



MEMORANDUM

September 9, 2025

TO: Gorge Commissioners

FROM: Jeff Litwak, Counsel

SUBJECT: Staff Report for Appeal Hearing:
Smartlink, LLC v. Skamania County, CRGC No. COA-S-24-01
Oral Argument Scheduled for September 9, 2025, Gorge Commission Meeting

Introduction to the Appeal

On September 9, 2025, you will hear oral argument and deliberate to an oral decision on an appeal entitled *Smartlink, LLC v. Skamania County*, CRGC No. COA-S-24-01. Smartlink's application to Skamania County proposed modifications to an existing cell tower in Cook, Washington at the intersection of Washington State Route 14.

This is the second time this matter has been appealed to the Gorge Commission. In the prior appeal, the Gorge Commission remanded Skamania County's decision back to Skamania County to "address whether the application qualifies for the expedited review process and qualifies as an [eligible] facilities review." "Expedited review" is a National Scenic Area process and "eligible facilities request" is a review pursuant federal telecommunications law. The Gorge Commission further ordered, "If Skamania County believes it must process the application as an eligible facilities request, it must do so only after making the necessary findings supported by substantial evidence in the whole record that the proposed modification qualifies as an eligible facilities request." The Gorge Commission's decision on the prior appeal is part of your packet of documents for this second appeal.

After the Gorge Commission's decision in the first appeal, Skamania County staff reapproved the application using the expedited review process and as an eligible facilities request. Neighboring property owners, the Kuehls, appealed that decision to the Skamania County hearing examiner, who concluded that the application did not qualify for NSA expedited review or as a federal eligible facilities request, and remanded the decision back to the county staff to review the application using

the standard review process. The applicant (Smartlink, LLC) and New Cingular Wireless (AT&T) appealed the hearing examiner's decision to the Gorge Commission. This is the current appeal.

The basic issues in this appeal are whether the hearing examiner erred in her conclusions that the application did not qualify for expedited review and as an eligible facilities request, and whether the application was "deemed approved" pursuant to federal telecommunications law.

I have drafted this staff report to assist you in preparing for the hearing. I can answer questions as you review the materials prior to the hearing and at the hearing, and I can help guide you to a coherent final decision at the hearing no matter what you decide at any decision point.

Your decision requires a simple majority of a quorum of commissioners. If all commissioners participate in the hearing, a decision to reverse or remand the county's decision will require at least seven votes.

Read this staff report first.

This staff report introduces you to the documents that you will use for the hearing; the hearing process; your duty to disclose conflicts of interest, ex parte communications, and bias; and a recommendation for how to sift through the parties' arguments and the administrative record. This staff report does not give you a recommendation for whether to affirm, remand, or reverse the hearing examiner's decision. This staff is not a substitute for reading the briefs, reviewing the record, and deciding the issues as the parties present them. The details in the parties' arguments are important.

I am providing a copy of this staff report to the parties. There is no opportunity for the parties to file written responses to this staff report. The parties may address this staff report as part of their oral argument.

Documents You Will Use for this Appeal Hearing

Your hearing package includes the following documents all provided on a USB drive. The files are numbered and named as below:

1. This staff report;
2. Notice of Hearing;
3. Record of Skamania County's proceeding, consisting of the following:
 - a. Record of current appeal
 - b. Record of prior appeal (COA-S-21-01)
 - c. Audio recording of hearing for prior appeal (part of the record of the prior appeal)
 - d. Record of the Gorge Commission's appeal proceeding for the prior appeal
4. Final Opinion and Order, *Kuehl v. Skamania County*, COA -S-21-01 (the Gorge Commission's decision on prior appeal)
5. The following briefs:
 - a. Appellants' Opening Brief and
 - b. Skamania County's Response Brief
 - c. Vivian Kuehl and Sue Kuehl Pederson's Response Brief
 - d. Friends of the Columbia Gorge's Response Brief

- e. Vivian Kuehl and Sue Kuehl Pederson's Brief Responding to Skamania County's Brief *
- f. Friends of the Columbia Gorge's Brief Responding to Skamania County's Brief *

You have copies of the National Scenic Area Act and Commission Rules in your Commissioner Handbook. The National Scenic Area Act and Commission Rules are also posted on the Gorge Commission's website at <http://www.gorgecommission.org/about-crgc/legal-authorities/> (scroll down). Copies of the Gorge Commission's prior appeal decisions are available on the Gorge Commission's website at <http://www.gorgecommission.org/about-crgc/appeals/> (organized by date of decision with the newest on top).

Please contact me if you cannot find these authorities or any other authority that you would like to review as you prepare for the hearing. Because this hearing is via Zoom webinar, I cannot give you paper copies at the hearing. You may wish to have copies of the appeal packet documents and legal authorities ready to look at during the hearing. I use tabs in Adobe Acrobat for having several documents open at once. You should practice setting up your screen to participate in the hearing in a Zoom window while also having easy access to the briefs and record and other reference material.

Preparing for the Hearing

You should expect to spend several hours preparing for the hearing. To prepare for the hearing, I recommend the following approach in the following order:

1. Finish reading this staff report.
2. Read the Notice of Hearing so you understand the procedure for the hearing.
3. Read the Gorge Commission's prior decision and then the Hearing Examiner's decision. The Gorge Commission's prior decision is part of your packet for this appeal hearing and the Hearing Examiner's decision is Appendix A in the petitioner's brief, beginning on .pdf page 39.
4. Review the briefs in the following order: the appellants' brief and Skamania County's Response Brief (Skamania County's response is aligned with the appellants); then Friends' and the Kuehls' response briefs and briefs responding to Skamania County's brief.
 - a. Read the summaries of the assignments of error and summaries of responses to the assignments of error in all the parties' briefs to get a sense of the parties' arguments. You do not need to completely understand the parties' arguments in this first pass.
 - b. Read the statements of facts in the briefs, paying attention to the different facts that the parties mention and different explanations of the same facts. To resolve any conflicts in the statements of facts, you should refer to the record. Understanding the factual basis of the appeal is necessary for you to understand the parties' arguments.
 - c. Finally, read the entirety of the briefs, making notes and questions as you read.

* The Chair allowed the Kuehls and Friends of the Columbia Gorge to file briefs responding to Skamania County's brief because Skamania County did not alert the Kuehls and Friends that its brief would be aligned with the appellants' brief. I discuss this below when I introduce the assignments of error.

5. Review the administrative record. There are three large documents that make up the record. The first is the record of the prior appeal (CRGC no. COA-S-21-01), which was Skamania County's initial decision; the second is the Gorge Commission's record of the first appeal, and the third is the record of the county's proceeding after the Gorge Commission remanded the first appeal back to Skamania County. The third is the most important for this appeal. As you review the record, you may discover that the pages the parties cite do not support their points or you may discover that other pages in the record support or contradict the parties' points. The record has many duplicates, so do not be surprised when you see the same document more than once.
6. Finalize any questions you have about the record or arguments so you can ask the parties at the hearing. Please try to limit your questions to just one (maybe two) because the parties will have their own prepared arguments. If they need to address too many questions from the Commission, they will not have time for their prepared arguments.
7. Call or email me if you have questions. My office cell is (509) 713-9626, and my email address is jeff.litwak@gorgecommission.org.

Conduct of the Hearing

The appellants brought this appeal under Commission Rule 350-60. I recommend you review Commission Rule 350-60-120 and -220 (concerning oral argument and standards of review) and the Notice of Hearing. The Notice of Hearing refines the procedure in the rule for this hearing.

The public may observe the hearing as an "attende" to the Zoom webinar, but this is not a public hearing, so the public does not get to speak.

A summary of the order of the hearing is:

1. Chair calls the hearing to order and reviews the Notice of Hearing;
2. Chair asks members of the Commission for disclosures of conflicts of interest, bias and ex parte communications; parties may ask questions or challenge commissioners' participation; commissioners address any concerns and challenges;
3. Commissioners may state questions that they wish the parties to address in their oral arguments;
4. Parties present their arguments (this is uninterrupted time, you do not get to ask questions of the parties while they are presenting their arguments);
5. Commissioners may ask questions of the parties after all arguments are done (parties get two minutes per side to answer questions); and
6. Commissioners deliberate to an oral decision.

Hearing Fairness

The Commission's rules require this hearing to be objectively fair and to appear fair to a reasonable person. At the beginning of the Commission's hearing, the Chair will request commissioners disclose any conflicts of interest, bias toward or against the application or any party, and any ex parte communications.

Conflicts of Interest/Bias/Appearance of Fairness

There are two types of conflicts of interest. A potential conflict of interest is when you or someone in your close family could financially benefit or lose from a decision, including whether a business with which you or a close family member is associated. An actual conflict of interest is when you or your close family would financially benefit or lose from a decision. Examples of a potential or actual conflict include a financial interest with one or more of the parties, or with the property in question. A past and concluded interest is not generally a potential or actual conflict, but the specifics of that past interest might constitute bias, so you should disclose those as well.

If you have an actual conflict, then you must disclose that conflict and recuse yourself from this hearing. You may provide a written disclosure in advance of the hearing or provide an oral disclosure at the hearing. If you believe you have a potential conflict, you must disclose that conflict at the hearing and explain it with enough detail that the parties can understand the nature of the potential conflict and make a judgment whether they believe you can be fair and impartial and decide the case solely on the record and briefs. The parties may ask you questions and may ask you to recuse yourself, but only you can decide whether to recuse yourself.

I recommend that in this case, you do not have an actual or potential conflict if you use AT&T as your provider for communication services.

Bias, prejudice, and appearance of fairness concerns arise when there are facts that would lead a reasonable person to believe that you cannot be a fair decision-maker in this appeal. You must disclose written or oral communications, statements, current or prior memberships, friendships, employment or other professional relationships, and other factors that might lead to such a concern.

Your participation and vote in the prior appeal does not constitute bias or prejudice or raise appearance of fairness concerns for this matter.

Please contact me to discuss any potential, actual, or past interests, or any of your actions during the prior appeal that you believe could affect your ability to fairly consider this current appeal so I can help you decide how to handle your participation in this appeal.

Ex Parte Communications

If you have had conversations that directly or indirectly relate to this appeal, you must disclose those conversations. Such communications are considered ex parte if they occurred while this appeal was pending. On August 1, 2024, I sent you an email informing you of this appeal, and that you should avoid communications about the matter. You must disclose your ex parte communications relating to this appeal from August 1, 2024, to the present. You do not need to disclose the communications you received from me announcing the filing of this appeal; and the Chair does not need to disclose conversations with me about motions and other pre-hearing matters.

A complete disclosure includes the name of the person that you communicated with, when you had the communication (as specific as possible), and the content of the communication in as much detail as you recall.

If you have had a conversation or if you have any questions about whether you need to make a disclosure in this case, please call or email me and I will discuss it with you individually.

Objections to a Commissioner’s Participation in the Appeal

One or more of the parties may object to a commissioner’s participation. If that occurs, the full Commission may discuss that individual commissioner’s participation, but the ultimate decision about whether to participate remains with that individual commissioner. If that commissioner chooses not to participate in the appeal, that commissioner should leave the hearing room (the Zoom webinar) so there is no risk that the commissioner will interact with the remaining decision-making commissioners. If a commissioner participates, but a court later determines that commissioner should have recused themselves, the court could remand the matter back to the Gorge Commission for a new hearing without the participation of that commissioner.

Questions from Commissioners

Before the parties give their oral arguments, you will have the opportunity to ask questions for the parties to address as part of their oral argument. Please keep in mind that the parties will have prepared their oral argument, so please limit your questions to one (or two at most) to allow the parties to use their argument time (20 minutes per side) to also say what they prepared. All the parties have appeared in appeal hearings before the Gorge Commission, so they are familiar with this process.

If the parties did not answer your question or if the parties’ arguments raise a new question for you, you may ask that question when the parties complete their arguments. Again, please limit your questions to one (or two at most). Each side gets two minutes to answer the question. You cannot ask a question for just one side to answer.

The Parties’ Briefs

The appellants’ brief and the response briefs have the following main sections.

Introduction and Summary of Arguments

The parties begin their briefs with an introduction to the case, a statement of the Gorge Commission’s ability to hear the appeals (jurisdiction and standing), and a summary of their arguments. The summary of arguments can help you stay organized. You can also use the table of contents in each brief as a roadmap to the brief and the appeal overall.

Summary of Facts

The parties’ briefs contain their recitations of the facts that they believe are important. The parties mention some different facts and give different explanations about the same facts. You do not need

to accept the parties' statements of facts if you believe the administrative record shows different facts. Review the briefs and the pages of the record that the parties refer to in their briefs. I do not summarize the facts here. You need to read the parties' recitations of the facts.

Standards of Review

Your review of the hearing examiner's decision is limited to the "standards of review" in Commission Rule 350-60-220. Think of the standards of review as the tests through which you must consider the hearing examiner's decision. The briefs are supposed to tell you what standards of review they believe the Commission should use and frame the arguments using those standards of review. If the decision passes the tests, then you would affirm; if not then you would remand or reverse.

Try to frame your deliberations and decision as whether the decision satisfies the applicable standards of review. Standards of review exist so that you decide appeals based on specific factors that the parties know in advance and not individual senses of correctness. You cannot decide the appeal based on standards or reasoning outside of the standards of review in the Commission's rules. The final order cannot contain statements that you make that are unrelated to the standards of review.

Assignments of Error

The Gorge Commission's appeal rule requires an appellant to identify "assignments of error." An assignment of error is a claim that a factual statement or a conclusion in the county's final decision was erroneous. One assignment of error may have several separate arguments that collectively constitute the appellant's reasoning why they believe the decision was erroneous. The respondents' briefs follow the same order as the appellants' briefs, except that the respondents cannot raise their own assignments of error; they can only respond to the appellants' assignments of error.

The appellants' brief presents two assignments of error, each alleging a different error in the hearing examiner's decision. Importantly, in this appeal, Skamania County's response brief is aligned with the appellants. Skamania County makes arguments in support of the appellants' assignments of error and counter to its own final decision. This is uncommon, but not improper under Washington law for appeals of Washington land use decisions. The Oregon Land Use Board of Appeals does not permit a local government to appeal its own decision or argue that its decision should be overturned. This is the first time that a county has argued in support of appellants in a National Scenic Area appeal. The Chair resolved a motion from the Kuehls and Friends about Skamania County's brief. The Chair required Skamania County to submit a new cover for its brief to make clear that its arguments were aligned with the appellants, required Skamania County to share the appellants' time for oral argument, and allowed the Kuehls and Friends to file responses to Skamania County's brief.

The legal question whether the Gorge Commission's appeal rules allow or should allow a county to file a response brief in support of the appellants and counter to its own final decision is not at issue in this appeal and you should not deliberate or attempt to decide that issue. This is something that you can address when you next update your rules for appeals.

This staff report introduces you to the assignments of error and the main legal issues in the assignments of error. The arguments principally require you to interpret provisions of law and apply the law as you understand it to the facts of the case. The parties largely agree on the facts of the case, but frame those facts differently. This staff report does not comprehensively summarize the parties' arguments. The parties make arguments and give more detail to their arguments than the general introductions below, so you need to read their briefs and rely on your understanding of their arguments and the relevant facts.

Recommended Approach to Understanding this Appeal

I recommend that you start by reading the Gorge Commission's prior decision. The prior decision is part of your packet for this appeal hearing. I recommend you then read the Hearing Examiner's decision, which is Appendix A in the petitioner's brief, beginning on .pdf page 39. After reading these, I believe the parties briefs will make more sense to you and that you should read the briefs as I described above on pages 3 and 4 of this staff report.

First Assignment of Error

The first assignment of error asks whether the hearing examiner erred in concluding that the application did not qualify for expedited review under Skamania County's National Scenic Area standards.

The appellants' and Skamania County's briefs did not identify the standards of review that they believe apply to this assignment of error. The Kuehl's brief identified the three standards of review that they believe are applicable (Kuehls' brief at 4). Friends of the Columbia Gorge's brief adopted the arguments in the Kuehls' brief for this assignment of error and thus did not independently identify standards of review. I recommend that you use the standards of review in the Kuehls' brief.

Whether the application qualifies for NSA expedited review depends on whether the proposed changes to the original tower (and accompanying base station, cabinetry, etc.) meet the NSA expedited review standards in Skamania County's code.

The appellants' brief argues that the application meets the standards for using NSA expedited review procedures and that some elements of its application are uses allowed without review.

Skamania County's brief also argues (contra to the decision of Skamania County's hearings examiner as explained above) that application met the standards for NSA expedited review.

The Kuehls' initial response brief argues that the application does not satisfy the standards for using the NSA expedited review process. The Kuehls' brief also argues that the Gorge Commission should not rule on whether the current development is legally existing because the hearing examiner did not rule on that and the parties have not presented evidence or argument to the hearings examiner on that issue. The Kuehls' additional response brief to Skamania County's brief addresses specific points in Skamania County's brief.

Friends' initial response brief adopted the arguments in Kuehls' brief for the first assignment of error, but its additional response brief to Skamania County's brief responds to Skamania County's arguments that the application met the standards for NSA expedited review.

Second Assignment of Error

The second assignment of error asks you to conclude that the application was approved by operation of law under the "shot clock" in federal telecommunications law.

The appellants' and Skamania County's briefs did not identify the standards of review that they believe apply to this assignment of error. Friends of the Columbia Gorge's brief identified two standards of review that they believe are applicable and explained how to apply those standards. (Friends' Brief at 11.) The Kuehls' brief adopted the arguments in Friends' brief and thus did not independently identify standards of review. I recommend that you use the standards of review in Friends' brief.

The appellants argue that their application qualified as an "eligible facilities request" under federal telecommunications law, and was deemed approved by operation of law in 2021.

The relevant federal laws are in the appellants' brief at Appendix C beginning at .pdf page 142. The first two pages of Appendix C are the United States Code, Title 47, section 1455. This is the law that Congress enacted that defines "eligible facilities request." The remaining pages of Appendix C are provisions in the Code of Federal Regulations (CFR) adopted by the Federal Communications Commission to interpret and implement section 1455(a)(1) and (a)(2)). The most relevant section of the CFR is section 1.6100(b)(7) (the definition of "substantial change").

Skamania County's brief also notes that the applicant sought review of its application as an eligible facilities request, and that the County could not satisfy the 60-day time period (the "shot clock") to review the application under that federal law unless it used the NSA expedited review procedures. Finally, Skamania County argues that the application qualifies as an expedited facilities request.

Friends of the Columbia Gorge's initial response brief argues that application does not qualify as an eligible facilities request because it substantially changes the existing development as defined in section 1.6100(b)(7) and other points in response to specific arguments in the appellants' brief. Friends' response to Skamania County's brief responds to the specific arguments in Skamania County's brief on this assignment of error.

"Third Assignment of Error"

Skamania County's brief makes a third argument beginning on page 6. Friends of the Columbia Gorge's response to Skamania County's brief refers to this as a "third assignment of error." I recommend that you do not refer to this argument as an assignment of error. Because Skamania County did not file its own appeal, it cannot raise any new assignment of error not already raised in the appellants' brief. Skamania County's argument relates to arguments in appellants' second assignment of error. I recommend you address these arguments as part of the second assignment of error, noting that the Kuehls and Friends argue that you do not need to address this specific argument.