

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

SMARTLINK, LLC and NEW CINGULAR)	
WIRELESS PCS, LLC,)	CRGC No. COA-S-24-01
)	
Appellants,)	Skamania County No. NSA-20-046
)	Remand
v.)	
)	
SKAMANIA COUNTY, VIVIAN)	FINAL OPINION AND ORDER
KUEHL, and SUE KUEHL PEDERSON,)	
)	
Respondents,)	
)	
and)	
)	
FRIENDS OF THE COLUMBIA GORGE,)	
)	
Intervenor-Respondent.)	
_____)	

I. INTRODUCTION

This matter involves an appeal by Smartlink, LLC and New Cingular Wireless PCS, LLC of Skamania County No. NSA-20-046 following a remand by the Gorge Commission in a prior appeal. The prior appeal was *Kuehl v. Skamania County*, CRGC No. COA-S-21-01 (Sept. 5, 2023). 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.”¹ After the Gorge Commission’s decision in the prior appeal, Skamania County Community Development Department staff reapproved the application using the National Scenic Area expedited review process and as an eligible facilities request. Neighboring property owners and respondents in this appeal, Vivian Kuehl and Sue Kuehl Pederson, appealed that second approval to the Skamania County Hearing Examiner, who concluded that the application did not qualify for expedited review and did not qualify as an eligible facilities request. The hearing examiner 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 PCS, LLC appealed the hearing examiner’s decision to the Gorge Commission. For clarity, we use the parties’ true names in this decision and do not refer to them as applicant, appellant, etc. We use “AT&T” to refer to Smartlink, LLC and New Cingular Wireless PCS, LLC and we use “Skamania County’s brief” to distinguish Skamania County’s argument to the Gorge Commission from Skamania County’s final decision. The hearing examiner’s decision is the county’s final decision on appeal to the Gorge Commission.

The Gorge Commission met on September 9, 2025, to hear oral argument and deliberate to a decision. Commissioner Miller was absent; all other commissioners were present and participated. The Gorge Commission voted to affirm the decision of the hearing examiner. The Chair of the Gorge Commission, Michael Mills, was the presiding officer at the hearing.

II. PARTIES AND ATTORNEYS

The parties and their attorneys in this matter are:

- Smartlink, LLC and New Cingular Wireless PCS, LLC, represented by Richard Busch, Busch Law Firm PLLC, Issaquah, Washington;

¹ “Expedited review” is a National Scenic Area process and “eligible facilities request” is a review pursuant federal telecommunications law. These processes are discussed in our resolution of the assignments of error.

- Skamania County, represented by Adam Kick, Prosecuting Attorney and Derek Scheurer, Deputy Prosecuting Attorney, Skamania County Prosecuting Attorney’s Office, Stevenson, Washington;
- Vivian Kuehl and Sue Kuehl Pederson, represented by Michael J. Wardell, Attorney at Law, Tukwila, Washington;
- Friends of the Columbia Gorge, represented by Nathan J. Baker, Senior Staff Attorney and Steven D. McCoy, Staff Attorney, Friends of the Columbia Gorge, Portland, Oregon.

III. RECORD PRESENT BEFORE THE GORGE COMMISSION

The Gorge Commission’s proceeding was on the amended record filed by Skamania County on February 11, 2025, as settled by the Chair of the Gorge Commission on February 11, 2025. Skamania County provided the record to the Gorge Commission in electronic form only. Members of the Gorge Commission received a copy of the record approximately two weeks prior to the oral argument.

If a party appeals this Final Opinion and Order, the Gorge Commission will transmit Skamania County’s record and the record of the Gorge Commission’s proceeding (under separate cover) to the court. If the court requires or requests a paper copy of the record, Skamania County is responsible for supplying the paper copy of the record of its proceedings, and the Gorge Commission is responsible for supplying the paper copy of the record of its proceeding. The Gorge Commission made an oral recording of its hearing. The oral recording is part of the record of the Gorge Commission’s proceeding and is available to the parties. The Gorge Commission does not make a transcript of its hearing. If a party chooses to do so, the Chair of the Gorge Commission will, upon request, assist by answering questions and identifying speakers. The Chair of the Gorge Commission will review the transcript and issue an order accepting it as accurate in full or in part as appropriate.

IV. PROCEDURAL MATTERS AND RULINGS

A. Disclosure of Conflicts of Interest and Ex Parte Communications

Prior to oral argument, Friends of the Columbia Gorge submitted a document entitled “Disclosure of Ex Parte Contact,” noting that Friends had sent a copy of a newsletter to Commissioner Liberty as part of a mass mailing. The communication described in the “Disclosure” document was a newsletter entry stating that the Skamania County Hearing Examiner remanded the Community Development Department’s decision for a full review and that the applicants appealed the decision to the Gorge Commission. Friends served copies of its “Disclosure” document on all parties. No party responded. This communication is not an *ex parte* communication as it did not involve any issue in the proceeding. *See, e.g.*, RCW 34.05.455 (prohibiting an *ex parte* communication “regarding any issue in the proceeding”). Here, the newsletter simply reported the outcome of the county’s proceeding before the hearing examiner and mentioned that an appeal had been filed; it did not mention any issues in the proceeding.

At the hearing, prior to the parties presenting oral argument, the Chair of the Gorge Commission asked members of the Gorge Commission to disclose conflicts of interest, *ex parte* communications, and appearance of fairness issues. The following members of the Gorge Commission made the following disclosures.

Commissioner Lach Litwer stated that he is the owner of a telecommunications engineering company, but his company does not do business with any of the parties.

Commissioner Michael Mills stated that he was a past member of Friends of the Columbia Gorge and that his deceased spouse had been a member of Friends of the Columbia Gorge during his time on the Gorge Commission.

The Chair of the Gorge Commission asked the parties if they had any questions or challenges to any commissioner's participation in the appeal hearing. The parties affirmatively stated that they did not have any questions or challenges to any commissioner's participation.

After the hearing and prior to the Chair of the Gorge Commission issuing this final opinion and order, a member of the Skamania County Board of Commissioners sent an email and images of the cell tower at issue to four members of the Gorge Commission, including the Chair of the Gorge Commission. This email was an improper *ex parte* communication and provided evidence outside of the record.² One member of the Gorge Commission replied to that email. The Gorge Commission's counsel provided copies of the email and images and the response email to the parties and asked whether they wanted to raise any objections. No party objected. The Chair did not consider the email or the images in drafting this final opinion and order.³

B. Hearing Procedure

The Gorge Commission issued a Notice of Hearing on August 5, 2025, that described the hearing process. The Chair of the Gorge Commission asked the parties if they had questions about the hearing procedure. No party asked questions or raised concerns or objections with the hearing procedure prior to, during, or after the hearing. The Gorge Commission adhered to the hearing procedure specified in the Notice of Hearing.

C. Record and Excerpt of Record

The administrative record of Skamania County's proceeding has three parts: 1. the record of Skamania County's proceeding on remand; 2. the record of Skamania County's initial

² During the hearing, in response to a question from Commissioner Liberty, AT&T stated that there were no photographs of the tower as built in the record.

³ The initial email and response are not part of the record of the Gorge Commission's proceeding. If a party wishes to use these documents in an appeal of the Gorge Commission's decision, the Gorge Commission will provide the documents separately.

decision in 2021; and 3. the record of the Gorge Commission’s 2023 appeal proceeding. The parties’ briefs use the following terms to refer to the three parts of the written record:

- “County Rec. 1” to refer to the record portion from the County’s first round of review of the Application (which culminated in the Hearing Examiner’s June 1, 2021, decision);
- “CRGC Rec.” to refer to the portion from the Gorge Commission’s prior appeal proceedings (which culminated in the Commission’s September 5, 2023, Final Opinion); and
- “County Rec. 2” to refer to the portion from the County’s second round of review (which culminated in the Hearing Examiner’s June 19, 2024, decision, challenged in the instant appeal).

We use the same terms in this final order and opinion.

D. Motion to Strike

The Skamania County Prosecuting Attorney’s Office filed the response brief for the county. That brief was aligned with the appellants in this matter. The Kuehls and Friends of the Columbia Gorge filed a motion to strike Skamania County’s brief as improper for its alignment with the appellants. The Chair resolved the motion by requiring Skamania County to submit a new cover for its brief and include a note on the cover to make clear that its arguments were aligned with the appellants. The Chair also 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.

E. Exhibits at Oral Argument

The respondents showed exhibits during the hearing. The exhibits are highlighted copies of pages from the county’s record. There were no objections to any of the exhibits. The

appellants submitted electronic copies of their exhibits to the Gorge Commission to become part of the record of the Gorge Commission’s proceeding.

F. Remaining Motions and Objections

All motions and objections not specifically ruled on by the Chair of the Gorge Commission or the full Gorge Commission are denied.

V. FACTS AND APPLICABLE LAW

In 2001, Skamania County approved construction of a telecommunication tower on the subject parcel in application no. NSA-00-078 (County Rec. 1 at 7) and subsequently approved a modification to the tower in application no. NSA-12-28 (County Rec. 2 at 106-27).

On October 28, 2020, AT&T filed the application at issue in this appeal, no. NSA-20-46, to increase the height of the tower and install associated panel antennas, remote radio heads, surge protector, fiber/dc cables, a pre-manufactured walk-in cabinet, and diesel generator within the existing compound. County Rec. 1 at 24, 30; County Rec. 2 at 288. In its submittal, AT&T stated that it was submitting the application as an “eligible facilities request” for a minor modification under section 6409 of the federal Middle Class Tax Relief and Job Creation Act of 2012, which is codified at 47 U.S.C. § 1455. *Id.* The regulations implementing section 6409 are codified at 47 C.F.R. § 1.6100. AT&T asserted that the scope of work was not a “substantial change” as that term is used in the definition of “eligible facilities request.”⁴ County Rec. 1 at 30.

⁴ “Eligible facilities request” is defined as “Any request for a modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving (i) Collocation of new transmission equipment; (ii) Removal of transmission equipment; or (iii) Replacement of transmission equipment.” 47 C.F.R. § 1.6100(b)(3).

“Substantial change” is defined in relevant part as “A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria: (i) For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater . . . (v) It would defeat the

One of the requirements for an eligible facilities request is that the local government must complete its review within 60 days (which is commonly referred to as the “shot clock”). 47 C.F.R. § 1.6100(c)(2). If a local government does not do so, the federal regulations state, “the request shall be deemed granted.” 47 C.F.R. § 1.6100(c)(4). The Skamania County Community Development Department approved the application using the National Scenic Area expedited review procedures and standards. County Rec. 1 at 163-72. The Kuehls appealed Skamania County’s staff decision to the Skamania County Hearing Examiner. County Rec. 1 at 173-81. The hearing examiner denied the appeal. County Rec. 1 at 1-23.

The Kuehls then appealed that denial to the Columbia River Gorge Commission. CRGC Rec. 861-65. The Gorge Commission remanded the hearing examiner’s decision back to Skamania County. County Rec. 2 at 371-94. In a “Summary of Conclusions and Order,” the Gorge Commission’s Final Opinion and Order stated:

We remand this matter back to Skamania County to address whether the application qualifies for the expedited review process and qualifies as an [eligible] facilities request, and to address SCC 22.06.140.A.1.a.vi. We recognize that SCC 22.06.140.A.1.a.vi would not apply if the application does not qualify as an expedited review use. We thus recommend Skamania County first determine whether the base station is “existing” pursuant to SCC 22.10.050(L)(1) and (3). If not, then Skamania County will need to process the application as a review use not entitled to expedited review, which would require applying facts and determinations of compliance using different standards. 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.

County Rec. 2 at 392-93 (brackets changed “expedited” to “eligible”).

concealment elements of the eligible support structure; or (vi) It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment” 47 C.F.R. § 1.6100(b)(7).

On remand, the Skamania County Community Development Department issued a new decision approving the modifications to the tower, again using the National Scenic Area expedited review process. County Rec. 2 at 462-65. The Kuehls again appealed the Skamania County staff decision to the Skamania County Hearing Examiner. County Rec. 2 at 404. On June 19, 2024, the hearing examiner concluded that the application did not qualify for expedited review and that the application was not “deemed granted” under the 60-day shot clock because the application did not qualify as an eligible facilities request because AT&T proposed a substantial change under 47 C.F.R. § 1.6100(b)(7). County Rec. 2 at 3-8. The hearing examiner’s decision is the county’s final decision in this matter.

AT&T timely appealed the hearing examiner’s decision to the Gorge Commission.

VI. RESOLUTION OF ASSIGNMENTS OF ERROR

First Assignment of Error

In the first assignment of error, AT&T argues that the hearing examiner erred in concluding that the application did not qualify for expedited review under Skamania County’s National Scenic Area standards.

Standards of Review Applicable to this Assignment of Error

AT&T did not identify the standards of review that they believe apply to this assignment of error. The standards of review applicable to this assignment of error are whether the decision was clearly erroneous or arbitrary and capricious, whether the findings are sufficient to support the decision, and whether the decision is supported by substantial evidence in the whole record. Commission Rule 350-60-220(1)(d), (e), and (f).

Washington courts describe the “clearly erroneous” standard as whether a reviewing court has a “firm and definite conviction that a mistake has been committed.” *See Dep’t of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

In contrast, when federal courts apply the “clearly erroneous” standard in administrative law cases, they typically ask whether a finding is “‘clearly erroneous,’ [that is] when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Washington courts consider an agency’s action to be arbitrary and capricious if “it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). Federal courts will find agency action arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Oregon courts do not use “clear error” or “arbitrary and capricious” standards in administrative law cases but instead use conceptually similar standards of substantial evidence and substantial reason. *See Armstrong v. Asten-Hill Co.*, 90 Or. App. 200, 206, 752 P.2d 312 (1988). Combining all these, we will apply the “arbitrary and capricious” standard as described by Washington state courts and federal courts to approximate a uniform standard throughout the National Scenic Area.

Washington state courts, Oregon state courts and federal courts explain substantial evidence in a similar way. The Washington Supreme Court has explained, “[s]ubstantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the

declared premise.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). The Oregon Supreme Court has explained that substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or. 172, 179, 855 P.2d 608 (1993). And the Ninth Circuit has explained that “[s]ubstantial evidence means ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ . . .” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

The Oregon Land Use Board of Appeals has summarized the requirement for adequate findings in Oregon law: “Findings must ‘(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. Additionally, findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below.” *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992) (internal citations omitted).

In Washington, “written findings must go beyond the ‘[s]tatements of the positions of the parties and a summary of the evidence presented.’ [A]dequate findings must also illuminate the decision-maker’s reasoning process. [Findings] must be ‘sufficiently specific to permit meaningful review.’ In the land use context, findings should also be sufficiently detailed to provide guidance to a proposed developer.” *One Energy Dev., LLC v. Kittitas County*, 9 Wn. App.2d 1057, (2019) (internal citations omitted).⁵

⁵ This is an unpublished case. Washington court rules limit citation to unpublished cases. We cite it here as a succinct summary rather than cite to each source separately and refer parties to the omitted citations.

Although Oregon and Washington case law use different terminology to evaluate whether findings support a decision, they are similar in requiring an identification of the evidence relied on and illuminating the decision-maker's reasoning.

Analysis

AT&T argues that the elements of its application to enlarge the tower fit within the land uses permitted through the expedited review process in SCC 22.10.050.L. The hearing examiner's findings related to this assignment of error are:

“In their appeal of the June 2, 2022 approval, [the Kuehls] have forwarded a more granular query as to the application's compliance with the requirements for expedited review under Title 22, looking solely at the plain language of the ordinance and not relying on a finding of lack of compliance with permit conditions or applicable setbacks. [the Kuehls] argued that Title 22 states:

“SCC 22.10.050.L. The following aboveground and overhead utility facilities:

- “1. Modify existing aboveground and overhead utility facilities or develop new aboveground and overhead utility facilities including building and equipment foundations, poles, transformers, conduit, fencing, pumps, valves, pipes, and water meters, provided the development would be less than or equal to one hundred twenty square feet in area and less than or equal to twelve feet in height.
- “2. Replace existing aboveground and overhead utility facilities including building and equipment foundations, poles, transformers, conduit, fencing, pumps, valves, pipes, and water meters, provided the replacement of facilities would be in the same location and no more than fifteen percent larger than the physical size of the existing facilities.
- “3. New antennas and associated support structures necessary for public service on existing wireless communication poles and towers other than those allowed outright, provided the size is the minimum necessary to provide the service. (emphasis added)

“[The Kuehls] assert that the proposed expansion of the tower fails to qualify for the expedited review process because the tower extension is greater than 12 feet in height, and thus does not qualify under subsection L.1. They further argue that the proposed extension of the tower itself disqualifies the proposal for consideration under subsection L.3, because – they contend – that

subsection authorizes expedited review of additional equipment onto existing structures, where the proposal is to enlarge the structure and to place additional equipment on what is new tower height rather than on “existing tower height.”³

“In light of the Gorge Commission remand and these code interpretation arguments forwarded by [the Kuehls], and having considered [AT&T’s] Response, and [the Kuehls’] and Friends of the Gorge’s replies, and reconsidering the plain language of the code, the undersigned is persuaded that the proposed extension of the tower was not in fact eligible for expedited review. This conclusion expressly reverses the contrary conclusion in the June 1, 2021 Examiner Decision.

³ While no one has forwarded as a primary argument that the proposal qualifies under subsection L.2, perhaps because it is not a replacement, the as-built tower was 56 feet tall, and 15% extension under subsection L.2 would have been limited to 8.4 feet in greater height. Of note, the proposal called for, and the June 2, 2022 permit approved, a 20-foot increase in tower height, while the now built extension installed by the Applicant appears to be 25 feet taller than the previously constructed tower height.”

County Rec. 2 at 6-7. The hearing examiner’s findings identified the relevant approval standard (SCC 22.10.050.L), set out the facts relied on (including in footnote 3), and explained how the facts led to the decision on compliance with the approval standard by setting out the Kuehls’ prevailing arguments addressing the specific subsections of the code and the Gorge Commission’s prior conclusion in this matter. The findings illuminated the hearing examiner’s reasoning process—that the tower extension is greater than 12 feet in height and that the additional equipment would be placed on the extension, not the existing portion of the tower. The hearing examiner’s conclusion referenced the parties’ arguments and the plain language of the code. Ideally, we would prefer the hearing examiner to identify what evidence and legal points in each document they rely on in making the decision to avoid the possibility of identifying conflicting evidence and points of law through incorporation of multiple documents; however, in this case, the findings are sufficiently specific to permit our meaningful review and we do not find conflicting evidence. The evidence supports the hearing examiner’s legal

conclusion and decision that the proposed tower expansion does not qualify for NSA expedited review.

The tower extension is greater than 12 feet in height (SCC 22.10.050.L.1).

Skamania County's expedited review standards require that a modification of existing aboveground and overhead utility facilities, including poles, must be less than or equal to 120 square feet in area and less than or equal to 12 feet in height to qualify for expedited review. SCC 22.010050.L.1. In footnote 3, the hearing examiner found that the tower extension, as proposed, would be 20 feet in height, and as built, is 25 feet in height. The elevation drawing at page 66 of County Record 1 (the same page that AT&T referenced in support of its argument that its proposal qualifies for expedited review (see below)) shows the tower heights described in footnote 3. This finding is supported by substantial evidence in the record.

AT&T argues that its proposal qualifies for expedited review under 22.10.050.L.1 because "AT&T's ground-mounted equipment (generator) and walk-in-cabinet meet these limitations on size, at a combined 81 square feet in area and 11 feet tall" (AT&T Opening Brief at 13, citing County Rec. 1 at 65-66). The Kuehls argue that AT&T's proposal does not qualify for expedited review because even if these elements of the proposal satisfy the standards for expedited review, the tower extension exceeds 12 feet in height.

We agree with the Kuehls that SCC 22.10.050.L.1 applies to the tower extension in addition to the ground-mounted equipment. The express language of this provision states, "Modify existing aboveground and overhead utility facilities or develop new aboveground and overhead utility facilities including building and equipment foundations, poles, . . ." SCC 22.10.050.L.1 (emphasis same as in the hearing examiner's decision, County Rec. 2 at 6). The list of facilities in this provision is preceded by the word, "including." While we understand a

“pole” differs from a “tower,” the word “including” signifies that the aboveground and overhead utility facilities listed in the provision are not an exclusive list. *State v. Kurtz*, 350 Or. 65, 75, 249 P.3d 1271 (2011) (“statutory terms such as ‘including’ and ‘including but not limited to,’ when they precede a list of statutory examples, both convey an intent that an accompanying list of examples be read in a nonexclusive sense”); *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 150 Wn. App. 176, 186, 206 P.3d 1272 (2009).

The tower is an aboveground and overhead utility facility, and its height exceeds the 12-foot standard in SCC 20.10.050.L.1 to qualify for expedited review. The hearing examiner’s application of SCC 22.10.050.L.1 to AT&T’s proposal is supported by substantial evidence in the whole record and is consistent with the plain language of the provision and is not clearly erroneous or arbitrary and capricious.

AT&T proposes to place additional equipment on what is new tower height rather than on existing tower height (SCC 22.010.050.L.3).

The hearing examiner also concluded that the tower was not eligible for expedited review pursuant to SCC 22.10.050.L.3, which requires new antennas and associated support structures be placed on existing wireless communication poles and towers. The hearing examiner stated that she based her decision on the parties’ briefing and the plain language of that provision. County Rec. 2 at 7. The elevation drawing at County Rec. 1 at 66 (again, the same page that AT&T cited in support of its argument that its proposal qualifies for NSA expedited review (see above)) shows that the proposal is for new antennas placed on the tower extension at elevation 72.0 feet above ground level, whereas the existing tower is only 56 feet above ground level. Although the hearing examiner did not make a specific finding that the new antennas and associated support structures be placed on the tower extension, that fact is supported by substantial evidence in the record.

AT&T argues that its proposal qualifies for expedited review under 22.10.050.L.3 because it is the minimum necessary to provide the service. (AT&T Opening Brief at 13-14.) The Kuehls argue that even if AT&T's proposal is the minimum necessary, the proposal does not qualify for expedited review because the new antennae would be placed on the tower extension, not the existing tower. (Kuehls' Response Brief at 14-15.) We do not address the issue whether AT&T's proposal is the minimum necessary to provide the service because it is not clear that the hearing examiner decided this issue. The hearing examiner did not expressly discuss this issue in the decision. We do not try to determine whether the hearing examiner impliedly addressed this issue in the incorporation of the parties' briefs, nor do we need to do so.

We agree with the Kuehls that AT&T's proposal does not qualify for expedited review under SCC 22.10.050.L.3 because the new antennae would be placed on the tower extension not the existing tower (at 72 feet in height, which is 16 feet above the height of the existing 56-foot tower, County Rec. 1 at 66). SCC 22.10.050.L.3 uses the term "existing," and we must give meaning to that term. The hearing examiner correctly concluded that placement of equipment on the tower extension does not qualify for expedited review.

AT&T argues that the Kuehls' argument would lead to an absurd result, using an analogy that a utility company could replace a pole as a use that does not require review, yet be unable to place any equipment on the new pole because it is not the "existing" pole. We note that SCC 22.10.050.L.3 excepts poles and towers allowed outright and we note that AT&T's analogy differs from the current situation where AT&T proposes to extend its tower above the height permitted through expedited review and add new equipment on that extension. We do not opine what type of review would be necessary in AT&T's scenario or a scenario where an applicant proposes placing equipment on a tower extension that qualifies for expedited review.

The hearing examiner's application of SCC 22.10.050.L.3 to AT&T's proposal is supported by substantial evidence in the whole record and the plain language of the provision and is not clearly erroneous or arbitrary and capricious.

Second Assignment of Error

In the second assignment of error, AT&T argues that the hearing examiner erred in concluding that the tower does not qualify as an eligible facilities request and that the application was approved by operation of law under the "shot clock" in 47 C.F.R. § 1.6100(c)(2) & (4) that is applicable to an eligible facilities request. Skamania County's brief also argues that the County could not satisfy the "shot clock" in reviewing the application unless it used the expedited review procedures.

Standards of Review Applicable to this Assignment of Error

AT&T's brief did not identify the standards of review that it believes apply to this assignment of error. Friends of the Columbia Gorge's response brief identified two standards of review: whether the decision improperly construes the applicable law and whether the decision is supported by substantial evidence in the whole record. Commission Rule 350-60-220(1)(f), (h). (Friends' Response Brief at 11.) We explained the substantial evidence standard above and do not repeat that explanation here. We do not reach AT&T's arguments whether the hearing examiner properly construed applicable law (the shot clock in 47 C.F.R. § 1.6100(c)(2) & (4)). We raise on our own the issue whether the findings are sufficient to support the decision. Commission Rule 350-60-220(1)(e). We explained the sufficient findings standard above and do not repeat that explanation here.

Analysis

In this assignment of error, we affirm the hearing examiner's decision that AT&T's proposal does not qualify as an eligible facilities request. Based on this conclusion, the 60-day

shot clock does not apply to the proposal and we do not need to decide whether the application was deemed approved through the shot clock. The hearing examiner's findings and conclusion relating to the second assignment of error are:

“More definitively, it is arguable that the proposed extension of the 2001 as-built tower fails to meet the criteria for eligible facilities request, which process pursuant to 47 CFR §§1.6100(b)(3) is only available to projects that do not substantially change the physical dimensions of the tower. The cited federal regulations define “substantial change” as follows:

“(7) Substantial change. A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

“

“(iii) For any eligible support structure, it . . . involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

“ . . . or

“(vi) It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment

“47 CFR §§ 1.6100(b)(7)(iii) & (iv) [sic, (iv) should be (vi)]. In its remand decision, the Gorge Commission concluded that the proposal does not qualify as an eligible facilities request both because the record shows the base station does not comply with the five-foot setback required by the 2001 permit for its construction and because the record shows the proposed height increase of base station elements exceeds 10%. The documentation submitted in this motions process supports both conclusions of the Gorge Commission that the criteria for eligible facilities request are not satisfied.”

County Rec. 2 at 7-8. The hearing examiner's finding identifies the relevant approval standard (47 CFR §§ 1.6100(b)(7)(iii) & (vi)); sets out the facts relied on by mentioning the referenced documents relied on (which are listed earlier in the hearing examiner's decision at County Rec. 2 at 4-5); and explained how the facts led to the decision on compliance with the approval standard (by reference to the Gorge Commission's prior conclusion in this matter). Again, we note that we

would prefer the hearing examiner to identify what evidence in each document they rely on in making the decision to avoid the possibility of identifying conflicting evidence through incorporation of multiple documents. Here, however, AT&T only raises legal arguments about whether the setback required in the 2001 decision applies to its proposal. For the purpose of the issues raised, the findings went beyond statements by the parties and illuminated the hearing examiner's reasoning process by reference to the Gorge Commission's prior conclusion in this matter. The findings are sufficiently specific to permit our meaningful review and they support the decision that the tower as initially built "[did] not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment" in accordance with 47 C.F.R. § 1.6100(b)(7)(vi).

The setback is less than five feet as required in the 2001 decision.

Condition of approval 2 in the 2001 decision required a five-foot setback from the Kuehls' property. County Rec. 1 at 264. The parties do not contest that the 2001 decision imposed this setback. In our prior decision in this matter, *Kuehl v. Skamania County*, No. COA-S-21-01 (Sept. 5, 2023) (Second Revised Final Opinion and Order), we cited to County Record 1 where the evidence showed that the tower, as built, violated the five-foot setback. *Id.* at 15-16 (County Rec. 2 at 385). We also noted, "On remand, our decision does not preclude Skamania County from reopening the record for new evidence to demonstrate that the application qualifies as an [eligible] facilities request; however, if Skamania County does so, it must explain and analyze the evidence in the whole record in adequate findings and conclusions." *Id.* at 22 (County Rec. 2 at 391).

The hearing examiner's decision notes that the parties submitted "documentation" and the hearing examiner considered it. County Rec. 2 at 8. We do not see in the record of the current

appeal that any party submitted new evidence tending to show that the tower complied with the five-foot setback; rather, the record shows that AT&T argued that the setback does not apply (an argument we address below). *See* County Rec. 2 at 26-29, 254. There being no new evidence showing that the tower complied with the five-foot setback, we affirm the hearing examiner’s factual conclusion that the tower, as built, violates the five-foot setback and legal conclusion that this violation means that the tower does not qualify as an eligible facilities request.

AT&T is precluded from arguing that the setback imposed in the 2001 decision does not apply.

AT&T argues that the setback requirement in the 2001 National Scenic Area permit under which the tower was originally built does not apply to the base or the foundation for the tower because the tower and foundation are not a “building.” (AT&T Opening Brief at 16-18). AT&T relies on the definition of “setback” in the Skamania County Building Code, specifically, SCC 15.04.040.C. AT&T provided a copy of the code in Appendix D of its brief. We do not decide whether Skamania County properly applied a five-foot setback to the base or the foundation for the tower in 2001. AT&T is precluded from challenging the propriety of the setback in the 2001 decision. AT&T made the same preclusion argument in its motion to dismiss the appeal before the hearing examiner with respect to the Kuehls’ appeal:

“Appellants continue to attack the County’s original 2001 approval of the wireless tower and seek removal of the tower as their remedy.

“As this Examiner ruled in her May 3, 2021, Ruling on Applicant Motion to Dismiss (copy attached as **Exhibit 1**) during the Appellants’ first appeal of NSA-20- 046, “[a]ll challenges in the instant appeal with respect to the 2001 approval of the existing wireless communications facility are untimely and must be dismissed for lack of jurisdiction.”

“Appellants are likewise precluded from arguing in this appeal that there was any impropriety or error in the County’s 2001 approval of the wireless tower .

...

County Rec. 2 at 253 (bold and italics in original). The hearing examiner did not address this argument. *See* County Rec. 2 at 3-8. AT&T's claim that the setback requirement that Skamania County imposed in its 2001 decision does not apply to the base or foundation for the tower is a similar "attack [on] the County's original 2001 approval of the wireless tower." We apply AT&T's own argument to its own challenge to the setback imposed in the 2001 decision as similarly untimely and similarly precluded.⁶ We affirm the hearing examiner's reliance on the setback imposed in the 2001 decision.

The size of the proposed cabinets is not relevant on remand.

The parties briefed that the cabinet size standard may only be an issue for towers that are in a right-of-way. The tower in this case is not in a right-of-way. The Kuehls and Friends of the Columbia Gorge argue that the Gorge Commission's prior consideration of the size of the proposed cabinet may have been an error. Friends of the Columbia Gorge Response Brief at 19 n. 11; Kuehl's Response to Skamania County's Brief at 13-14. The Kuehls argue that the Gorge Commission does not need to review that element of the hearing examiner's opinion if the Gorge Commission would affirm the hearing examiner's decision that the tower violates the setback. We agree. Because the tower does not qualify as an eligible facilities request (because it violates the setback imposed in 2001), a consideration of the size of the cabinets to determine whether AT&T's proposal qualifies as an eligible facilities request is not necessary.

We also choose not to review the cabinet size element in the hearing examiner's decision because the parties did not present the issue sufficiently to the hearing examiner. AT&T only

⁶ We also note that there is no date on the code; we do not know whether this code is the current code or the code that was applicable at the time of the 2001 National Scenic Area permit under which the tower was originally built; and the parties have not provided briefing whether we should consider the current code or the code in effect in 2001. Nor have the parties presented briefing whether applying the code in this case conflicts with the Management Plan.

argued to the hearing examiner that the cabinet size is inapplicable in a footnote. County Rec. 2 at 251. Friends of the Columbia Gorge also only presented its suggestion that the Gorge Commission may have erred in a footnote. County Rec. 2 at 195. We do not find in the record that the Kuehls briefed this issue to the hearing examiner. We do not believe that presenting an argument that AT&T believed was dispositive for the first time in a footnote was sufficient. *See, e.g., Falls v. Marion County*, 61 Or LUBA 39, 46 (2010) (LUBA will not consider an assignment of error that is presented only in a footnote in a brief to LUBA).

Finally, we note that the hearing examiner’s mention of the size of the cabinets is not a basis for remand where we already remand the matter for a different reason. *See, e.g., Allen v. City of Portland*, 15 Or LUBA 464, 472, *rev’d on other grounds*, 87 Or App 459, 742 P.2d 701 (1987), *rev. den.*, 305 Or 103, 750 P.2d 497 (1988) (holding that when a local government makes an irrelevant finding, LUBA may consider it “mere surplusage, and the fact that the finding may be erroneous or not supported in the record is not grounds for reversal or remand.”).

“Third Assignment of Error”

Skamania County’s brief presents its argument about cabinet size in a separate section of its brief that is numbered “3” (Skamania County Response Brief at 6), whereas the appellants made this argument as part of its second assignment of error. Appellant’s brief at 21-24. The organization of Skamania County’s brief was confusing in this respect and seems to have caused Friends of the Columbia Gorge’s response to Skamania County’s brief to refer to this third-numbered argument as a “third assignment of error.” We addressed this argument above and do not treat Skamania County’s brief as presenting a third assignment of error.

VII. DECISION

We deny AT&T's appeal and affirm the decision of the hearing examiner. The matter is remanded to the Skamania County Community Development to conduct a full review under SCC Title 22.

IT IS SO ORDERED, this 24th day of November 2025.



Michael Mills
Chair
Columbia River Gorge Commission

NOTICE: You are entitled to seek judicial review of this Corrected Final Opinion and Order within 60 days from the date of service of this order, pursuant to section 15(b)(4) of the National Scenic Area Act, 16 U.S.C. § 544m(b)(4).

NOTICE OF MAILING

I certify that on November 24, 2025, I mailed the attached FINAL OPINION AND ORDER by electronic mail to the following persons, all of whom have indicated that they accept email service:

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s/ Connie Acker

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