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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

TRI-COUNTY METROPOLITAN )  
TRANSPORTATION DISTRICT OF )  
OREGON, an Oregon municipal )  
corporation, )  
Plaintiff, )  
v. )  
MCI COMMUNICATIONS SERVICES, )  
INC., a Delaware corporation, )  
Defendant. )

No. CV-09-277-HU

OPINION & ORDER

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/ / /

1 - OPINION & ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff Tri-County Metropolitan Transportation District of  
3 Oregon (plaintiff or "TriMet"), brings this action against  
4 defendant MCI Communications Services, Inc., now doing business as  
5 Verizon Business Services (defendant or "MCI"), for restitution and  
6 a declaration that plaintiff does not owe defendant additional  
7 funds. Both parties move for summary judgment.

8 The parties have consented to entry of final judgment by a  
9 Magistrate Judge in accordance with Federal Rule of Civil Procedure  
10 73 and 28 U.S.C. § 636(c). For the reasons discussed below, I  
11 grant plaintiff's motion and deny defendant's motion.

12 BACKGROUND

13 In December 1990, defendant entered into a Right-of-Way  
14 Agreement (MCI ROW Agreement) with Burlington Northern Railway  
15 Company (BNR), in which BNR conveyed to defendant a limited  
16 easement to use a Rail Corridor, controlled by BNR at that time,  
17 for MCI's fiber optic communications system. Exh. A to Hardiman  
18 Declr. The Rail Corridor is generally located along I-5 and  
19 Highway 217, between Beaverton and Wilsonville.

20 In November 1997, Portland and Western Railroad (P&W)  
21 purchased from BNR, which had become Burlington Northern Santa Fe  
22 Railroad (BNSF), all of BNSF's track and other improvements needed  
23 for rail service on the Rail Corridor. Exh. E to Hardiman Declr.  
24 (Bill of Sale dated Nov. 25, 1997 between BNSF and P&W). On the  
25 same date, November 25, 1997, BNSF granted a "permanent and  
26 exclusive rail service easement" to P&W, for the purpose of  
27 "operating and/or developing rail service over, or constructing,  
28 maintaining, replacing or lawfully removing any rail facilities .

1 . . that now, or in the future are present on the Rail Line  
2 Corridors." Exh. E to Hardiman Declr.

3 In the spring of 1998, BNSF conveyed the Rail Corridor to the  
4 Oregon Department of Transportation (ODOT). Exh. C to Hardiman  
5 Declr. (Donation Contract between BNSF and the State of Oregon  
6 dated April 24, 1998); Exh. D to Hardiman Declr. (Quitclaim Deed  
7 dated May 12, 1998).

8 Beginning in 1996, before BNSF granted the easement to P&W and  
9 before BNSF conveyed its interest in the Rail Corridor to ODOT,  
10 Washington County, several cities in Washington County, TriMet,  
11 Metro, and ODOT began studying the feasibility of a 14.7 mile  
12 commuter rail line over the Railway Corridor between Wilsonville  
13 and Beaverton. See Exh. G to Hardiman Declr. (Recitals contained  
14 in Continuing Control Agreement). In September 1999, Washington  
15 County began alternatives analyses and an environmental assessment  
16 process for the commuter rail project. The Federal Transit  
17 Administration (FTA), part of the United States Department of  
18 Transportation, provided oversight and in 2004, authorized  
19 commencement of the final design of the commuter rail project. Id.

20 On November 21, 2005, Washington County executed a Shared Use  
21 Agreement with P&W which gave Washington County the right to  
22 provide passenger service over P&W's rail line located within the  
23 proposed commuter rail corridor. Id.

24 In March 2006, ODOT entered into a fifty-year Ground Lease of  
25 the Rail Corridor with plaintiff, allowing plaintiff to construct  
26 and operate the commuter rail project. Exh. H to Hardiman Declr.  
27 At the same time, ODOT and plaintiff entered into a "Continuing  
28 Control Agreement" which recited, inter alia, that plaintiff

1 intended to enter into a Full Funding Grant Agreement (FFGA) with  
2 the FTA for acquisition, construction, operation, and maintenance  
3 of the commuter rail project, and further recited that the Shared  
4 Use Agreement between Washington County and P&W which was executed  
5 in November 2005, would be assigned to plaintiff within three  
6 business days of the date the FFGA was executed. Exh. G to  
7 Hardiman Declr.

8 In September 2006, ODOT wrote to defendant to notify defendant  
9 that the location of a portion of defendant's fiber optic system  
10 within the right-of-way granted in the MCI ROW Agreement, had to be  
11 changed for the relocation or placement of railroad tracks and  
12 operational improvements in connection with the commuter rail  
13 project. Exh. K to Hardiman Declr.

14 In late October 2006, plaintiff entered into the FFGA with the  
15 FTA. Exh. I to Hardiman Declr. Then, plaintiff and P&W entered  
16 into a fifty-year Shared Use Agreement which authorized plaintiff  
17 to provide passenger commuter rail service on the Rail Corridor.  
18 Exh. J to Hardiman Declr.

19 In 2007, defendant, plaintiff, ODOT, and P&W entered into an  
20 "Interim Relocation Agreement," under which the parties  
21 acknowledged that ODOT, plaintiff, and P&W determined that the  
22 location of certain portions of defendant's fiber optic facilities  
23 had to be changed for the relocation or placement of railroad  
24 tracks and improvements in connection with the commuter rail  
25 project, and further, that defendant disputed the assertion by  
26 ODOT, plaintiff, and P&W that defendant was obligated to relocate  
27 its facilities at its own expense and cost. Exh. B to Hardiman  
28 Declr. at p. 1. Because ODOT, plaintiff, and P&W wanted to proceed

1 with the project, they agreed that the "relocation payments [to  
2 reimburse defendant] called for by this Agreement will be made  
3 under protest and with a reservation of rights and that no party is  
4 waiving any claims or defenses in any legal proceeding by entering  
5 into this Agreement . . . ." Id. Under this interim agreement,  
6 plaintiff paid \$142,533.50 to move defendant's fiber optic system.

7 In this litigation, plaintiff contends that because defendant  
8 had no right to the \$142,533.50 plaintiff paid under protest,  
9 defendant has been unjustly enriched by the amount of that payment.  
10 Plaintiff seeks restitution of this amount, along with interest at  
11 the rate of nine percent per annum from March 16, 2007, the date  
12 plaintiff paid the money, until it is repaid. Plaintiff also seeks  
13 a declaration that it does not owe an additional \$170,023.10 in  
14 relocation expenses that defendant contends plaintiff owes to it.

15 STANDARDS

16 Summary judgment is appropriate if there is no genuine issue  
17 of material fact and the moving party is entitled to judgment as a  
18 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
19 initial responsibility of informing the court of the basis of its  
20 motion, and identifying those portions of "'pleadings, depositions,  
21 answers to interrogatories, and admissions on file, together with  
22 the affidavits, if any,' which it believes demonstrate the absence  
23 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
24 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

25 "If the moving party meets its initial burden of showing 'the  
26 absence of a material and triable issue of fact,' 'the burden then  
27 moves to the opposing party, who must present significant probative  
28 evidence tending to support its claim or defense.'" Intel Corp. v.

1 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
2 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
3 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
4 designate facts showing an issue for trial. Celotex, 477 U.S. at  
5 322-23.

6 The substantive law governing a claim determines whether a  
7 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
8 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
9 to the existence of a genuine issue of fact must be resolved  
10 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
11 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
12 drawn from the facts in the light most favorable to the nonmoving  
13 party. T.W. Elec. Serv., 809 F.2d at 630-31.

14 If the factual context makes the nonmoving party's claim as to  
15 the existence of a material issue of fact implausible, that party  
16 must come forward with more persuasive evidence to support his  
17 claim than would otherwise be necessary. Id.; In re Agricultural  
18 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
19 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
20 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

## 21 DISCUSSION

### 22 I. Overview of Parties' Arguments

23 Plaintiff contends that financial responsibility for the  
24 relocation of defendant's fiber optic lines is governed by the  
25 terms of the MCI ROW Agreement. In particular, plaintiff relies on  
26 Section 13.2 of the MCI ROW Agreement which requires defendant to  
27 incur relocation expenses made necessary for the relocation or  
28 placement of railroad tracks or for railroad operational

1 improvements. Plaintiff argues that Section 13.3 of the MCI ROW  
2 Agreement, under which relocation expenses are borne by the  
3 railroad, does not apply because that section addresses relocations  
4 made to accommodate third parties.

5 Defendant argues that, assuming ODOT is the "Railroad," ODOT's  
6 request that defendant relocate its fiber optic system was made to  
7 accommodate plaintiff's commuter rail system and thus the  
8 relocation was required to accommodate a third party. Thus,  
9 defendant contends that Section 13.3 applies and defendant is not  
10 responsible for the costs.

11 Alternatively, defendant argues that it is entitled to summary  
12 judgment because BNSF did not convey the benefits of the MCI ROW  
13 Agreement to ODOT. Accordingly, defendant asserts, BNSF remains  
14 the "Railroad" within the meaning of the MCI ROW Agreement and only  
15 BNSF may enforce that agreement.

## 16 II. Rules of Easement Construction

17 The Oregon Supreme Court has explained that

18 [s]everal legal principles govern the proper construction  
19 of an instrument creating an easement, whether by  
20 reservation or express grant. First, in such cases,  
21 "[i]t is the duty of the court to declare the meaning of  
22 what is written in the instrument." Minto v. Salem Water  
23 Etc. Co., 120 Or. 202, 210, 250 P. 722 (1976). Further,  
24 the court will look beyond the wording of the instrument  
25 "only where there is an uncertainty or ambiguity."  
26 Fendall v. Miller, 99 Or. 610, 619, 196 P. 381 (1921).  
27 If the wording at issue is uncertain or ambiguous, then  
28 the court must determine the intent of the original  
parties by examining the relevant surrounding  
circumstances.

25 Tipperman v. Tsiatsos, 327 Or. 539, 544-45, 964 P.2d 1015, 1019  
26 (1998); see also Or. Rev. Stat. §§ (O.R.S.) 42.210-300 (Oregon  
27 statutes regarding interpretation of writings).

28 As I explained in a 1999 Opinion:

1 "The interpretation of an express easement, like that of  
2 contracts and other written instruments, is a question of  
3 law for the court." Kell v. Oppenlander, 154 Or. App.  
4 422, 426, 961 P.2d 861, 863 (1998) (citing State Highway  
Comm'n v. Deal, 191 Or. 661, 681-82, 233 P.2d 242, 251  
(1951)); Oregon Revised Statute (ORS) 42.230).

5 "In construing an easement, [the court's] fundamental  
6 task is to discern the nature and scope of the easement's  
7 purpose and to give effect to that purpose in a practical  
8 manner." Watson v. Banducci, 158 Or. App. 223, 230, 973  
9 P.2d 395, 400 (1999) (citing Bernards v. Link, 199 Or.  
10 579, 593, 248 P.2d 341, 347 (1952)). "To determine an  
11 easement's purpose [the court] 'look[s] first to the  
12 words of the easement, viewing them in the context of the  
13 entire document.'" Id. (quoting Kell, 154 Or. App. at  
14 426, 961 P.2d at 863). Words in the grant of an easement  
15 are given their plain, ordinary meaning. Fendall v.  
16 Miller, 99 Or. 610, 616-17, 196 P. 381, 383 (1921). If  
17 the easement's terms clearly express the easement's  
18 purpose, the analysis ends here. Watson, 158 Or. App. at  
19 230, 973 P.2d at 400.

20 "If ambiguity remains, [the court] look[s] to relevant  
21 surrounding circumstances for evidence of the original  
22 parties' intent [.]" Id. "[R]elevant considerations may  
23 include the easement's purpose, the circumstances  
24 existing at the time of the grant, and the manner in  
25 which the original parties used the easement." Id.

26 "In giving effect to an easement's purpose, general  
27 principles of reasonableness control." Id. at 231, 973  
28 P.2d at 400. "Ordinarily, an easement passes no rights to  
the grantee except those rights that are necessary for  
the easement's reasonable and proper enjoyment." Id.  
The grantor retains "'full dominion and use of the land  
[subject to an easement], except so far as a limitation  
of the grantor's right is essential to the fair  
enjoyment' of the easement that was granted." Id.  
(quoting Miller v. Vaughn, 8 Or. 333, 336 (1880))  
(brackets in Watson).

22 Cal-Neva Land & Timber, Inc. v. United States, 70 F. Supp. 2d 1151,  
23 1157 (D. Or. 1999) (brackets in original).

### 24 III. Construction of the MCI ROW Agreement

#### 25 A. Relevant Terms of the Agreement

26 The MCI ROW Agreement is dated December 18, 1990, and begins  
27 with several recitals. The first recital provides that the  
28 Railroad controls a right-of-way, excluding buildings or



1 structures, within certain real property upon which it operates a  
2 rail transportation system. Exh. A to Hardiman Declr. at p. 3.  
3 This is then referred to as the "Railroad Right-of-Way." Id. The  
4 second recites that the Railroad is willing to grant to defendant  
5 the right to construct, install, operate, maintain, repair,  
6 reinstall, remove, and replace a fiber optic telecommunications  
7 transmission system and certain appurtenant equipment and  
8 structures "Within the Railroad Right-of-Way." Id. The third  
9 recites that defendant wishes to acquire from the Railroad the  
10 right to construct and operate a fiber optic telecommunications  
11 transmission system and certain appurtenant equipment and  
12 structures (referred to as the "MCI System"), "Within the Railroad  
13 Right-of-Way, at locations designated in Exhibit A to the ROW  
14 Agreement." Id.

15 In the definition section, "Railroad" is defined as  
16 "Burlington Northern Railroad Company, a Delaware corporation and  
17 any parent, wholly owned subsidiary or affiliate of Railroad." Id.  
18 at p. 6. "Within" is defined as "in, on, upon, over, under,  
19 across, along and through." Id. at p. 7.

20 Section 2 of the MCI ROW Agreement provides the "Grant of  
21 Rights by Railroad." Id. at p. 8. Generally, the Railroad grants  
22 defendant the right to construct and operate the MCI system within  
23 various sections of the Railroad Right-of-Way. Id. (§ 2.1). It  
24 states that

25 [s]ubject to the terms and conditions of this Agreement,  
26 Railroad hereby grants to MCI, and MCI hereby accepts  
27 certain easement and related rights (the 'Rights'), at  
28 MCI's sole cost and expense: . . . the immediate right  
to Construct and Operate the MCI System Within  
approximately 245.67 miles of Railroad Right-of-Way  
between the System Segment End Points of Seattle,

1 Washington to Eugene, Oregon as shown on the Exhibit  
2 A[.]"

3 Id.

4 Section 2.4 includes the right of the Railroad to  
5 construct and operate, and to change, modify or relocate,  
6 railroad tracks, signals, communication or other wire or  
7 fiber lines, pipelines, electric lines, and other  
8 railroad facilities Within any or all parts of the  
9 Railroad Right-of-Way or permit others to do so for  
10 Railroad, all or any of which may be freely done at any  
11 time or times by Railroad or others with Railroad's  
12 permission, without liability to MCI or to any other  
13 party for compensation or damages, unless and except to  
14 the extent that this Agreement otherwise expressly  
15 provides therefor.

16 Id. at p. 9 (§ 2.4(iii)).

17 Section 13 governs Railroad Relocations and Abandonment:

18 13.1 If, following Initial Construction of the MCI  
19 System, Railroad relinquishes or redefines the boundaries  
20 of Railroad Right-of-Way upon which the MCI System is  
21 located, such that the MCI System is later found to be  
22 outside the Railroad Right-of-Way, Railroad shall not  
23 require additional payments such as lease payments or  
24 easement fees other than as may be provided in Section 3  
25 hereof.

26 13.2 If Railroad determines that the location of any of  
27 the MCI System must be changed for the relocation or  
28 placement of railroad tracks or Railroad operational  
improvements, or for reasons beyond the control of  
Railroad, Railroad shall notify MCI of such plans and  
shall use Railroad's best reasonable efforts to secure an  
alternative location for the MCI System. MCI shall move  
the affected MCI System to such alternative location at  
MCI's own expenses, costs and risk as soon as  
practicable. . . . .

13.3 If Railroad desires the relocation of a portion of  
the MCI System to accommodate third parties, Railroad  
shall notify MCI of such fact, and MCI shall promptly  
thereafter submit to Railroad a detailed, itemized  
estimate (the "Estimate") of the actual costs and  
expenses that MCI expects to incur, plus reasonable  
standard additives in moving the MCI System as requested  
by Railroad ("Moving Costs"). A list of standard  
additives will be provided to Railroad with any bills  
containing such additives. Upon receiving from Railroad  
fifty percent (50%) of the Estimate, MCI shall proceed,  
as expeditiously as feasible under the circumstances, to

1 relocate the MCI System as directed by Railroad. Upon  
2 completion of such relocation and the submission to  
3 Railroad of invoices documenting the Moving Costs,  
4 Railroad shall promptly pay the balance of such Moving  
5 Costs, provided, however, that Railroad shall not be  
6 obligated to pay total Moving Costs in excess of One  
7 Hundred Ten Percent (110%) of the Estimate, unless  
8 Railroad requests changes in the approved design and/or  
9 construction methods in which event MCI shall submit to  
10 a revised Estimate.

11 Id. at pp. 27-28.

12 B. Discussion

13 Both parties offer various arguments as to why the MCI ROW  
14 Agreement requires the opposing party to bear the cost of  
15 relocating the MCI System caused by the commuter rail project.

16 Under Section 13.2, assuming, as defendant does for the  
17 purpose of this argument, that ODOT is "the Railroad," the  
18 operative language reads:

19 If [ODOT] determines that the location of any of the MCI  
20 System must be changed for the relocation or placement of  
21 railroad tracks or [ODOT] operational improvements, or  
22 for reasons beyond the control of [ODOT], . . . MCI shall  
23 move the affected MCI System to such alternative location  
24 at MCI's own expense, cost and risk as soon as  
25 practicable.

26 Exh. A to Hardiman Declr. at p. 27 (§ 13.2).

27 The plain language states that MCI is responsible for the  
28 relocation costs when ODOT determines that the location of the MCI  
System has to be changed due to (1) relocation or placement of  
railroad tracks, or (2) operational improvements of ODOT, or (3)  
reasons beyond ODOT's control.

Under Section 13.3, "[i]f [ODOT] desires the relocation of a  
portion of the MCI System to accommodate third parties," then ODOT  
is responsible for the costs of relocating the MCI System. Id. at  
p. 28 (§ 13.3). The MCI ROW Agreement does not further define

1 "accommodate" or "third parties." The plain language of this  
2 section indicates that when the MCI System is relocated because  
3 ODOT is accommodating a third party, ODOT bears the relocation  
4 costs.

5 Depending on the interpretation of the language in these two  
6 sections, a conflict could arise if ODOT determined that the  
7 location of the MCI System had to be changed due to the relocation  
8 or placement of tracks required by ODOT to accommodate a third  
9 party. Defendant argues that these are the facts present here and  
10 that it violates basic rules of contract interpretation to (1) read  
11 Section 13.2 to require defendant to bear relocation costs for any  
12 relocation or placement of railroad tracks while (2) also reading  
13 Section 13.3 to require ODOT to bear the relocation cost whenever  
14 the relocation is required to accommodate a third party.

15 To harmonize the two provisions and give them both effect,  
16 defendant argues that Section 13.2 applies when the relocation or  
17 placement of track is required for ODOT's needs, but Section 13.3  
18 controls any time the MCI System must be moved to accommodate the  
19 needs of a third party. Defendant contends that the phrase  
20 "relocation or placement of railroad tracks" in Section 13.2 should  
21 be read as a specific example of "Railroad operational  
22 improvements" such that it is only when the relocation or placement  
23 of tracks is required by the Railroad, meaning ODOT, that Section  
24 13.2 applies. Any other relocation or placement falls under  
25 Section 13.3.

26 Plaintiff contends that Section 13.2 should control over  
27 Section 13.3 because Section 13.2 precedes Section 13.3.  
28 Additionally, plaintiff argues that because railroad operation

1 purposes are paramount to fiber optic purposes under the MCI ROW  
2 Agreement, Section 13.2 "trumps" Section 13.3.

3 In construing a contract, "an interpretation which gives a  
4 reasonable, lawful, and effective meaning to all the terms is  
5 preferred to an interpretation which leaves a part unreasonable,  
6 unlawful, or of no effect[.]" Restatement (Second) of Contracts §  
7 203(a) (1981); see also Anderson v. Divito, 138 Or. App. 272, 278,  
8 908 P.3d 315, 320 (1995) (Oregon Revised Statute § (O.R.S.) 42.230  
9 "requires construction of the contract as a whole, giving effect to  
10 every word and phrase."). Thus, "[t]he usual rule of  
11 interpretation of contracts is to read provisions so that they  
12 harmonize with each other, not contradict each other." Peterson v.  
13 Minidoka County School Dist. No. 331, 118 F.3d 1351, 1359 (9th  
14 Cir.), amended, 132 F.3d 1258 (9th Cir. 1997); see also Sanders v.  
15 Oregon Pac. States Ins. Co., 314 Or. 521, 527, 840 P.2d 87, 90  
16 (1990) (noting, in context of statutory construction, that if there  
17 is a conflict between provisions, it is the court's duty to try to  
18 harmonize them).

19 The analysis starts with the language in Section 13.2. The  
20 three conditions requiring defendant to pay the relocation costs  
21 are separated by the word "or," meaning each one stands independent  
22 of the other. The word "railroad" in the phrase "relocation or  
23 placement of railroad tracks" is written with a lower case "r", and  
24 thus is not "the Railroad" as earlier defined in the MCI ROW  
25 Agreement. There is no modifying language to the phrase  
26 "relocation or placement of railroad tracks." With the lower case  
27 "railroad" and no modifiers to the condition "relocation or  
28 placement of railroad tracks," the plain language obligates

1 defendant to bear the costs of moving its MCI System caused by any  
2 "relocation or placement of tracks." The plain language does not  
3 restrict defendant's obligation to a relocation or placement of  
4 tracks caused by or benefitting ODOT.

5 In contrast to the first triggering condition, the second  
6 triggering condition, "[ODOT] operational improvements," contains  
7 a restrictive modifier by mandating that ODOT be the party whose  
8 operational improvements cause a change in the MCI System location.  
9 The use of "Railroad" (meaning ODOT) in this second triggering  
10 condition shows that the drafters knew how to require that the  
11 condition be related to a need of ODOT (or anyone else standing in  
12 the Railroad's shoes).

13 When these first two triggering conditions are considered  
14 together<sup>1</sup>, the most logical interpretation, and the one that gives  
15 effect to all of the conditions triggering defendant's obligation  
16 to pay for the relocation costs under Section 13.2, is to read  
17 "relocation or placement of railroad tracks" to mean any such  
18 relocation or placement, regardless of the entity requesting,  
19 requiring, or benefitting from, the relocation or placement. This  
20 is because if, as defendant suggests, the phrase "[ODOT]  
21 operational improvements" includes the "relocation or placement of  
22 railroad tracks," the "relocation or placement of railroad tracks"  
23 no longer has any independent meaning or effect and the first  
24

---

25 <sup>1</sup> The third triggering condition, "reasons beyond the  
26 control of [ODOT]," is not at issue in the case and does not  
27 provide meaningful context for the interpretation of the prior  
28 two conditions other than to show, once again, the use of the  
upper case Railroad as distinguished from the lower case  
railroad.

1 triggering condition is surplusage. Such an interpretation is to  
2 be avoided. Thus, to give effect to the "relocation or placement  
3 of railroad tracks" condition, Section 13.2 must be interpreted to  
4 mean exactly what that provision says: defendant bears the burden  
5 of paying for relocation costs of its MCI System when the location  
6 of the MCI System is changed because of the relocation or placement  
7 of any railroad tracks.

8 This construction of Section 13.2 does not negate the  
9 "accommodation of third parties" language in Section 13.3 when that  
10 section is interpreted to apply to costs of changing the location  
11 of the MCI System caused by accommodating a need of a third party  
12 other than a need to relocate or place railroad tracks. That is,  
13 when ODOT accommodates a third party's needs other than by  
14 relocating or placing tracks, then ODOT is responsible for any  
15 costs incurred in changing the location of the MCI System under  
16 Section 13.3. But, if the change of location of the MCI System is  
17 caused by any relocation or placement of tracks, or by ODOT's  
18 operational improvements, or by a reason beyond ODOT's control,  
19 then defendant bears the burden of such costs under Section 13.2.

20 This construction of Sections 13.2 and 13.3 relies on the  
21 plain, ordinary meaning of the words, gives effect to all of the  
22 conditions recited in Section 13.2, and harmonizes Sections 13.2  
23 and 13.3 by giving them both effect. Moreover, this interpretation  
24 is consistent with the MCI ROW Agreement's stated intent that the  
25 fiber optic needs of defendant are subordinate to the use of the  
26 land for railroad purposes. See § 2.4 of MCI ROW Agreement (Exh.  
27 A to Hardiman Declr. at p. 9) (providing that rights granted to  
28 defendant are subordinate to the "prior and continuing right of

1 [ODOT]" to use and maintain the property in the operation of its  
2 railroad, to dispose of all or any part of its property, and to  
3 construct and operate, change, modify, relocate tracks, signals,  
4 communication or other fiber lines, pipelines, electric lines, and  
5 "other railroad facilities" within the Right-of-Way).

6 Defendant's additional arguments do not warrant extensive  
7 discussion. First, defendant contends that various other contracts  
8 related to the Rail Corridor, the use or control of the Railroad  
9 Right-of-Way, and the development of the commuter rail project<sup>2</sup> all  
10 give plaintiff control over and sole responsibility for the  
11 commuter rail project. This argument is not relevant to the  
12 interpretation of the plain language of the MCI ROW Agreement.  
13 Even if defendant accurately represents the provisions in those  
14 contracts, the interpretation of the MCI ROW Agreement provided  
15 above is not inconsistent with TriMet possessing control over and  
16 responsibility for the commuter rail project.

17 Second, defendant relies on an August 8, 2006 letter from John  
18 Geil, the Oregon Department of Justice's Attorney-in-Charge of the  
19 Commercial Condemnation & Environmental Litigation Section, to John  
20 Stephens, plaintiff's counsel. Exh. 8 to Sarratt Declr. Geil  
21 wrote the letter in response to plaintiff's request to ODOT that  
22 ODOT inform AT&T and defendant that they must relocate their  
23 telecommunications cables in order to accommodate plaintiff's  
24 proposed commuter rail project. Id. ODOT denied the request  
25 because ODOT believed it did not have authority to require

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26  
27 <sup>2</sup> Defendant cites to the Ground Lease, the Continuing  
28 Control Agreement, TriMet's Shared Use Agreement with P&W, and  
the FFGA. Exhs. G, H, I, and J to Hardiman Declr.



1 defendant and AT&T to relocate their telecommunication cables. Id.  
2 Geil, writing on behalf of ODOT, put forth two arguments supporting  
3 the denial. The first argument concerned whether the MCI ROW  
4 Agreement under which the easement was originally granted to  
5 defendant by BNSF, was later conveyed with the land to ODOT. Id.  
6 Alternatively, ODOT argued that the Continuing Control Agreement  
7 transferred to plaintiff any authority ODOT possessed requiring  
8 existing easement holders to relocate their easements to  
9 accommodate the commuter rail project. Id.

10 Notably, neither argument interprets the language of Sections  
11 13.2 and 13.3 of the MCI ROW Agreement. Neither argument  
12 interprets the identical right-of-way agreement BNSF made with  
13 AT&T. Thus, the argument about what Geil wrote on behalf of ODOT  
14 is not relevant to the proper construction of Sections 13.2 and  
15 13.3 of the MCI ROW Agreement.

16 Finally, both Judge Haggerty<sup>3</sup> and Judge Aiken<sup>4</sup> have issued  
17 related opinions which the parties here discuss and rely on. AT&T  
18 Commc'ns-East, Inc. v. BNSF Rwy Co., No. CV-06-866-HA, 2006 WL  
19 3408035 (D. Or. Nov. 27, 2006), aff'd, 323 Fed. Appx. 487, 2009 WL  
20 725174 (9th Cir. Jan. 22, 2009) (unpublished opinion); MCI  
21 Telecomms. Corp. v. Tri-County Metro. Transp. Dist. of Or., No. CV-  
22 97-807-AA, Opinion (D. Or. Apr. 23, 1998), aff'd 201 F.3d 444, 1999

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24 <sup>3</sup> In Judge Haggerty's case, BNR granted a nearly identical  
25 easement in the same real property as in the instant case, to  
AT&T.

26 <sup>4</sup> Judge Aiken's case involved the same easement to MCI as  
27 in the instant case, but the real property at issue was land on  
28 which MAX light rail to Hillsboro was constructed and was not the  
land used for the commuter rail project.

1 WL 1000903 (9th Cir. Nov. 3, 1999) (unpublished opinion).

2 I discuss these opinions in more detail below. But, at this  
3 juncture, I agree with defendant that Judge Aiken's case is not  
4 instructive here because although she interpreted Sections 13.2 and  
5 13.3 of the MCI ROW Agreement, in the case before her BNSF conveyed  
6 the land directly to plaintiff. As a result, plaintiff, not ODOT,  
7 was "the Railroad," and plaintiff's request that defendant change  
8 the location of the MCI System was made on its own behalf, not on  
9 behalf of a third party. Judge Aiken never considered the argument  
10 that defendant makes here.

11 Judge Haggerty discussed a nearly identical easement granted  
12 by BNR to AT&T, in the context of the identical subsequent grant of  
13 the Rail Corridor by BNSF to ODOT. He stated that Section 11(a) of  
14 the AT&T Right-of-Way (ROW) Agreement, which is nearly identical<sup>5</sup>  
15 to Section 13.2 of the MCI ROW Agreement, controlled. Although  
16 Judge Haggerty's conclusion is not binding here because it was a  
17 different easement with a different party, and there is no  
18 indication that he was squarely presented with the argument made  
19 here, the interpretation of the MCI ROW Agreement that I set forth  
20 herein is consistent with his conclusion.

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21  
22 <sup>5</sup> The differences between Section 13.2 of the MCI ROW  
23 Agreement and Section 11(a) of the AT&T ROW Agreement are minor  
24 and of no consequence. First, all references to MCI or to the  
25 "MCI System," in Section 13.2 of the MCI ROW Agreement appear as  
26 AT&T or the "AT&T Facilities" in the AT&T ROW Agreement. Second,  
27 in the AT&T ROW Agreement, the word "any" appears in the third  
28 triggering condition between the words "for" and "reasons" so  
that the third triggering conditions is "or for any reasons  
beyond the control of Railroad[.]" Compare Exh. A to Hardiman  
Declr. at p. 27 (MCI ROW Agreement) with AT&T, 2006 WL 3408035,  
at \*7 (Judge Haggerty opinion quoting Section 11(a) of the AT&T  
ROW Agreement).

1           Additionally, the Ninth Circuit, in affirming Judge Haggerty,  
2 stated that because the AT&T ROW Agreement ran with the land when  
3 BNSF conveyed the Beaverton segment to ODOT, "ODOT had authority  
4 under Section 11(a) of the ROW to require AT&T to relocate its  
5 fiber optic facilities at its expense to accommodate the placement  
6 of new railroad tracks." 2009 WL 725174, at \*1. Thus, the  
7 interpretation I set forth is also consistent with the Ninth  
8 Circuit's conclusion.

9           Accordingly, assuming, as defendant does for the purposes of  
10 this argument, that ODOT is "the Railroad" under the MCI ROW  
11 Agreement, I agree with plaintiff that the request to change the  
12 location of the MCI System was made for the relocation or placement  
13 of railroad tracks as set forth in Section 13.2 of the MCI ROW  
14 Agreement, triggering defendant's obligation to pay for the  
15 relocation of the MCI System.

#### 16 IV. Conveyance of the Interest by BNSF to ODOT

17           Defendant seeks summary judgment in its favor, and argues  
18 against summary judgment for plaintiff, for the independent reason  
19 that, according to defendant, BNSF did not convey the benefits of  
20 the MCI ROW Agreement to ODOT and therefore, BNSF remains the  
21 Railroad within the meaning of the ROW Agreement. If BNSF is the  
22 Railroad, then ODOT cannot enforce the payment obligations in  
23 Section 13.2 of the MCI ROW Agreement.

24           As noted in the background section above, in the spring of  
25 1998, BNSF conveyed the Rail Corridor to ODOT. The operative  
26 documents memorializing this conveyance are the April 24, 1998  
27 Donation Contract and the May 12, 1998 Quitclaim Deed. Exhs. C and  
28 D to Hardiman Declr.

1 In the Quitclaim Deed, BNSF quitclaimed to ODOT, "all of  
2 [BNSF's] right title and interest . . . in and to parcels of land  
3 located in the Counties of Washington, Clackamas, Marion, and  
4 Multnomah, State of Oregon, as such parcels of land are more  
5 particularly described in Attachment 1[.]" Exh. D to Hardiman  
6 Declr. at p. 1. This conveyance was

7 SUBJECT, however, to all existing interests in the  
8 Premises, including but not limited to the Rail Service  
9 Easement granted to Portland & Western Railroad, Inc., on  
November 25, 1997, and all reservations, easements and  
other encumbrances, of record or otherwise.

10 Id.

11 Additionally, the Quitclaim Deed expressly reserved unto BNSF,  
12 its successors and assignees,

13 a non-exclusive, permanent easement for construction,  
14 reconstruction, maintenance, use and/or operation of one  
15 or more pipelines or fiber optic communication lines,  
16 together with related facilities and appurtenances in,  
17 under, across, along and through any 10-foot wide portion  
18 of the Premises, including the right for [BNSF], its  
19 successors and assignees, or any of its licensees, to  
enter, disturb the surface, and occupy the Premises for  
purposes of constructing, reconstructing, maintaining,  
using and/or operating one or more pipelines or fiber  
optics communication lines, facilities and appurtenances  
in, under, across, along and through all or any portion  
of the Premises . . . .

20 Id. at p. 2.

21 The Donation Contract recites that ODOT desires to obtain  
22 BNSF's ownership interests in "the following rail corridors[.]"  
23 Exh. C to Hardiman Declr. at p. 2. Following the description of  
24 the property, the Donation Contract makes clear that the conveyance  
25 is of "all of BNSF's ownership interest in the Rail Corridors"  
26 except for "any and all rail, ties, spikes," etc., including "other  
27 improvements needed for rail service," and any vehicles,  
28 "maintenance equipment on wheels," etc., that are present on the

1 Rail Corridors on the date of closing. Id. at pp. 3-4.

2 The Donation Contract then states that the conveyance is  
3 "subject to the terms and conditions set forth" in

4 [1] this Agreement, [2] in the Quitclaim Deed, and/or [3]  
5 in any agreement assigned by BNSF to ODOT by the terms of  
6 this Agreement, including BNSF's retained interests, as  
7 specified in more detail in the Quitclaim Deed, for a  
8 non-exclusive, permanent easement for construction,  
9 maintenance and operation of one or more pipelines or  
10 fiber optic communication lines, together with related  
11 facilities and appurtenances, in, under, across, along  
12 and through any 10-foot wide portion of the Rail  
13 Corridors, on conditions that do not significantly  
14 increase the liability risk of the rail serve operator  
15 over the Rail Corridors and do not significantly  
16 interfere with rail operations, construction or  
17 maintenance activities on the Rail Corridors[.]

18 Exh. C to Hardiman Declr. at p. 4.<sup>6</sup>

19 Under both the Quitclaim Deed and the Donation Contract, when  
20 BNSF donated its interest in the Rail Corridors to ODOT, BNSF  
21 expressly retained for itself a non-exclusive, permanent easement  
22 for the construction, etc., of one or more pipelines or fiber optic  
23 communication lines. Defendant argues that this reserved easement  
24 is the easement BNSF granted to defendant in the MCI ROW Agreement.

25 In support of this argument, defendant primarily relies on

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26 <sup>6</sup> The language in what I have delineated as the third type  
27 of agreement the Donation Contract is subject to is less than  
28 clear. Under this provision, the conveyance in the Donation  
Contract is subject to any agreement assigned by BNSF to ODOT by  
the terms of the Donation Contract. I take this to refer to  
Section 2 of the Donation Contract entitled "Assignment of Rail  
Corridor Contracts" and discussed more fully below. The  
confusing language is that after stating that the conveyance is  
subject to any agreements assigned by BNSF to ODOT under the  
Donation Contract, the following words appear: "including BNSF's  
retained interests, as specified in more detail in the Quitclaim  
Deed, for a non-exclusive, permanent easement . . . ." The use  
of "including," suggests that the interest for the fiber optic  
easement retained by BNSF was "assigned" by BNSF to ODOT. This  
makes little sense.

1 Section 2 of the Donation Contract which addresses assignments of  
2 rail corridor contracts. In Section 2, BNSF first assigns to ODOT  
3 (1) all assignable rights and obligations of BNSF which accrue  
4 after closing, (2) to the extent they are related to the rail  
5 corridors, and (3) are set forth in any agreement identified in  
6 Exhibit D. Id. at p. 4. The MCI ROW Agreement is not identified  
7 in Exhibit D.

8 Next, Section 2 provides that ODOT accepts the assignment of  
9 these rights and obligations, in accordance with the terms of each  
10 applicable agreement and the Donation Contract. Id. at pp. 4-5.  
11 BNSF, not ODOT, is responsible for performing BNSF's duties in  
12 assigned agreements which accrue on or before closing. Id. at p.  
13 5. ODOT, not BNSF, is responsible for performing all assignee  
14 duties in assignment agreements accruing after the closing date.  
15 Id.

16 Section 2 then states that BNSF reserves the rights and  
17 obligations set forth in any agreement identified in Exhibit D, to  
18 the extent those rights are related to (1) one or more other rail  
19 corridors or BNSF property, and (2) to the extent those rights are  
20 related to BNSF's retained fiber optic easement. Id.

21 Finally, Section 2 provides that "[i]f any contract is related  
22 to the Rail Corridors, and not to rail service provided over the  
23 Rail Corridors or fiber optic facilities now located on the Rail  
24 Corridors, but inadvertently is not identified in Exhibit D," BNSF  
25 is to provide ODOT a copy of the contract and assign it to ODOT,  
26 and ODOT is to assume the rights and obligations in that contract  
27 to the extent they are related to the Rail Corridors. Id.

28 Defendant argues that Section 2 of the Donation Contract makes

1 clear that the parties to that contract did not intend to convey,  
2 as part of the Donation Contract, any contracts relating to fiber  
3 optic facilities, including defendant's facilities, then located on  
4 the Rail Corridors. Defendant notes that the MCI ROW Agreement is  
5 not listed in Exhibit D to the Donation Contract. Additionally,  
6 under the final provision in Section 2, the parties underscored  
7 their intent to omit any contract related to fiber optic facilities  
8 then located in the Rail Corridor from being identified in Exhibit  
9 D. Thus, defendant contends, by reserving and not conveying  
10 responsibility for defendant's fiber optic facilities in the Right-  
11 of-Way, BNSF remains the Railroad under the MCI ROW Agreement.

12 I agree with defendant that Section 2 makes clear that a  
13 contract related to fiber optic facilities then located in the  
14 Railroad Corridor was not identified in Exhibit D and was not meant  
15 to be identified in Exhibit D. Assuming that the MCI ROW Agreement  
16 was purposefully excluded from the list of agreements in Exhibit D,  
17 then, under the language of Section 2, it follows that BNSF did not  
18 assign to ODOT any assignable rights and obligations of BNSF  
19 related to the MCI ROW Agreement which accrued after closing  
20 because such rights and obligations were not set forth in an  
21 agreement identified in Exhibit D and clearly were not meant to be  
22 set forth there.

23 Notably, however, Section 2 concerns assignments. As  
24 discussed below, I conclude that the initial conveyance by BNSF to  
25 ODOT of all of BNSF's "right title and interest" subject to "all  
26 existing interests . . . including but not limited to . . . all  
27 reservations, easements and other encumbrances, of record or  
28 otherwise" included the easement created by the MCI ROW Agreement

1 because the easement runs with the land. With the easement being  
2 transferred to ODOT by virtue of the conveyance itself, then there  
3 was simply no need for BNSF to assign it to ODOT in Section 2.  
4 Accordingly, the absence of the MCI ROW Agreement from Exhibit D  
5 does not persuade me that the parties intended that BNSF reserve to  
6 itself the easement created by the MCI ROW Agreement.

7 I agree with plaintiff that defendant's position that when  
8 BNSF conveyed the property to ODOT, BNSF also retained its interest  
9 in the MCI ROW Agreement, is illogical, is inconsistent with Oregon  
10 property law, and is inconsistent with the conclusions made by  
11 Judge Aiken and Judge Haggerty in their respective, related cases.

12 First, plaintiff indicates that it makes little sense for BNSF  
13 to have retained only a "burden" on the estate when it conveyed the  
14 remainder of its property interest to ODOT. Additionally,  
15 plaintiff contends that it makes little sense for BNSF to have  
16 conveyed the property to ODOT subject to the MCI ROW Agreement, and  
17 then retain the power to require defendant to move defendant's  
18 fiber optic system at defendant's expense due to railroad track  
19 relocation or placement or due to railroad operational improvements  
20 when BNSF no longer owned the track and no longer conducted  
21 railroad operations in the property. I agree with plaintiff.

22 Second, under Oregon law, the burden of an easement is  
23 presumed to run with the servient estate. The Oregon Supreme Court  
24 has explained that

25 [r]ights conferred by an easement attach to the estate  
26 and not to the person of the dominant tenement and they  
27 follow that estate into the hands of the assignee  
28 thereof. On the other hand, they are a charge upon the  
estate or property of the servient tenement and follow it  
into the hands of any person to whom such tenement or any  
part thereof is subsequently conveyed.



1 Monese v. Struve, 155 Or. 68, 77, 62 P.2d 822, 825 (1936); see also  
2 Beck v. Lane County, 141 Or. 580, 592, 18 P.2d 594, 598 (1933)  
3 ("The [property] . . . passed to the [successor] incumbered [sic]  
4 by the easement, so covenanted or reserved, and the right and  
5 burden thus created passed to and was binding upon all subsequent  
6 grantees of the respective properties.").

7       The express language in the Quitclaim Deed that the grant to  
8 ODOT was subject to all existing interests in the property,  
9 including all easements of record or otherwise, is consistent with  
10 Oregon property law. Under Oregon law, when BNSF conveyed the  
11 Railroad Segment to ODOT, the "burden" of the easement created by  
12 the MCI ROW Agreement ran with the Railroad Segment land.

13       Third, both Judge Aiken's and Judge Haggerty's opinions are  
14 instructive. Judge Aiken construed the same MCI ROW Agreement, but  
15 in the context of a conveyance from BNSF to TriMet, not ODOT. MCI  
16 Telecomms., Op. at p. 3. MCI argued that BNR never assigned its  
17 rights under the MCI ROW Agreement to TriMet as required by Section  
18 26.1 of the MCI ROW Agreement and therefore, TriMet possessed no  
19 rights under the MCI ROW Agreement to require MCI to relocate its  
20 fiber optic system at its own expense. Id. at p. 4.

21       Judge Aiken ruled for TriMet on the basis that the easement  
22 passed with the land and thus, TriMet succeeded to BNR's rights  
23 under the easement as a matter of law. Id. at pp. 4-7. TriMet  
24 then had the authority to require MCI to relocate its system at  
25 MCI's expense under Section 13.2 of the MCI ROW Agreement. Id.

26       Judge Aiken noted that under the deed from BNR to TriMet,  
27 TriMet took possession of the property "subject to all  
28 encumbrances," which thus included the MCI ROW Agreement. Id. at

1 pp. 4-5. She explained that MCI's argument required the court to  
2 enforce the MCI ROW Agreement's easement rights, but not to enforce  
3 the reciprocal obligation by MCI to pay for relocation. She  
4 rejected this position because both the rights and obligations of  
5 the easement were created by the same instrument. Id. at p. 5.  
6 She further explained that the common law rule that an easement  
7 runs with the land enables the easement to survive in the absence  
8 of an assignment, thus avoiding the contradictions of MCI's  
9 position. Id. at pp. 6-7.

10 The Ninth Circuit affirmed Judge Aiken. The Ninth Circuit  
11 noted that the MCI ROW Agreement expressly provided that "[t]his  
12 Agreement shall be binding upon and inure to the benefit of the  
13 parties hereto and their respective successors or assigns." 1999  
14 WL 1000903, at \*1. This language negated MCI's argument that the  
15 easement was personal to MCI. Id. The court noted that use of the  
16 words "successors or assigns" was traditionally seen as strong  
17 evidence that the parties did not intend the covenants to be  
18 personal. Id. The court "view[ed] the provision expressly  
19 extending the benefits and burdens of the Agreement to the parties'  
20 successors and assigns as decisive." Id. It concluded that  
21 "Section 26.1 entitled Tri-Met to Burlington's rights as a  
22 successor in its interest in the fee." Id. at \*3.

23 Although Judge Aiken's decision addressed a different land  
24 conveyance, the decisions issued in the case are relevant here.  
25 First, as Judge Aiken noted, a conveyance of property "subject to  
26 all encumbrances," meant that under the deed, the grantee took the  
27 property subject to the MCI ROW Agreement. The language of the  
28 conveyance in the instant case is not materially different from

1 that in the conveyance discussed in Judge Aiken's case.

2 Second, as the Ninth Circuit noted, Section 26.1 of the MCI  
3 ROW Agreement reveals the drafters' intent to have the agreement  
4 run with land. Third, as Judge Aiken noted, the defendant's  
5 argument that it retained easement rights, but not the relocation  
6 obligations under the MCI ROW Agreement, while the grantee assumed  
7 the obligation of the easement without its accompanying rights, "is  
8 not a feasible legal proposition."

9 Judge Haggerty's case is more directly on point. There, both  
10 Judge Haggerty and the Ninth Circuit considered a nearly identical  
11 easement and the identical land conveyance from BNSF to ODOT. In  
12 that case, TriMet argued that the AT&T ROW Agreement ran with the  
13 land when it was conveyed from BNSF to ODOT. AT&T argued that BNSF  
14 reserved its rights and obligations under the AT&T ROW Agreement  
15 when it conveyed its interest in the Railroad Corridor to ODOT.

16 Judge Haggerty concluded that BNSF had conveyed the property  
17 to ODOT subject to the easement and therefore, ODOT succeeded to  
18 BNSF's right to make AT&T relocate the facilities under the  
19 relevant provision of the AT&T ROW Agreement. 2006 WL 3408035, at  
20 \*8. Judge Haggerty noted that the right to compel AT&T to relocate  
21 its facilities at its own expense to allow for placement of  
22 railroad tracks was a term and condition of AT&T's easement. Id.

23 The Ninth Circuit affirmed Judge Haggerty. AT&T argued that  
24 BNSF retained its rights and obligations under the AT&T ROW  
25 Agreement "despite conveying to ODOT in fee simple title to the  
26 land governed by the ROW, and that those rights and obligations did  
27 not run with the land." 2009 WL 725174, at \*1. As in Judge  
28 Aiken's case, the court first looked at the provision in the ROW

1 agreement providing that the ROW was to be binding upon and inure  
2 to the benefit of the parties "and their respective successors or  
3 assigns." Id. The court concluded first that this language  
4 "indicates that AT&T and BNSF intended the easement to run." Id.  
5 Then, the court continued, because the AT&T ROW Agreement ran with  
6 the land when BNSF conveyed the Rail Corridor to ODOT, ODOT had  
7 authority to require AT&T to relocate its fiber optic facilities at  
8 AT&T's expense in order to accommodate the placement of new  
9 railroad tracks. Id.

10 Notably, both Judge Haggerty and the Ninth Circuit quickly  
11 disposed of the argument that BNSF reserved the ROW agreement to  
12 itself when conveying the real property to ODOT subject to the  
13 easement. Both courts stated clearly that once the property was  
14 conveyed to ODOT subject to the AT&T ROW Agreement, ODOT could  
15 enforce the relocation expense provision against AT&T. Although  
16 the AT&T ROW Agreement is not the agreement at issue in this case,  
17 any difference between that agreement and the MCI ROW Agreement at  
18 issue here is immaterial. Most importantly, the same land  
19 conveyance from BNSF to ODOT was at issue before Judge Haggerty and  
20 the Ninth Circuit.

21 Defendant's argument is not supported by Section 2 of the  
22 Donation Contract, common sense, Oregon law, and the opinions  
23 issued in Judge Aiken's and Judge Haggerty's related cases.  
24 Instead, logic and the relevant law (both Oregon property law and  
25 the decisions in Judge Aiken's and Judge Haggerty's cases) combine  
26 to compel a conclusion that BNSF did not retain the MCI ROW  
27 Agreement easement unto itself when it conveyed the subject  
28 property to ODOT. Rather, plaintiff succeeded to the rights and

1 obligations of the MCI ROW Agreement and under Section 13.2, has  
2 the authority to require defendant to pay for the relocation of its  
3 fiber optic system.

4 Defendant offers two additional arguments that are not  
5 persuasive. Separate from the MCI ROW Agreement is the actual  
6 Easement Deed related to the easement created by the MCI ROW  
7 Agreement. Exh. 2 to Sarratt Declr. Although the MCI ROW  
8 Agreement was executed in 1990, the parties to that agreement did  
9 not actually execute a deed until October 1998. Id. The deed was  
10 recorded in Washington County on January 20, 1999. Id.

11 Section 2.6 of the MCI ROW Agreement provides that upon  
12 completion of the construction of the MCI System, defendant "may,  
13 at its option, deliver to Railroad documents evidencing one or more  
14 easement grants, executed by MCI or one or more of its affiliates  
15 exactly in the form of Exhibit B . . . ." Exh. A to Hardiman  
16 Declr. at p. 11. If the documents are acceptable to the Railroad,  
17 the Railroad was to execute the documents and return them to  
18 defendant. Id. Defendant could then record the documents in the  
19 appropriate jurisdiction. Id. Exhibit B is a form entitled  
20 "Easement Deed and Agreement." Id. at p. 50. The Easement Deed  
21 executed by defendant and BNSF is identical to this form.

22 BNSF executed, and defendant recorded, the Easement Deed after  
23 the spring 1998 conveyance of the Rail Corridors to ODOT.  
24 Defendant argues that the post-conveyance execution and recording  
25 of the Easement Deed evidences BNSF's belief that BNSF had  
26 reserved, and not conveyed, the corresponding property interest to  
27 defendant's fiber optic easement. That is, because the MCI ROW  
28 Agreement required the Easement Deed to be executed by "the

1 Railroad," BNSF's execution of the deed after it conveyed the Rail  
2 Corridors subject to the easement to ODOT, indicates that BNSF saw  
3 itself, and not ODOT, as "the Railroad" at that time.

4 Plaintiff suggests that the late recording of the Easement  
5 Deed is better explained by the fact that MCI did not complete the  
6 initial construction of the MCI System until 1998, or simply, that  
7 having previously completed the MCI System, defendant neglected to  
8 prepare the Easement Deed until 1998, and then, BNSF executed it  
9 upon presentation because it was required to do so by the terms of  
10 the MCI ROW Agreement.

11 While plaintiff's explanation makes some sense, it is  
12 unsupported by any evidence in the record such as when the initial  
13 construction of the MCI System was completed, or any deposition  
14 testimony, for example, from defendant or BNSF about the timing of  
15 the Easement Deed. Nonetheless, I find defendant's proffered  
16 interpretation unpersuasive in light of the discussion above. Even  
17 if BNSF thought, at the time it executed the Easement Deed, that  
18 BNSF had retained the easement as defendant suggests, BNSF did not,  
19 in light of the language used in the conveyance documents, common  
20 sense, and Oregon law, sufficiently and reasonably articulate that  
21 belief.

22 Finally, defendant states that it has provided, and continues  
23 to provide, communication services to BNSF in exchange for the  
24 easement created by the ROW Agreement. I agree with plaintiff that  
25 the consideration defendant "paid," or continues to "pay" to BNSF  
26 for the easement, is irrelevant to whether BNSF retained the  
27 easement in the subsequent conveyance of the property to ODOT.

28 / / /

1 CONCLUSION

2 I grant plaintiff's motion for summary judgment (#18) and deny  
3 defendant's motion for summary judgment (#26).

4 IT IS SO ORDERED.

5 Dated this 31st day of March, 2010.

6  
7  
8 /s/ Dennis James Hubel  
9 Dennis James Hubel  
United States Magistrate Judge