

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 14-1072****September Term, 2014****FCC-14-28****FCC-DA-14-330****Filed On: September 9, 2014**

National Association of Broadcasters,

Petitioner

v.

Federal Communications Commission and  
United States of America,

Respondents

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Benton Foundation, et al.,  
Intervenors**BEFORE:** Tatel, Griffith, and Wilkins, Circuit Judges**ORDER**

Upon consideration of the motion to dismiss No. 14-1072, the opposition thereto, and the reply; and the motion to consolidate, the responses thereto, and the replies, it is

**ORDERED** that the motion to dismiss No. 14-1072 be granted. This court has jurisdiction to review an “order of the Commission.” 47 U.S.C. § 402(a). The National Association of Broadcasters seeks review of a Public Notice issued by the Federal Communications Commission’s Media Bureau, but the Public Notice is not an “order of the Commission.” To obtain judicial review of an order issued by FCC staff pursuant to delegated authority, the Association was required to fulfill the “condition precedent” of filing an application for review by the FCC of the Media Bureau’s decision, and to wait until the FCC ruled on the application. See 47 U.S.C. § 155(c)(7), Int’l Telecard Ass’n v. FCC, 166 F.3d 387, 388 (D.C. Cir. 1999) (per curiam); Richman Bros. Records, Inc. v. FCC, 124 F.3d 1302, 1303 (D.C. Cir. 1997). The Association’s letters to the FCC’s Secretary were not the functional equivalent of applications for review, as the first letter did not ask the FCC to review the Media Bureau’s action, and the second was untimely.

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See 47 C.F.R. § 1.115(a), (d). And the Bureau's Public Notice cannot be considered a "de facto" FCC rule for purposes of judicial review simply because it has immediate effect, given the statutory grant of jurisdiction over orders "of the Commission" and the clear statutory requirement that the FCC must review a staff decision before it is reviewed in court. See Int'l Telegard, 166 F.3d at 388. As for the argument that the Public Notice is reviewable because FCC has implicitly approved it, this court will not infer approval from a minority of Commissioners' disagreement with a staff decision and the majority's silence. The Association also maintains there is a futility exception to the requirement to seek FCC review, but even assuming the Association is correct, the exception does not apply here because the Association has shown "nothing concrete to support its claim of futility." Star Wireless, LLC v. FCC, 522 F.3d 469, 476 (D.C. Cir. 2008). Finally, the Association's protest that dismissing this action will allow the Public Notice to "evade" judicial review misses the mark, given that nothing appears to have prevented the Association or any regulated entity from filing a timely application for FCC review. It is

**FURTHER ORDERED** that the motion to consolidate be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

**By:** /s/  
Laura Chipley  
Deputy Clerk/LD