BEFORE THE COLUMBIA RIVER GORGE COMMISSION

VIVIANN KUEHL and SUE KUEHL PEDERSON, Appellants, v. SKAMANIA COUNTY, Respondent, and SMARTLINK, LLC FOR AT&T, Respondent (Applicant).	)	CRGC No. COA-S-21-01 Skamania County No. NSA-20-46 **SECOND REVISED FINAL OPINION AND ORDER**

This appeal challenges Skamania County's approval of a modification to an existing wireless tower and cabinetry on an existing base station in Cook, Washington, in Skamania County.[1] The appellants own the parcel adjacent to the existing tower and base station and argue that Skamania County erred in approving the proposed modification. Skamania County Department of Community Development staff initially approved the proposed modification. The

[1] Our use of the term "existing" in reference to the wireless tower and base station are solely to describe the tower and base station as currently on the ground. We discuss below that the record does not establish that the base station is an "existing use or structure" as defined in the Skamania County Code. Wherever we say, "existing tower" or "existing base station," we do not imply they are an "existing use or structure" as that term is used in the Skamania County Code.

appellants appealed that decision to the Skamania County Hearings Examiner, who affirmed the staff decision. The appellants then appealed to the Columbia River Gorge Commission pursuant to 16 U.S.C. § 544m(a)(2). The Gorge Commission met on November 9, 2021, to hear oral argument and deliberate to a decision. The Commission voted to remand Skamania County's decision back to Skamania County.

I. PARTIES AND ATTORNEYS

The parties in the appeal are:

- Viviann Kuehl and Sue Kuehl Pederson, represented by Michael John Wardell, Attorney at Law, Tukwila, Washington.
- Skamania County, represented by Adam Kick and Derek Scheurer, Skamania County Prosecuting Attorney's Office, Stevenson, Washington.
- SmartLink, LLC for AT&T, represented by Kim Allen, Busch Law Firm, PLLC, Issaquah, Washington.

II. RECORD PRESENT BEFORE THE COMMISSION

The Commission's proceeding was on the record developed by Skamania County. Skamania County provided the record to the Commission in electronic form only. The appellants filed a timely record objection raising issues with the administrative record. The Chair of the Commission resolved all record objections and settled the record on August 20, 2021. Members of the Commission received an electronic copy of the settled record approximately two weeks prior to the oral argument.

If a party appeals this Final Opinion and Order, the Commission will transmit Skamania County's record and the record of the Commission's proceeding (under separate cover) to the court in which the appeal is filed. If the court requires or requests a paper copy of the record, Skamania County is responsible for supplying the paper copy of its record and the Commission is responsible for supplying the paper copy of the record of its proceeding. The Commission

made an oral recording of its hearing. The oral recording is part of the record of the Commission's proceeding and is available to the parties.

III. PROCEDURAL MATTERS AND RULINGS

A. Disclosure of Conflicts of Interest and Ex Parte Communications

At oral argument, no commissioners made disclosures of conflicts of interest or *ex parte* communications. The Chair announced that the parties could raise concerns with and challenge commissioners' participation in the hearing. No party raised concerns with or challenged any commissioner's participation.

B. Hearing Procedure

The Commission issued a Notice of Hearing on October 5, 2021, that described the hearing process. Commission Chair, Robert Liberty, was the presiding officer at the hearing. The Chair reviewed the hearing procedure and announced that the parties could ask questions about the procedure or conduct of the hearing and should raise objections to procedures if and when they occurred to allow the Commission to consider them and if needed, correct an error. No party raised any objections or concerns with the hearing process during the hearing. The Commission adhered to the hearing procedure specified in the Notice of Hearing.

C. Motions and Orders Prior to this Final Opinion and Order

The appellants filed an "Errata and Request for Clarification" on September 10, 2021, requesting the Commission "have one [additional] omitted exhibit added to the record on appeal." The errata filing was not timely as a record objection because the Commission had already resolved the record on August 20, 2021. The errata filing was not in the form of a motion, but the Commission treated it as a motion, waiting to see if the other parties would respond within the time specified in the Commission's rules. No party responded to the errata. Before the Chair of the Commission could respond to the errata, the appellants filed their brief.

The appellants' brief did not refer to the additional document. After the hearing, on January 12, 2022, the appellants filed a letter requesting the Commission approve the errata filing. As a record objection, the errata filing was not timely. Additionally, the petitioners filed their brief without reference to the omitted exhibit included with the errata filing. The original errata filing and subsequent letter are denied as untimely and moot. The omitted exhibit mentioned in the errata filing and subsequent letter is not part of the record on review.

IV. FACTS

The origin of this case dates to 1999. In that year, then-property owners Horst and Sanger Schwarz granted a lease to TowerCo Assets, LLC. AR 55. The leased area is adjacent to the appellants' property. AR 10. The apparent intent of the lease was for a wireless tower and accompanying base station because shortly after entering that lease, in 2001, Skamania County approved a wireless tower and base station development at that location. AR 263. The record does not indicate when the tower was first constructed, but there is no dispute that it has been at its current location for many years.

The current tower is 56 feet in height and is designed with "stealth" elements; it has design elements to try to camouflage it as a conifer. AR 263–67, 273–75, 108–11. The applicant proposes to modify the tower to a height of 76 feet and add new antennas and several other new elements to the tower and base station, including a new cabinet that is six feet, eight inches square and "11+/-" feet in height. AR 24, 107–11. The applicant asserted that the proposed modification qualifies as an eligible facilities request pursuant to federal law, 47 C.F.R. §§ 1.6100(b)(3), (7). AR 24.

Skamania County Community Development Department staff approved the application using the expedited review procedures in the *Management Plan for the Columbia River Gorge National Scenic Area* and pursuant to SCC 22.06.140 and SCC 22.10.050. AR 154–67. The

expedited review procedures do not provide for notice of the proposed development to adjacent property but requires notice of the decision to adjacent property owners. SCC 22.06.140.

The appellants, owners of the property adjacent to the base station, received a copy of the decision and filed an appeal with the hearings examiner for Skamania County. The hearings examiner issued an Order Setting Hearing and Pre-Hearing Schedule, AR 352; allowed a motion to dismiss with full briefing and issued a Ruling on Applicant's Motion to Dismiss, AR 306; and issued her Findings, Conclusion and Decision denying the appeal, AR 1–23, which included denying requests from the appellants' attorney to reopen the record, AR 295kk, and denying several of the appellants' exhibits at AR 579–797, AR 5–6.

The appellants then appealed to the Gorge Commission. We discuss specific relevant facts in our discussion of the appellants' assignments of error below.

V. ASSIGNMENTS OF ERROR

The appellants raised 15 assignments of error. At the hearing, the Commission summarized and addressed those assignments of errors in the following six headings:

1. If there are omissions in the application materials, are they a basis for reversal or remand under our review standards (assignments of error 1 through 7)?

2. Were the procedures used by the County prejudicial to the substantial rights of the appellants (assignments of error 12 through 14)?

3. Did the County correctly conclude, based on the facts it found and its conclusions of law, that the expedited review provisions apply to the application (assignments of error 8 through 10 and 15)?

4. Did the County correctly conclude, based on the facts it found and its conclusions of law, that the application satisfied the resource protections in the expedited review section of its code (assignment of error 11)?

5. Are there other possible errors in the County's decision not covered under the first four headings or anything else we should be considering in this appeal?

6. If there was an error requiring reversal or remand, do the provisions of the eligible facilities review in the federal regulations apply and do we have jurisdiction over this appeal? Does the proposed development qualify as an eligible facilities review?

1. If there are omissions in the application materials, are they a basis for reversal or remand under our review standards (assignments of error 1 through 7)?

In assignments of error 1 through 7, the appellants argue that the application materials omitted required elements or contained conflicting information. Assignment of error 7 is a statement that encompasses all of assignments of error 1 through 6 and is denied as duplicative.

In assignments of error 1 through 6, the appellants argue that the application materials did not contain the signature of the owner of the parcel on which the tower and base station is located; the site plan and other application materials contained different statements of the as-built dimension between the base station and the appellants' property boundary; the description of land uses on the parcel did not specify that the existing dwelling is vacant and did not show the location of wells and irrigation; and the application did not contain required information for wildlife sites within 1000 feet of the parcel, information about how the proposed modification is the minimum necessary, and other requirements for expedited review use applications.

In past appeals that raised the issue of an incomplete application, the Commission has applied different standards of review depending on the parties' arguments. In *Friends of the Columbia Gorge v. Skamania County* [Eagle Ridge Dev. Corp.], CRGC No. S-99-01, at 8–9 (June 22, 2001), the Commission remanded the decision pursuant to the standard of review that requires a decision be supported by substantial evidence in the whole record (Commission Rule 350-60-220(1)(f)). The Commission concluded in that case that there was not sufficient information in the record to support the factual determinations in the county's decision.

In another case, *Bacus v. Skamania County*, CRGC No. COA-S-04-01 (Aug. 10, 2004), the Commission applied the standard of review that requires a decision be flawed by procedural

errors that prejudice the substantial rights of the appellants (Commission Rule 350-60-220(1)(g)). In that case, the Commission concluded that the application was missing some elements but did not remand on that basis because there was no prejudice and the County's decision otherwise complied with the development standards.

Finally, in our one past decision involving the question whether the property owner had to sign the application, *GLW Ventures v. Skamania County*, CRGC Nos. COA-S-13-02 & COA-S-13-03 (May 13, 2014), we concluded that the term "property owner" is ambiguous and we reviewed the decision under Commission Rule 350-60-220(1)(h) (whether the county properly construed the applicable law).

Assignment of Error 1

In assignment of error 1, the appellants argue that Ms. Schwarz must sign the application because she is the title holder of the land on which the tower and base station is located. This was not one of the issues at the merits hearing before the hearings examiner, thus we must consider whether the appellants preserved this issue for appeal. The appellants did not identify where in the record they preserved this issue; however, we note that the appellants raised it at AR 331 in their briefing to the hearings examiner in response to the applicant's motion to dismiss.

SCC 22.06.060.A.1.a.ix requires the signature of the "property owner." The Gorge Commission applied this provision in its prior *GLW Ventures* decision. Consistent with that decision, we review assignment of error 1 under Commission Rule 350-60-220(1)(h) (whether the county properly construed the applicable law). We conclude that Skamania County properly construed SCC 22.06.060.A.1.a.ix.

In the *GLW Ventures* decision, the Gorge Commission concluded that the U.S. Forest Service is an owner of the subject parcel land and needed to have signed the application. Subsequently, the Skamania County Superior Court affirmed and amplified the Gorge

Commission's decision, concluding that whenever the Forest Service owns a conservation easement on a parcel, it is a property owner that must sign the application. *GLW Ventures v. Skamania County*, No. 14-2-00071-7 (Skamania Cnty. Super. Ct. Dec. 17, 2015). In our *GLW Ventures* decision, we specifically noted and gave great weight to the form of the conservation easement—specifically, that the grantor gave all interest in the property to the Forest Service, except for rights that the grantor specifically reserved to herself. We reaffirm our *GLW Ventures* decision and explain how the instant appeal is readily distinguished from the *GLW Ventures* decision.

In the instant appeal, the record does not contain a copy of the 1999 lease, but it does contain a copy of a subsequent 2010 easement for the site of the tower and base station at issue.[2] AR 52–62. Without a copy of the original lease in the record, we look to the easement document for context, which the easement suggests we may do because section 9 of the easement seems to subsume the lease into the easement. Section 9 specifies, "Upon the execution and recording of the Easement in the Real Property Records of Skamania County, Washington, Grantor [Sanger Schwarz] hereby assigns to Grantee [TCO Assets, LLC (the tower owner)] all of Grantor's right, title, and interest in the Lease." AR 55.

Section 3 of the easement is pertinent to our analysis. Section 3 specifies,

> Grantor has no right to object to or approve any development or improvements on the Easement Area. If requested by Grantee, Grantor will execute at Grantee's sole cost and expense, all documents required by any governmental authority in connection with any development of, or construction on the Easement Area, . . .

AR 54. Here, Ms. Schwarz expressly transferred her right to object to or approve any development of the tower and base station site. In effect, she transferred her right to consent to

[2] We do not know why the parties executed a subsequent easement, nor do we believe that reason, whatever it might be, is material to the issues in this appeal.

the application and thus her signature was unnecessary on the application. That differs from the *GLW Ventures* case in which the grantor transferred all rights of ownership, except for reserved rights. The grantor did not reserve the exclusive right to approve of new land use applications for the subject property; thus, the Forest Service received that right in the transfer and consequently, its signature was necessary. Based on this record, we cannot find that Skamania County improperly construed SCC 22.06.060.A.1.a.ix when reviewing the application without Ms. Schwarz's signature. Assignment of error 1 is denied.

Assignments of Error 2 through 6

In assignments of error 2 through 6, the appellants argue that Skamania County reviewed an incomplete application. The Gorge Commission understands the appellants to argue that the decision violates the standard of review in Gorge Commission Rule 350-60-220(1)(g): "The decision is flawed by procedural errors that prejudice the substantial rights of the appellant(s)." In each assignment of error, the appellants raise one or more elements that they argue the application was missing.

The expedited review process only requires Skamania County to send notice of the application to the four tribal governments, the Gorge Commission, and the U.S. Forest Service. SCC 22.06.140.B.2.a. The expedited review procedures do not specify that Skamania County must send notice to adjacent property owners and do not provide a comment period for adjacent property owners. The appellants, as adjacent property owners, thus did not have a substantial right to receive the information in the application and comment on the application,[3] and thus they

[3] We do not opine in this decision whether an appellant would be prejudiced if receiving an application through a public record request or other manner of receiving a copy of the application and attempting to provide comment on the application.

were not prejudiced by any missing information in the application. Assignments of error 2 through 6 are denied.

2. Were the procedures used by the County prejudicial to the substantial rights of the appellants (assignments of error 12 through 14)?

In assignments of error 12–14, the appellants argue that the hearings examiner made two rulings that erroneously limited the evidence and argument they could make in their appeal. Assignment of error 14 is a statement that encompasses all of assignments of error 12 and 13 and is denied as duplicative. We understand the appellants' briefing to argue that "The decision is flawed by procedural errors that prejudice the substantial rights of the appellants" in Commission Rule 350-60-220(1)(g).

Assignment of Error 12

The appellants first argue that the hearings examiner erred in ruling that the "appellants' notice of appeal must state their assigned error, and defined the issues Appellants' allegedly raised." App. Br. at 49. The appellants do not cite to the record to show us which ruling they are referring to. The hearings examiner made several rulings throughout her handling of the appeal. *See* AR 352 (Order Setting Hearing and Pre-Hearing Schedule); AR 306 (Ruling on Applicant's Motion to Dismiss); AR 19 (ruling in final decision denying requests in AR 295kk (letter from appellants' attorney to hearings examiner requesting reopening the record)); and AR 5–6 (ruling in final decision denying several of the appellants' exhibits at AR 579–797). Without knowing which ruling the appellants are referring to, we cannot analyze this assignment of error. Assignment of error 12 is denied.

Assignment of Error 13

In assignment of error 13, the appellants argue that the portion of the hearings examiner's order denying the applicant's motion to dismiss that limits the issues on appeal was outside of

her authority. The appellants make their argument in about one-half of a page, so their argument is only marginally developed. They cite to SCC 2.80.160(E), which authorizes the hearings examiner to resolve scheduling issues, including resolution of any other issues for the purpose of conducting an efficient hearing. From this, they reason that the hearings examiner did not have authority to consider the applicant's motion to dismiss. We disagree. The applicant's motion to dismiss raised legal arguments regarding the issues that the appellants raised in their notice of appeal. In effect, the hearings examiner bifurcated the hearing, which is a common approach to ensure an efficient hearing by clarifying issues and evidence for the merits hearing. The appellants were provided the opportunity to respond to the motion to dismiss and argue why the issues in their notice of appeal were proper and should survive to the merits hearing. Had the hearings examiner not allowed the applicant to file a motion to dismiss, the same arguments would have been considered at the merits hearing. Considering the motion to dismiss and resolving a portion of the appellants' arguments in advance of the merits hearing did not prejudice the appellants and was not a procedural error. Assignment of error 13 is denied.

3. Did the County correctly conclude, based on the facts it found and its conclusions of law, that the expedited review provisions apply to the application (assignments of error 8 through 10 and 15)?

Assignments of error 8 through 10 and 15 principally argue that Skamania County erred in applying the expedited review provisions to the application. Assignment of error 15 encompasses all of assignments of error 8 through 11 and is denied as duplicative.

From the record, we understand that Skamania County applied the expedited review process because it provided a process for making a decision within 60 days, which the applicant asserted was a required deadline under federal law. AR 9. We review for compliance with the provisions in the Skamania County Code rather than the county's reasoning.

The expedited review process is a process authorized in the *Management Plan for the Columbia River Gorge National Scenic Area* that allows a county to make a decision using less procedure and fewer standards for certain proposed land uses. Skamania County adopted the list of uses allowed through expedited review in SCC 22.10.050 and adopted the procedural requirements for expedited review in SCC 22.06.140.

SCC 22.10.050(L) allows the following development to be reviewed using the expedited review process:

> 1. Modify existing aboveground and overhead utility facilities or develop new aboveground and overhead utility facilities … 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 communications poles and towers other than those allowed outright, provided the size is the minimum necessary to support the service.

Skamania County asserted that the application qualified for expedited review pursuant to subsections 1 and 3. AR 8. We must consider whether there is substantial evidence in the whole record and that Skamania County's findings are sufficient to support Skamania County's assertion that the application qualified for expedited review.

The factual requirements in subsections 1 and 3 require that the development must be "existing," "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," and "the size is the minimum necessary to support the service." If there is substantial evidence and sufficient findings on all these factual elements, then Skamania County made a permissible legal conclusion that the application qualified for expedited review.

Assignment of Error 8

In this assignment of error, the appellants argue generally that the hearings examiner erred in not considering compliance with past conditions of approval. The hearings examiner concluded that she could not consider code violation claims. AR 17–18 (conclusions 2 and 3).

Generally, we agree that Skamania County may refer claims of code violations to the county's code violations process. However, here, where the terms of the land use ordinance apply to "existing aboveground and overhead utility facilities" and "existing wireless communications poles and towers" (*see* SCC 22.10.050(L)(1) and (3) (underlining added)), the hearings examiner must determine whether the facilities at issue are "existing," which, as we explain below, requires an inquiry into whether the use or structure was built in compliance with the original permit or subsequent permits issued to correct a development that was improperly constructed.

There are two relevant defined terms that relate to the question whether the tower site is "existing." SCC 22.04.010 defines "existing use or structure" as:

> "Existing use or structure" means any use or structure that was legally established.

And SCC 22.04.010 defines "legally established" as:

> "Legally established" means:
> 1. The landowner or developer obtained applicable land use and building permits and complied with land use regulations and other laws that were in effect at the time the use or structure was established, or that were in effect at the time the landowner or developer corrected an improperly established use or structure;
> 2. The use or structure was initially operated or constructed according to those applicable permits, land use regulations and other laws, or has been operated or constructed according to permits obtained to correct an improperly established use or structure; and
> 3. Any changes to the original use or structure must comply with all applicable permit requirements, land use regulations and other laws that were in effect at the time the change was established.

These definitions come directly from the *Management Plan for the Columbia River Gorge National Scenic Area*. These provisions recognize a use or structure as legally existing when the developer obtained the necessary permits and constructed the land use in accordance with those permits, or corrected violations through new permits. If the developer complied with the permits and applicable regulations in initially starting the use or building the structure, or corrected code violations through new permits, then the use was "legally established" and is "existing." If not, then the use was not legally established and is not considered an existing use or structure, and consequently, is not an "existing" facility that qualifies for the expedited review procedure.[4] We acknowledge that when a use or development is not currently in compliance with a prior permit or regulation and a county did not do a post-construction inspection to verify that it was initially constructed in compliance with the prior permit and regulations, the applicant may have a more difficult evidentiary burden to demonstrate that the use or structure qualifies as an existing use or structure. We do not opine here how an applicant must satisfy that burden.

Because SCC 22.10.050(L)(1) and (3) requires a use be "existing" and the definition of an existing use or structure required some inquiry into the initial compliance with a permit and applicable regulations, the hearings officer erred in concluding that she could not consider any issues relating to compliance.

We conclude that the decision improperly construed applicable law, and thus we sustain assignment of error 8. We apply this conclusion to assignments of error 9 and 10 in which the appellants identified specific elements of the application that they suggest requires the county to conclude the tower site is not "existing" for the purpose of the expedited review process.

Assignment of Error 9

[4] We do not suggest here any other implication for concluding that a use is not "legally established" pursuant to SCC 22.04.010(E).

In this assignment of error, the appellants argue that the tower site is not an existing use because the 1999 lease for the tower and base station violate condition 3 of the 2001 permit, which specified that the tower and base station site shall not be leased (AR 294rr (argument); AR 264 (condition 3)).

The 2001 permit does not acknowledge the 1999 lease or require that it be terminated. Thus, we do not know whether the 2001 permit referred to the 1999 lease or to only new future leases. Based on that ambiguity, we cannot conclude that the existence of the 1999 lease precludes the tower and base station from being considered an existing use. Assignment of error 9 is denied.

Assignment of Error 10

In this assignment of error, the appellants argue that the base station was built out of compliance with the required five-foot setback required in the 2001 permit. Condition of approval 2 in the 2001 permit required a five-foot setback from the appellants' property. AR 264. The appellants argued to the hearings examiner that they only recently learned from a survey of their property that the base station is "'just over 4 ft' rather than the required 5 ft from our property line to the cell tower base retaining wall." AR 294rr. The appellants did not provide a copy of the survey for the record. The applicant did not address this issue in its brief.

The hearings examiner found, "The perimeter fence of the lease area is set back fewer than five feet from the parcel's east boundary (approximately 2.5 feet)." The hearings examiner cited to "Exhibit C1.1 (pages 42 (Sheet A.1) and 43 (Sheet A.2), Site Plan," which corresponds to pages 64 and 65 in the administrative record that Skamania County provided to us. The pages that the hearings examiner cited do not show a dimension for the setback between the base station and the appellants' property. We do not find other evidence in the record that the as-built setback distance at issue is five feet or greater.

Because the hearings examiner found that the as-built setback distance is less than five feet, she should have correspondingly concluded that the base station was not "legally established" for the purpose of reviewing the proposal as an expedited review use.[5]

We remand this matter to Skamania County to review the application as a use not entitled to expedited review based on the current record. However, we acknowledge that on remand, new substantial evidence may show that the base station was built in compliance with the setback requirement in the 2001 permit,[6] in which case, Skamania County may again determine whether the application qualifies for expedited review.

4. Did the County correctly conclude, based on the facts it found and its conclusions of law, that the application satisfied the resource protections in the expedited review section of its code (assignment of error 11)?

Assignment of Error 11

The appellants' argument in assignment of error 11 relates to compliance with the standards for protection of scenic resources. Their argument makes assertions that the county did not consider cumulative effects and several arguments about how the tower site does not currently comply with landscape and visual subordinance requirements. App. Br. at 47–48. We understand this assignment of error to argue the current application does not comply with the scenic resource protection standards for expedited review uses in SCC 22.06.140.A.1.a.

We understand the appellants brief to argue that the decision is clearly erroneous, that the findings are insufficient to support the decision and the decision lacks substantial evidence in the whole record. Commission Rule 350-60-220(1)(d), (e), and (f).

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[5] Below, we also explain that this violation of the 2001 permit precludes the application from being considered an eligible facilities request pursuant to 47 C.F.R. § 1.6100(b)(7).
[6] Condition 2 of the 2001 permit specifies, "Determination of the property line location is the responsibility of the applicant and must be confirmed by a surveyor if the property boundary is in question." AR 264.

We have scoured the record and find little analysis of whether the proposed tower satisfies SCC 22.06.140.A.1.a. Finding 15 of the hearings examiner's decision adopts the county staff's findings relating to scenic resource protection (AR 10, citing to "C.1.12, pages 132–33, which correspond to pages AR 154–55 of the administrative record before the Gorge Commission). The county staff's findings only address the requirement in SCC 22.06.140.A.1.a.ii and iii (requiring that structures use dark earth colors and non-reflective building materials). The hearings examiner also cites testimony from the applicant's representative, the application materials generally, and photos of the site that the appellants submitted into the record. The hearings examiner's conclusions of law only cite to finding 15 in concluding that the appellants' property is not an established recreation site, and the proposed tower expansion would not significantly interfere with the appellants' use of their property. AR 19 (conclusion 7).

We cannot find anything in the county staff's decision or the hearings examiner's decision that addresses SCC 22.06.140.A.1.a.vi, which is the other scenic resources provision in the expedited review standards that Skamania County should have applied to the application. SCC 22.06.140.A.1.a.vi requires,

> Structures within one-half mile of a key viewing area and topographically visible from the key viewing area shall be sited, screened and/or designed to achieve the applicable scenic standard [visual subordinance].

This silence on subsection vi is notable because the county staff found the application incomplete in part because it did not address visual subordinance in its application materials (AR 71–72), and the applicant provided a statement addressing visual subordinance. AR 103 (footnote omitted).

Because Skamania County's decision did not address SCC 22.06.140.A.1.a.vi, the decision is clearly erroneous, the findings are insufficient to support the decision and the decision lacks substantial evidence in the whole record to demonstrate compliance with SCC 22.06.140.A.1.a.vi. Assignment of error 11 is sustained.

5. Are there other possible errors in the County's decision not covered under the first four headings or anything else we should be considering in this appeal?

The Commission did not identify other issues in the appeal.

6. If there was an error requiring reversal or remand, do the provisions of the eligible facilities review in the federal regulations apply and do we have jurisdiction over this appeal? Does the proposed development qualify as an eligible facilities review?

Finally, we address the arguments in the applicant's brief that the Gorge Commission is without jurisdiction to hear this appeal because the application was an eligible facilities request and was deemed approved on the 60th day after the Skamania County accepted the application for review, and that only a court, not an administrative agency, may resolve claims pursuant to the eligible facilities request regulations.

The eligible facilities request (EFR) provisions in the Code of Federal Regulations are short, but complex enough to have spawned two lengthy explanations by the Federal Communications Commission. *See* 29 FCC Rcd. 12865 (2014) (justification for rule adoption); 35 FCC Rcd. 5977 (2020) (clarifying the 2014 explanation and requesting comments for amending the regulations). At base, the provisions provide an expedited process for proposals to modify an existing telecommunications facility in a manner that does not substantially change the physical dimensions of the tower or base station. 47 C.F.R. §§ 1.6100(b)(3), (7). The local government must provide a decision within 60 days after deeming the application complete or the applicant may notify the local government that the application is deemed approved. 47 C.F.R. § 1.6100(c)(4). The EFR regulations also contain some limits on the type of information that a

local government may request. 47 C.F.R. § 1.6100(c)(1). Finally, 47 C.F.R. 1.6100(c)(5) specifies, "Applicants and reviewing authorities may bring claims related to [the EFR regulations] to any court of competent jurisdiction."

We believe we have jurisdiction to consider this appeal because the applicant voluntarily participated in the appeal to the hearings officer and has continued to participate in the appeal to the Gorge Commission. (*See, e.g.*, AR 294uu (AT&T's brief to hearings examiner for merits hearing); AT&T's brief to Gorge Commission).

We next turn to the questions whether the proposed modification to the base station and tower qualify as an eligible facilities request. Again, a proposal to modify an existing telecommunications facility qualifies as an eligible facilities request is if it does not substantially change the physical dimensions of the tower or base station. 47 C.F.R. §§ 1.6100(b)(3). The definition of what constitutes a substantial change specifies:

> (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 C.F.R. §§ 1.6100(b)(7)(iii) & (iv). The staff decision does not analyze whether the application satisfies these regulations. The entirety of the county staff's decision on these regulations is one paragraph stating,

> An application submitted October 28, 2020 was deemed incomplete. A letter requesting additional information to correct the deficiencies was sent to the applicant on November 11, 2020. The applicant submitted written documentation on December 10, 2020, addressing the applicable eligible facilities request criteria

> under the expedited review process. The application was deemed complete December 10, 2020 and a memo of completeness was sent to the applicant the same day.

The hearings examiner specifically stated that she was without authority to consider compliance with federal law. AR 17 (Conclusion 1). The hearings examiner thus proceeded to resolve the appeal pursuant to provisions in the Skamania County Code without making findings whether the proposed tower modification qualified as an eligible facilities request.

We conclude that if Skamania County intended to process the application as an eligible facilities request, its decision should have, but did not, make findings and conclusions that the application qualified as an eligible facilities request. Here, the county staff's decision merely deferred to the applicant's "written documentation," but there are no findings or conclusions in the staff's decision that show the staff independently analyzed that documentation and concluded that the application qualified as an eligible facilities request. We concluded in a prior decision that a mere reference to or adoption of an applicant's statement is insufficient without independent analysis.

In *Irish v. Skamania County*, No. COA-S-01-07 (May 8, 2002), we concluded:

> In their Third Assignment of Error, Petitioners assert that the Board's decision is further flawed by the lack of any significant independent review by the County of Mr. Haight's "Staff Report" and "Preliminary Director's Decision." The County concedes this issue. Except for adopting the Planning Department's rationale as to why the application should be considered a cluster development, the County simply relied on and adopted the applicant's evaluation of his project's compliance with the Skamania County Code. In doing so the County abdicated its responsibility to independently examine whether the project in fact complied.

Id. at 8–9 (internal citation omitted).[7] Skamania County's decision in the current appeal suffers the same flaw—there is no independent examination whether the proposed modification qualifies as an expedited facilities request.

We reiterate that Skamania County may adopt an applicant's proposed findings of fact and conclusions of law, but to do so, the county must expressly adopt those findings and conclusions and independently evaluate and reach its own conclusion whether the applicant's findings and conclusions are correct.

Here, that lack of an independent analysis is important because evidence submitted by the applicant shows a new six-foot, eight-inch square cabinet that is "11+/-" feet tall (AR 107–11) and a diesel generator. Based on the applicant's site plan drawings, (AR 107–11), this is more than 10% larger in height and overall volume than any other existing cabinet, which precludes the proposed modification from being an eligible facilities request pursuant to 47 C.F.R. § 1.6100(c)(7)(iii). *See also* AR 244 (photo of the existing cabinets on the base station); AR 256 (photo showing the base station with no cabinets currently exceeding the height of the six-foot chain link fencing). We also note that we concluded in our discussion of assignment of error 10 that the record does not show the base station complies with the five-foot setback required in the 2001 permit. Consequently, the record also shows that the proposed modification does not qualify as an eligible facilities request pursuant to 47 C.F.R. § 1.6100(c)(7)(vi).

Skamania County's decision is clearly erroneous by not independently determining whether the application qualifies as an eligible facilities request and by not independently analyzing and determining the correctness of the applicant's assertion that the application

[7] All the Gorge Commission's appeal decisions are available on the Gorge Commission's website.

qualifies as an eligible facilities request. Skamania County's decision is also not supported by substantial evidence in the whole record because the whole record shows the proposed new cabinet is more than 10% larger in height and overall volume than any other cabinet currently located on the base station and that the base station was not built in compliance with the 2001 permit. On remand, our decision does not preclude Skamania County from reopening the record for new evidence to demonstrate that the application qualifies as an expedited facilities request; however, if Skamania County does so, it must explain and analyze the evidence in the whole record in adequate findings and conclusions.

VI. SUMMARY OF CONCLUSIONS AND ORDER

We remand this matter back to Skamania County to address whether the application qualifies for the expedited review process and qualifies as an expedited facilities request, and to address SCC 22.06.140.A.1.a.vi. We recognize that SCC 22.06.140.A.l.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

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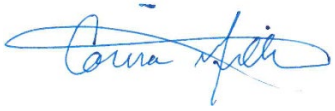
supported by substantial evidence in the whole record that the proposed modification qualifies as an eligible facilities request.

IT IS SO ORDERED this 5th day of September 2023.



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Carina Miller
Chair
Columbia River Gorge Commission

NOTICE: You are entitled to seek judicial review of this Final 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 September 5, 2023, I mailed the attached SECOND REVISED 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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