

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Application of

OPTIMA ENRICHMENT, INC.

For a Construction Permit for a New
Noncommercial FM Station at
Delafield, Wisconsin

MX Group 93

File No. 0000167847

Fac. ID. No. 768334

To: The Secretary, FCC
Attn: The Chief, Audio Division, Media Bureau

OPPOSITION TO PETITION TO DENY

Optima Enrichment, Inc. (“Optima”), tentative selectee for a new noncommercial FM station at Delafield, Wisconsin, by its attorney, hereby timely¹ opposes the petition to deny² filed by Waterloo Christian Radio Corporation (“WCRC”) on September 1, 2022 (the “Petition to

¹ Optima notes that this Opposition is timely filed. WCRC served the Petition to Deny on Optima via email without first obtaining permission from Optima for such service. A petition to deny must be served in paper form as prescribed in the Communications Act and rules of the Federal Communications Commission (“FCC” or “Commission”). *See* 47 U.S.C. § 309(d)(1) ; 47 CFR §§ 1.45(a), 1.47(d), 1.939(c); *see also Center for International Media Action; Common Frequency, Inc.; Prometheus Radio Project*, Letter Decision, DA 18-729 (MB July 13, 2018). The Petition to Deny was not served in paper form, but rather via email. Had the Petition to Deny been properly filed in paper form, Optima’s response would have been due on September 15, 2022. 47 CFR § 1.4(h). Consequently, this Opposition is timely filed.

² The Petition to Deny did not contain allegations of fact supported by affidavit as required by the FCC’s rules. 47 CFR § 73.7004(b)(petitions to deny “must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.”). Accordingly, the Petition to Deny is therefore procedurally deficient and should be dismissed.

Deny”).³ Optima filed the above-referenced New NCE FM Construction Permit Application (the “Application”) on November 9, 2021.⁴ The Petition to Deny fails to articulate any reason—let alone “a substantial and material question concerning the grantability of the tentative selectee’s application”⁵—why Optima is not qualified to hold the construction permit sought by the Application. Indeed, WCRC’s objections are aimed not at Optima as the tentative selectee, but rather Community Public Radio, Inc. (“CPR”), whose mutually exclusive application will be dismissed upon grant of Optima’s application.⁶ The Petition to Deny is a late-filed effort to object to the inclusion of CPR in MX Group 93 and improperly raises arguments against the non-tentative selectee. Accordingly, the Petition to Deny should be dismissed or denied.

In the Petition to Deny, WCRC asserts that CPR’s application should have been dismissed (resulting in CPR not being included in MX Group 93) because CPR had an attributable interest in more than 10 applications filed in the filing window.⁷ Any such objection should have been raised long ago. The Media Bureau issued a Public Notice identifying the MX groups resulting from the November 2021 filing window on November 29, 2021.⁸ In that Public Notice, the Bureau specifically provided that “If an applicant believes any application has been

³ *In re Application of Optima Enrichment, Inc. for a Construction Permit for a New Noncommercial FM Station at Delafield, Wisconsin*, Petition to Deny, filed by Waterloo Christian Radio Corporation on September 1, 2022.

⁴ LMS File No. 0000167847. The Application was subsequently amended on January 31, 2022.

⁵ *In re Comparative Consideration of 27 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 22-61 (rel. Aug. 2, 2022) at para 102 (the “MO&O”).

⁶ *Id.*

⁷ Petition to Deny at 2-3.

⁸ *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021 Filing Window For New Noncommercial Educational FM Stations*, Public Notice, MB Dkt. No. 20-343, DA 21-1476 (Nov. 29, 2021).

erroneously included, or excluded, from one of the MX groups listed in Attachment A, it should notify the Audio Division (Division) as soon as possible, and within 10 days.”⁹ WCRC thus had until December 9, 2021 to object to CPR’s inclusion in MX Group 93. Now, some 280 days later, WCRC argues that CPR’s application should have been dismissed. Those arguments are untimely.

That the MO&O allows for petitions to deny to be filed against a *tentative selectee* does not render the Petition to Deny any less procedurally deficient. The MO&O provides that disappointed applicants in an MX group may file a petition to deny raising arguments as to why the *tentatively selected application* should not be granted:

For example, an applicant that concedes that the *tentative selectee* is qualified for the points received but believes its own proposal should have received a greater number of points than the *tentative selectee’s* would make its argument in a petition to deny. Likewise a disappointed applicant that believes the *tentative selectee* should have received fewer points would make such an argument in a petition to deny.¹⁰

The objections raised in the Petition to Deny, however, relate to CPR, whose application was not tentatively selected for grant. Specifically, WCRC argues that *CPR’s* application should have been dismissed because *CPR* had an interest in more than 10 applications.¹¹ Indeed, WCRC acknowledges that its arguments relate to the non-tentative selectee.¹² Section 73.3584(a) of the Commission’s rules states that “[f]or mutually exclusive applications subject to selection by . . . fair distribution/point system (reserved channels), petitions to deny may only be

⁹ *Id.*

¹⁰ MO&O at para. 85 (emphasis added).

¹¹ Petition to Deny at 3-5.

¹² *Id.* at 5 (“WCRC acknowledges [*sic*] that the Commission prefers not to evaluate the characteristics of applicants that are not tentative selectees.”).

filed against . . . *tentative selectee(s)*.”¹³ The Media Bureau has affirmed that petitions to deny may not be filed against non-tentative selectees.¹⁴ Accordingly, the Petition to Deny is procedurally inappropriate and subject to dismissal.

After acknowledging that its arguments relate to CPR, and not Optima, WCRC throws some additional arguments pertaining to Optima’s third-level tie-breaker against the wall in the apparent hope that they will stick.¹⁵ They do not. First, contrary to WCRC’s assertion, Optima’s January 2022 amendment to its Application did not constitute “a post-filing comparative upgrade.”¹⁶ Optima properly and timely certified on its Application that it applied for an NCE construction permit in a prior filing window, had its application accepted, and that the application was subsequently dismissed. When it filed its amendment to the Application, Optima did not change its certification, but merely provided a statement supplying the file number for the previous application.¹⁷ The file number was already a matter of record with the FCC. Second, and again contrary to WCRC’s bald assertion, Optima did provide evidence in the Application as originally filed that it has been in continuous existence since October 2007.¹⁸ Finally, WCRC twists logic in asserting that the Commission could not consider a prior NCE

¹³ 47 CFR § 73.3584(a) (emphasis added).

¹⁴ See, e.g., *In re Centro Familiar de Restauracion y Vida for New NCE, Chaparral, NM, File No. 0000167079*, Letter Decision, DA 22-771 (MB July 18, 2022).

¹⁵ Petition to Deny at 5-6.

¹⁶ *Id.* at 6.

¹⁷ See statement included in the Application as attachment titled “Optima Enrichment Statement on Past NCE Window Dismissal.”

¹⁸ See corporate records of Optima Enrichment, Inc., included in the Application as attachment titled “OPTIMA ENRICHMENT, INC. (O021417).”

application dismissed pursuant to the Fair Distribution of Service Analysis as relevant to the third-level tie-breaker and cites no precedent to support its position.

For the foregoing reasons, the Petition to Deny should be dismissed or denied.

Respectfully submitted,

OPTIMA ENRICHMENT, INC.

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Its Attorney

Dated: September 15, 2022

DECLARATION OF JOHN MELCHERT

I, John Melchert, declare under penalty of perjury as follows:

1. I am Director of Optima Enrichment, Inc.
2. The facts contained in the foregoing “Opposition to Petition to Deny” are true and correct to the best of my knowledge and belief.

September 15, 2022

/s/
John Melchert
Director, Optima Enrichment, Inc.

CERTIFICATE OF SERVICE

I, Kimberly Riddick, a secretary in the law firm of Wiley Rein LLP, do hereby certify that I have on this 15th day of September 2022 caused a copy of the foregoing "Opposition to Petition to Deny" to be served by First Class U.S. Mail, postage prepaid, upon the following:

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