed and that three and a half 24-hour ambulances would not always meet demand.  
13 The evidence in this case overwhelmingly supports a finding of a public need for both  
14 emergency and non-emergency ambulance services because of the inadequate service  
15 provided by Living Cross.

16 **3. Living Cross was not deprived of due process as a result of the lack of**  
17 **established rules, standards, policies or procedures for determining missed**  
18 **call rates**

19 {10} Living Cross observes that the PRC has not adopted any rules or regulations

1 setting forth a uniform standard for continuous and adequate ambulance service  
2 response times, as it has done for certain other passenger transportation industries.  
3 Living Cross contends that the PRC's lack of specific uniform rules regarding  
4 response times allows the PRC to arbitrarily decide the merits of applications for  
5 ambulance services contrary to both the Motor Carrier Act and the Ambulance  
6 Standards Act, NMSA 1978, §§ 65-6-1 to -6 (1974, as amended through 1998).  
7 Living Cross also argues that it is deprived of its due process rights if the PRC fails  
8 to provide notice as to when it is necessary and appropriate for a service provider to  
9 spend more money or apply for increased tariff rates in order to keep dropped call  
10 rates to the level that the PRC may consider to be appropriate. We review  
11 constitutional issues of law, including due process claims, de novo. *TW Telecom of*  
12 *N.M., L.L.C. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-029, ¶ 15, 150 N.M. 12,  
13 256 P.3d 24.

14 {11} The Motor Carrier Act does not require uniform standards for response times  
15 or dropped calls. As previously discussed under the Motor Carrier Act, AMR was  
16 required to prove that the existing ambulance service provided by Living Cross was  
17 "inadequate" and that AMR's proposed service would be "directly responsive to a  
18 public need and demand" for the service. Section 65-2A-13(C)(1). The Motor

1 Carrier Act does not define what constitutes “public need and demand” or what  
2 renders a service “inadequate,” nor does it give the PRC standards for evaluating  
3 either of these terms. However, the Motor Carrier Act does state that the “ ‘ability to  
4 provide certificated service’ means that an applicant or carrier can provide reasonably  
5 continuous and adequate transportation service.” Section 65-2A-3(A). The term  
6 “continuous and adequate service” is further defined as

7 for full-service carriers, reasonably continuous availability, offering and  
8 provision of transportation services through motor vehicles, equipment  
9 and resources satisfying safety and financial responsibility requirements  
10 under the Motor Carrier Act and commission rule, which are reasonably  
11 adequate to serve the entire full-service territory authorized in the  
12 certificate, with *reasonable response to all requests for service for the*  
13 *nature of passenger service authorized, based on the nature of public*  
14 *need, expense and volume of demand for the type of service authorized*  
15 *during seasonal periods.*

16 Section 65-2A-3(M)(1) (emphasis added). It is fair, then, to conclude that the  
17 reasonableness of Living Cross’s response times was a factor to be assessed in  
18 determining whether its service was inadequate. To the extent that it has included  
19 responsiveness in this assessment, the plain language of the Motor Carrier Act  
20 supports only the inference that responsiveness should be analyzed on a case-by-case  
21 basis. Thus, the Legislature has chosen not to micromanage or specifically define  
22 every term in the Motor Carrier Act, but instead has delegated authority to the PRC

1 to assess these factors and weigh the reasonableness of a carrier’s response to  
2 requests for service according to the unique circumstances of each case. In fact, a  
3 uniform response time standard might actually be contrary to the discretionary  
4 approach that the Motor Carrier Act appears to endorse.

5 {12} The Ambulance Standards Act also does not require the PRC to establish  
6 standards for dropped calls or response times. Instead, the Ambulance Standards Act  
7 requires the PRC to adopt regulations establishing uniform standards for vehicle  
8 design, health and safety equipment used in ambulances, procedures for operating  
9 ambulances, annual safety inspections, and licensing ambulance personnel. *See* § 65-  
10 6-4 (establishing the legislative purposes of the Ambulance Standards Act). Because  
11 the responsiveness of an ambulance service provider is outside of the ambit of the  
12 Ambulance Standards Act, it does not impose any requirement to establish uniform  
13 standards for adequate ambulance service, as Living Cross claims.

14 {13} There are sound reasons for the PRC to avoid adopting a uniform  
15 responsiveness standard. For example, acceptable standards of responsiveness may  
16 differ substantially in more rural areas versus suburban or urban areas, and can  
17 depend on weather conditions or the size of the territory served. *See* 18.3.14.10(I)  
18 NMAC (listing “factors that can cause delays in meeting anticipated response times”

1 such as “(1) the geography of the territory; (2) whether the service uses volunteer or  
2 paid drivers; (3) whether the territory is urban or rural or both; (4) stationing points  
3 for ambulances and crews; [and] (5) weather”). Indeed, witnesses for AMR,  
4 Superior, and Living Cross acknowledged during the PRC proceedings that they are  
5 not aware of any uniform national, state, local, or industry standards for ambulance  
6 response times or missed calls, and the parties have not cited to any such standards  
7 in the briefing before this Court.

8 {14} Likewise, Living Cross has not presented a persuasive argument that the lack  
9 of uniform standards for ambulance response times presents a constitutional due  
10 process problem. Living Cross claims that the lack of a uniform response time  
11 standard “fails to give adequate notice to the carrier as to what level [of response  
12 time] is expected.” However, as discussed above, the Motor Carrier Act provides a  
13 sufficiently definite standard by requiring that response times, among other factors,  
14 be “reasonable” and must provide both parties with an opportunity to present  
15 evidence as to reasonableness, which Living Cross did in this case. Sections 65-2A-  
16 3(M)(1); 65-2A-13(C). Thus, the statutory scheme followed by the PRC provides  
17 adequate due process. *See TW Telecom of N.M.*, 2011-NMSC-029, ¶ 17  
18 (“[F]undamental requirements of due process in an administrative context are

1 reasonable notice and *opportunity to be heard and present any claim or defense.*”  
2 (emphasis in original) (internal quotation marks and citations omitted)).

3 {15} We agree with the hearing examiner that proof of a public need, the failure of  
4 the existing carrier to provide reasonably continuous and adequate service, and proof  
5 of the existing carrier’s inability to cure or provide continuous and adequate service  
6 in the future are sufficient standards by which the PRC could grant a certificate to  
7 operate ambulance service on a case-by-case basis. Moreover, a prior PRC case cited  
8 by Living Cross where a 1 percent 911-emergency zero-status dispatch unavailability  
9 in Bernalillo County was one of several factors considered in the PRC’s finding that  
10 there was insufficient evidence to justify a new emergency ambulance carrier, and  
11 was not dispositive to the PRC’s consideration of call response time or its weighing  
12 of individual factors in this case.

13 **4. The PRC did not err by considering Living Cross’s financial stability**  
14 **when assessing whether Living Cross was providing continuous and**  
15 **adequate service**

16 {16} Living Cross filed a motion in limine before the hearing examiner seeking to  
17 exclude evidence related to its financial fitness, tax conditions, and economic status,  
18 and claiming that those factors were not relevant to assessing its fitness to provide  
19 ambulance services. The hearing examiner found that Living Cross’s financial debts

1 and unpaid tax bills were relevant to several issues concerning the burdens of proof  
2 borne by both AMR and Living Cross. *See* 1.2.2.35(A) NMAC (setting forth the rule  
3 that in administrative proceedings, all relevant evidence is generally admissible and  
4 that the presiding officer shall consider, but not be bound by, the New Mexico rules  
5 of evidence).

6 {17} Living Cross asserts that it was error for the PRC to consider this evidence  
7 because in 2013 the Legislature amended the Motor Carrier Act to prohibit the PRC  
8 from considering a carrier’s financial fitness in recognition of the financial  
9 vulnerability of small businesses in a traditionally thin market transportation industry.

10 We disagree. The policy behind the Motor Carrier Act is “to foster the development,  
11 coordination and preservation of a safe, sound and adequate motor carrier system,  
12 requiring financial responsibility and accountability on the part of motor carriers  
13 through state licensing and regulation of motor carriers.” Section 65-2A-2. In  
14 addition, Section 65-2A-13(C)(2) imposes the burden on the protesting carrier—in  
15 this case, Living Cross—to demonstrate “with reasonable specificity . . . the . . .  
16 economic analysis related to expenses and revenues of the full-service operation and  
17 the anticipated economic, business or functional effect of the proposed service on the  
18 existing provision of, or rates for, full-service transportation within the full-service



1 territory.” The PRC was also required to consider whether AMR’s entry into the  
2 Valencia County market would cause financial harm to Living Cross. *See* § 65-2A-  
3 13(C)(2) & (D)(1). Therefore, Living Cross’s financial condition prior to and  
4 following the temporary grant of authority to AMR in April 2013 was relevant.

5 {18} Living Cross’s financial condition was alarming. Living Cross had incurred  
6 large debts, outstanding federal and state tax bills, improper loans to Bris, loans from  
7 Bris’s family to Living Cross with high interest rates, lease agreements designed to  
8 mask compensation, and systemic financial problems that began years before AMR  
9 filed its application. Bris testified in a deposition that Living Cross owed about  
10 \$1,000,000 in federal taxes that had been delinquent since the 1990s. As of April 1,  
11 2013, Living Cross still owed \$532,948.78 to the IRS as evidenced by an installment  
12 agreement. Living Cross also owed \$811,544.72 in New Mexico state taxes as of  
13 November 6, 2006. As a result, the New Mexico Taxation and Revenue Department  
14 filed an application for injunction from engaging in business, and thereafter Living  
15 Cross entered into an installment agreement to pay back the taxes to avoid being put  
16 out of business. As of September 3, 2014, Living Cross still owed \$75,196.09 to the  
17 State of New Mexico. Further, at least two loans from Bris’s mother to Living Cross  
18 carried a 25 percent annual interest rate. One lease agreement required Living Cross

1 to pay David Bris \$3100 per month to lease space identified as his residence and was  
2 signed by David Bris, lessor, and David Bris, lessee for Living Cross—a troubling  
3 arrangement.

4 {19} Living Cross took out other questionable loans prior to AMR’s application.  
5 For example, Living Cross entered into a promissory note in 1994 with J. Edward  
6 Hollington & Associates, amended the note 17 times, and modified it 14 times. As  
7 of October 5, 2012, Living Cross owed \$146,052.20 on the note and was borrowing  
8 an additional \$60,000 from the lender. There are other examples of indebtedness in  
9 the record that we do not need to detail. Suffice it to say that Living Cross’s balance  
10 sheets as of December 31, 2013 showed total assets of \$228,457.58 and total  
11 liabilities of \$1,906,990.69.

12 {20} It was not arbitrary, capricious, an abuse of discretion, or otherwise not in  
13 accordance with law for the hearing examiner to admit this evidence and then rely on  
14 it in determining the merits of this case. Section 65-2A-35(C) (detailing the  
15 circumstances under which this Court may reverse a PRC order pursuant to the Motor  
16 Carrier Act). It was reasonable to conclude that the evidence of Living Cross’s  
17 financial distress was relevant to whether (1) AMR’s proposed entry into Valencia  
18 County was directly responsive to a public need and demand for the service proposed;

1 (2) Living Cross’s existing ambulance service in Valencia County was provided on  
2 a reasonably continuous and adequate basis; (3) Living Cross, the current operator,  
3 was willing and able to provide, and did subsequently provide, reasonably continuous  
4 and adequate service within Valencia County; and (4) AMR’s entry into the market  
5 would have a financial impact on Living Cross. There is substantial evidence that  
6 Living Cross was operating in severely distressed financial conditions long before  
7 AMR entered the market. This evidence supports the PRC’s conclusions.

8 **5. The PRC did not err by refusing to allow Living Cross to implement lease**  
9 **agreements with another provider as an alternative to granting AMR’s**  
10 **application**

11 {21} Living Cross asserts that even if it failed to meet a standard of continuous and  
12 adequate service in the past, it is entitled to remedy the situation by entering into lease  
13 agreements with other private companies under the provisions of Sections 65-2A-  
14 13(D)(1) and 65-2A-24(A) rather than the PRC authorizing AMR to operate in  
15 Valencia County. Under Section 65-2A-13(D)(1), the PRC should not have granted  
16 AMR’s application in this case if it found that Living Cross provided ambulance  
17 service “on a reasonably continuous and adequate basis” in Valencia County, or if it  
18 found that Living Cross “is willing and able to provide, and does subsequently  
19 provide, reasonably continuous and adequate service within [Valencia County].”

1 However, there was ample justification in this case for the PRC's conclusion that the  
2 proposed lease agreements were insufficient to prove that Living Cross could provide  
3 continuous and adequate service or would be able to do so in the future.

4 {22} Living Cross proposed to enter into one of two alternative lease agreements  
5 with Superior; the first would be a lease for personnel and equipment, and the second  
6 would be a personnel-only lease. The personnel and equipment lease requires  
7 Superior to lease both ambulances and crews to Living Cross on an as-needed basis,  
8 24 hours per day, for emergency ambulance calls within Valencia County. Living  
9 Cross and Superior represented that Superior would dedicate two units to the lease  
10 and additional units would be provided as needed during peak periods. Living Cross  
11 would have full control and responsibility for the deployment and operation of the  
12 leased units. Similarly, under the personnel-only lease, Superior would make  
13 available to Living Cross two paramedic and EMT teams 24 hours per day. Living  
14 Cross represented that it presently had sufficient ambulances and equipment to run  
15 five ambulances, and it would be able to immediately provide five ambulances in  
16 Valencia County with leased personnel from Superior. Living Cross also stated that  
17 leased personnel would be under its control and it would be solely responsible for  
18 their actions.

1 {23} It was reasonable for the hearing examiner to conclude that these lease  
2 agreements do not show that Living Cross would be able to provide continuous and  
3 adequate service.<sup>1</sup> Paragraph 3 of the proposed personnel and equipment lease states  
4 in pertinent part that

5 Superior shall give a request for deployment of a staffed ambulance unit  
6 and under this Agreement for response to a call for emergency  
7 ambulance service in Valencia County pursuant to this Agreement  
8 priority over its non-emergency and inter-facility carriage in Bernalillo  
9 County, *but shall have full discretion of whether to dispatch equipment  
10 and/or personnel as set forth below, to the extent that its units may be  
11 involved in, or anticipated to be required in, emergency ambulance  
12 transport within Bernalillo County.*

13 (Emphasis added.) As Bris conceded, this provision means that Superior is not  
14 necessarily required to respond and assist Living Cross when such assistance is  
15 requested. Under paragraph 13 of the personnel and equipment lease, the agreement  
16 may be terminated by either party with 30 days' written notice at any time, with or  
17 without cause. In light of these facts, the PRC did not abuse its discretion in  
18 concluding that there was simply no assurance that the proposed personnel and  
19 equipment lease would provide the necessary services to Valencia County, or even

---

20 <sup>1</sup>On November 18, 2016, Living Cross filed a notice of subsequent change in  
21 authority with recently-enacted regulations regarding motor vehicle leasing attached.  
22 We have considered the notice, and conclude that it is not relevant to our analysis in  
23 this case.

1 continue for more than one month at a time.

2 {24} The PRC's misgivings regarding the proposed personnel-only lease were also  
3 reasonable. That agreement can be terminated by either party for any reason with six  
4 months' written notice. The hearing examiner reasonably concluded that termination  
5 of the personnel-only lease upon six months' notice, much like the 30-day notice  
6 provision of the personnel and equipment lease, would not provide a sufficient  
7 opportunity for the PRC to certify another carrier to provide ambulance service in  
8 Valencia County.

9 {25} The hearing examiner also reasonably concluded that Living Cross did not  
10 sufficiently establish how either lease agreement would help restore its tenuous  
11 financial condition. For example, Superior would bill for and retain 100 percent of  
12 the revenues for the services that its leased equipment and employees provided under  
13 the personnel and equipment lease, which means that Living Cross would not gain  
14 any revenue or cash flow from those services. Under the personnel-only lease,  
15 Superior would retain 80 percent of the revenues. Even though Living Cross would  
16 retain 20 percent of the revenues under the personnel-only lease, it would bear all of  
17 the fuel costs and other expenses associated with the ambulance units and equipment.  
18 Although Living Cross argued that the lease agreements would allow it to slowly

1 build up its fleet over time, the hearing examiner’s skepticism regarding these vague  
2 plans for financial recovery was reasonable, given Living Cross’s inability to operate  
3 profitably with a larger fleet long before AMR’s application to operate in Valencia  
4 County.

5 {26} The hearing examiner reasonably concluded that based on Living Cross’s  
6 history of failing to deploy an adequate number of ambulances and the uncertainty  
7 created by both leases and the lack of any definite business plan, Living Cross had  
8 not demonstrated an ability to return to reasonably continuous and adequate  
9 ambulance service in Valencia County in the near future. For the reasons discussed,  
10 this conclusion was supported by substantial evidence and was not arbitrary.

11 **6. The PRC did not err by failing to adequately consider the financial impact**  
12 **to Living Cross of authorizing AMR to operate in Valencia County**

13 {27} Living Cross argues that the economic harm it would suffer due to AMR’s  
14 entry into Valencia County alone was a sufficient ground to deny AMR’s application,  
15 and therefore the PRC did not properly consider the effect of AMR’s application on  
16 the existing ambulance service. Section 64-2A-8(D) provides that “[b]efore granting  
17 a certificate for ambulance service, the [PRC] shall also consider the effect that  
18 issuance of the certificate would have on existing ambulance service in the territory.”  
19 When read in conjunction with Section 65-2A-13(D)(3), it is clear that the diversion

1 of revenue from an existing carrier is only one factor to be considered in determining  
2 the effect on existing ambulance service. Section 65-2A-13(D)(3) provides, in  
3 relevant part:

4 In considering the potential effect on provision of transportation  
5 services to the public . . . the [PRC] shall consider all evidence presented  
6 pertaining to such potential effect, including evidence of the effect that  
7 diversion of revenue or traffic may have on the provision of full-service  
8 passenger service to the community. Diversion of revenue or traffic  
9 from an existing motor carrier shall not, however, be sufficient grounds  
10 for denying the application without a showing that the diversion  
11 presents a reasonable potential to affect the provision of full-service  
12 passenger service to the community.

13 {28} In compliance with the Motor Carrier Act, the PRC considered the financial  
14 impact on Living Cross in assessing AMR's application. The hearing examiner found  
15 that the impact on Living Cross from authorizing an additional carrier could be  
16 determined more definitively in this case because AMR was already operating in  
17 Valencia County pursuant to the authority granted in NMPRC Docket No. 13-00079-  
18 TR-M<sup>2</sup> and under the temporary authority the PRC granted to AMR in this case. The  
19 hearing examiner recognized that Living Cross's transport revenues declined when  
20 AMR serviced many of the calls that Living Cross previously would have serviced.

---

21 <sup>2</sup>The PRC previously granted a certificate to AMR that this Court vacated as  
22 the result of an attorney's conflict of interest. *Living Cross Ambulance Serv., Inc. v.*  
23 *N.M. Pub. Regulation Comm'n*, 2014-NMSC-036, ¶ 23, 338 P.3d 1258.



1 However, Living Cross's expenses also declined, and Living Cross actually made a  
2 profit through October 31, 2014. By contrast, in 2012, the year before AMR applied  
3 for authority to operate in Valencia County, Living Cross suffered heavy financial  
4 losses. The hearing examiner reasonably found that Living Cross's underlying  
5 financial troubles predated AMR's initial entry in April 2013 and were not caused by  
6 AMR.

7 {29} We conclude that contrary to Living Cross's contentions, the PRC *did*  
8 adequately consider the financial impact to Living Cross of granting AMR's  
9 application. In so doing, the PRC did not abuse its discretion by concluding that  
10 AMR's entry had a "limited incremental financial impact" on Living Cross, and then  
11 finding that the impact was outweighed by the need for an additional service provider  
12 as a result of Living Cross's inability to provide reasonably continuous and adequate  
13 service.

14 **7. The PRC was not obligated to give AMR supplemental authority rather**  
15 **than granting its application**

16 {30} Finally, Living Cross contends that the PRC should have modified its  
17 certificate to AMR to only allow AMR to operate when Living Cross's fleet was fully  
18 deployed. As an initial matter, Living Cross does not offer any legal basis that would  
19 make it error for the PRC to refuse to grant supplemental authority in lieu of the

1 operating authority sought in the application in this case. Instead, Living Cross  
2 broadly contends that granting AMR only supplemental authority would be consistent  
3 with the policy of the Motor Carrier Act, and points to its cross-examination of a PRC  
4 expert witness who acknowledged that he had not considered allowing AMR to  
5 provide services only when Living Cross ambulances were not available. Living  
6 Cross argues that the PRC failed to consider this alternative, which is not so. The  
7 PRC specifically addressed granting AMR only supplemental authority and rejected  
8 it because Living Cross's supplemental authority proposal was unclear, and no such  
9 alternative was put forth by any of Living Cross's witnesses. Based on the briefing  
10 before the PRC, the PRC reasonably determined that this alternative was vague and  
11 properly rejected it.

12 **CONCLUSION**

13 {31} For the foregoing reasons, the PRC's decision is affirmed.

14 {32} **IT IS SO ORDERED.**

15

16

17

18

**WE CONCUR:**

---

**EDWARD L. CHÁVEZ, Justice**

1

---

2 **CHARLES W. DANIELS, Chief Justice**

3

---

4 **PETRA JIMENEZ MAES, Justice**

5

---

6 **BARBARA J. VIGIL, Justice**

7

---

8 **JUDITH K. NAKAMURA, Justice**