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Decision 92-07-007 July 1, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC COMPANY to permit the use of certain of its right of way and to allow use of and access to certain other of its properties and facilities by MCI Telecommunications Corporation, in accordance with the terms of a Right of Way Agreement dated as of February 19, 1992. (Electric) (U 39 E)	Application 92-04-011 (Filed April 7, 1992)

I N D E X

INTERIM OPINION

In this decision we grant Pacific Gas and Electric Company (PG&E) authority under § 851 of the Public Utilities Code[1] to fulfill an agreement it conditionally entered into with MCI Telecommunications Corporation (MCI) to allow MCI to string its fiber optic cable on PG&E's transmission towers and to permit MCI to use a portion of PG&E's own fiber optic telecommunications network. The narrow issue of whether to grant this authorization raises several subsidiary questions, including:

- Does this transaction require the Commission's authorization?
- What are the ratemaking implications of the agreement?
- Will PG&E receive adequate compensation for allowing MCI to use its right of way and fiber optic network?
- What are the environmental effects of the agreement?

I. Background

A. Procedural History

PG&E filed this application on April 7, 1992, asking the Commission either to approve its agreement with MCI under § 851, to exempt the agreement from § 851 under the provisions of § 853(b), or to find that the agreement did not require the Commission's approval. PG&E further sought the Commission's approval of the joint use of PG&E's right of way under § 767 and authority to implement the agreement with MCI.

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1 All statutory references in this opinion are to the Public Utilities Code unless specifically stated otherwise.

On April 28, the administrative law judge directed PG&E to serve its application more broadly and extended the period to protest the application. GTE California Incorporated (GTEC) and the Commission's Division of Ratepayer Advocates (DRA) filed protests, but GTEC later withdrew its protest. PG&E filed a reply to the protests.[2]

B. The Agreement

Under the terms of the agreement, MCI will provide PG&E a certain amount of capacity on MCI's nationwide telecommunications system in exchange for use of two parts of PG&E's system.

First, MCI will receive the right to use a specified number of miles of PG&E's right of way in Northern and Central California. The agreement allows MCI to request PG&E to install fiber optic ground wire (FOG wire) on transmission towers within the right of way. MCI will use the FOG wire as transmission cable for its system. In some places, the FOG wire will replace existing static ground wire and serve the same functions of safety and system protection. The FOG wire will be connected with other components of MCI's system through splice cases mounted at the base of certain towers, and MCI will have access to these cases. PG&E will design, construct, install, maintain, and repair the FOG wire to MCI's specifications and at MCI's expense. MCI will supply the FOG wire, but legal title will pass to PG&E on delivery.

Second, MCI will receive a right to limited use of PG&E's internal fiber optic telecommunications system. MCI's use is limited to the "dark fibers"[3] of PG&E's telecommunications system running from San Rafael in Marin County through San Francisco and

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2 MCI also served, but did not file, its reply to the protests.

3 "Dark fiber" is the industry's term for unused fiber optic capacity. Optical fibers transmit information in the form of light impulses, and therefore unused fibers are physically dark.

on to Brisbane in San Mateo County. MCI has a further right to require PG&E to upgrade or increase the number of dark fibers in its system, at MCI's expense.

C. PG&E's Motion for Protection

On April 7, 1992, PG&E filed a "Motion for Protection of Proprietary Information." The motion asks the Commission to accept certain exhibits attached to its application under seal pursuant to § 583 and General Order (GO) 66-C and to withhold these exhibits from public inspection. The exhibits claimed to be proprietary consist of the agreement, a list of the locations of the affected PG&E right of way, a calculation of the value of the telecommunications services PG&E receives under the agreement, a study of the value of the use of the rights of way and the dark fibers, and the service list (which consists of officials in the cities and counties where the right of way is located).

PG&E offers scant support for its motion. The motion notes only that disclosure of the agreement would "place PG&E at an unfair commercial disadvantage in negotiations for similar business arrangements with other telecommunications companies," and PG&E is currently negotiating such arrangements. The motion also states that disclosure would prejudice MCI's negotiations for similar transmission rights.

This state has a strong policy favoring disclosure of documents pertaining to the operation of its public agencies, a policy articulated by the Legislature's statement that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Government Code § 6250; see AT&T Communications of Calif., Inc. [D.89-12-019] 34 CPUC2d 77, 79-80.)

Despite the strong policies against protecting information from public disclosure, we will grant PG&E's motion to a limited extent. From our review of the materials, we can perceive the possibility that disclosure could disrupt PG&E's and

MCI's negotiations of similar agreements. We will accept the exhibits for filing under seal and we will withhold these materials from public disclosure under the provisions of GO 66-C, § 2.2(b), which protects from public inspection "reports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage." However, this protection will be limited to two years from the date of this decision.[4] If PG&E believes that further protection is necessary after two years, it may file an appropriate motion specifically designating the materials it deems necessary to protect and stating clearly the justifications for further withholding the material from public inspection.

In addition, we will refer to portions of the protected materials when necessary to make this opinion clear and comprehensible. It is not our intent that these references should put the parties at a business disadvantage, but we must retain the ability to discuss the public's business in a coherent fashion.

II. Discussion

A. Does this Agreement Require the Commission's Authorization?

PG&E raises some threshold issues regarding the necessity for the Commission's authorization of the agreement.

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4 A supplement to DRA's protest refers to the materials for which PG&E sought protection from disclosure. DRA does not concede that the material is proprietary, but in compliance with § 583, DRA also filed this supplement to its protest under seal. The limitations on protection from disclosure adopted for PG&E's materials will also apply to the sealed supplement to DRA's protest.

1. Does § 851 Apply?

PG&E argues that the agreement does not require the Commission's authorization under § 851. That section provides, in pertinent part:

> "No public utility...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its...plant, system, or other property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it so to do."

PG&E contends that § 851 does not apply because the agreement does not require it to transfer or convey property to MCI or otherwise to encumber utility property which is necessary or useful in the performance of PG&E's utility functions. PG&E makes three arguments to support its assertion.

First, PG&E states that the permission granted to MCI to use PG&E's right of way is a license, and the agreement defines this license as not conveying any interest in real property. Because the agreement allowing MCI use of PG&E's right of way does not dispose of a property interest, PG&E concludes that § 851 does not apply. Similarly, MCI's use of PG&E's dark fibers is limited and provides no basis for application of § 851. MCI acquires no right of control or possessory interest, and PG&E retains legal title to both existing fibers and any fibers installed at MCI's request.

PG&E's first argument hinges on its contention that the rights granted to MCI under the agreement are a license. In evaluating this contention, of course, we are not bound by the parties' characterization of these rights as a license nor by the agreement's recitation that it "does not include a conveyance of any interest in real property." In general, a license is an authority to do a particular act on the property of another. (Fisher v General Petroleum Corp. (1954) 123 Cal.App.2d 770, 776.) Two characteristics distinguish a license from a lease or an

easement. The first characteristic, as noted by PG&E, is that a license does not create an interest in the land of the licensor. (Johnson v Kenneth I. Mullen Inc. (1989) 211 Cal.App.3d 653, 657.) The second distinguishing characteristic is that a license is revocable at any time at the will of the licensor (Miller v Desilu Productions, Inc. (1962) 204 Cal.App.2d 160, 165; Alameda v Ross (1939) 32 Cal.App.2d 135), unless specific factors, not present here, apply. (Bomberger v McKelvey (1950) 35 Cal.2d 607, 618.) The element of revocability is lacking here; the agreement's definition of license cited by PG&E also states that MCI's license is "irrevocable throughout the Term of this Agreement" (Article 1). Because the rights granted MCI are irrevocable, we cannot unequivocally agree with the characterization of MCI's rights as a license. It is not necessary for our purposes to determine the precise legal description of MCI's rights.[5] It is sufficient to conclude that PG&E has failed to persuade us that the rights granted to MCI under the agreement do not fall within the scope of § 851.

PG&E's second argument is that § 851 does not apply because the agreement in no way creates an encumbrance of PG&E's property. An encumbrance is "any right to, or interest in, land which may subsist in another to the diminution of its value but consistent with the passing of the fee." (Evans v Faught (1965) 231 Cal.App.2d 698, 706.) PG&E argues that MCI's rights do not fit this definition because the agreement does not confer an interest in the property and because MCI's use and additions enhance, rather than diminish, the value of PG&E's property.

We again find PG&E's argument unpersuasive. The language of Evans and of Civil Code § 1114, which Evans interprets, defines

5 We note that DRA concludes that "a right greater than a license has been created" by the agreement.

"encumbrance" for the purpose of determining whether a covenant against encumbrances connected with a transfer of real property had been violated. Evans goes on to distinguish a broader category of encumbrance that consists of "a physical burden upon the land, permanent in character and of an open and notorious nature, which affects only the physical condition of the property." (231 Cal.App.2d at 709.) Evans derives this rule from a study of cases that include, instructively, a case that found that electric transmission towers and the associated easement can fall within this broader category of encumbrance (McCarty v Wilson (1920) 184 Cal. 194). This example also counters PG&E's contention that MCI's use of PG&E's property would be an enhancement, rather than a burden, and thus not an encumbrance. "Encumber," as used in the cases and statutes cited by PG&E, is seen through the eyes of a prospective purchaser of real property, and it would be a rare purchaser who would view MCI's right to place its FOG wire within the right of way as a valuable addition to the property.[6] The language of § 851 is expansive, and we conclude that it makes sense to read "encumber" in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility's plant, system, or property. The exercise of MCI's rights under the agreement will openly alter the physical condition of PG&E's property by resulting in the placement of FOG wire and splice cases along PG&E's right of way. We therefore conclude that the agreement encumbers PG&E's plant, system, or property within the meaning of § 851.

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6 We note that the agreement requires PG&E under certain circumstances to seek an agreement from the holders of its security interests that acquisition of PG&E's right of way, as a result of enforcement of the security interests, would be subject to the agreement and to MCI's license. Under this provision, the agreement establishes an "encumbrance" in a sense closer to the narrow definition.

Finally, PG&E argues that § 851 does not apply to the agreement because MCI's license is limited to property that is not necessary or useful in the performance of PG&E's duties to the public. PG&E represents that the portion of the right of way on which the FOG wire will be constructed is not necessary or useful in PG&E's performance of its duties to the public, and the dark fibers to be used by MCI are not currently used by PG&E.

PG&E is wrong for two reasons. First, PG&E is wrong factually because, as DRA points out, the static ground wire currently used in utility service will be replaced in some locations by MCI's FOG wire. The FOG wire in these locations will take over the utility functions of safety and system protection. In addition, the agreement grants MCI the right to construct facilities on substation sites that PG&E owns in fee and uses in the provision of electrical service.

PG&E's argument also contradicts its statements elsewhere in the application that the costs of acquiring and developing both the transmission right of way and the internal telecommunications system are reflected in PG&E's rate base (Application, pp. 17-18). By permitting these investments to be placed in rate base, we necessarily determined that the assets were "used and useful" in providing service to customers. (Southern California Gas Co. [D.84-09-089] 16 CPUC2d 205, 228.) PG&E seems to carve up these assets into portions that are actually used by ratepayers and those that merely play a supporting role. PG&E thus would distinguish between the parts of the air space above the right of way that are or are not currently occupied by transmission towers and wires and between the specific fibers in the bundled cable that are or are not actually in use for PG&E's communications. We think PG&E attempts to draw too fine a distinction. When an asset is in rate base, it is devoted in its entirety to the provision of service to ratepayers (cf. § 217 (broad definition of "electric plant")), and the plain language of § 851 compels the conclusion that parts of

the asset may not be disposed of without our prior approval. This conclusion should not be read as in any way discouraging joint use of utility assets in appropriate cases; to the contrary, we favor maximizing the efficient use of utility property.

PG&E also points to additional language in § 851:

> "Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value...."

PG&E's argues that its agreement with MCI is an arm's length transaction and the property involved must be "conclusively presumed" to be not useful or necessary to the utility business. This argument could, if accepted, be used to dispose of all the utility's assets with impunity. This result is, of course, nonsensical, and this interpretation of the statute completely contradicts § 851's primary determination that unauthorized dispositions of utility property are void. It makes much more sense to read this provision of § 851 to emphasize that the presumption is "as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value." This language echoes the definition of a bona fide purchaser of real property (see Scheas v Robertson (1951) 38 Cal.2d 119, 128 ("a 'bona fide purchaser is one who takes in good faith and for value...'")), and this emphasis makes it clear that this provision is intended to protect innocent purchasers from having their transactions invalidated solely on the ground that the utility's action in transferring the property was beyond its authority. (Cf., Civil Code § 1214 (establishing the validity of the first-recorded conveyance of real property).)

For all of the preceding reasons, we reject PG&E's assertions and conclude that § 851 applies to the agreement between PG&E and MCI.

2. Should the Agreement Be Exempted From § 851?

Recognizing that the Commission might not agree that § 851 applies to this agreement, PG&E in the alternative requests an exemption from the requirements of § 851 under the provisions of § 853(b):

> "The commission may...exempt any public utility...from this article if it finds that the application thereof...is not necessary in the public interest."

PG&E asserts that exemption is appropriate in this case for two reasons. First, the agreement advances the public interest by significantly reducing PG&E's expenditures on internal telecommunications capacity. Second, exemption would allow the parties to implement the agreement quickly and to meet MCI's pressing need for use of the FOG wire by the end of the year.

We reject PG&E's request for an exemption from § 851. PG&E's second argument, which is essentially that exemption is convenient for the parties, would apply in nearly all such cases, and PG&E has not explained how the parties' narrow interest relates to the public interest that is the standard of § 853(b). PG&E's first argument has more appeal, but the prospect for savings must be balanced against the potentially decades-long term of the contract and the millions of dollars of value involved in this transaction. On balance, we conclude that the public interest is better served by subjecting the agreement, and others like it, to at least the minimal scrutiny required under § 851.

B. Should the Agreement Be Authorized Under § 851?

Having disposed of the threshold issues, we arrive at the heart of PG&E's request. If exemption under § 853(b) is not granted, PG&E believes that the authorization required by § 851 is warranted.

PG&E points out that its ratepayers will benefit from the agreement because PG&E will receive a specified amount of MCI's telecommunications capacity, which PG&E would otherwise have to purchase in the open market. All costs associated with MCI's use of the right of way and the dark fibers would be borne by MCI. Nothing resulting from the agreement would impair PG&E's ability to provide gas and electric service to its customers.

In addition, PG&E submits that public policy encourages the joint use of rights of way and fiber cables. By eliminating the need for MCI to install its FOG wires on a separate transmission system on a second right of way, the agreement minimizes the environmental effects of MCI's expansion of its system. Section 767.5(b) declares the Legislature's finding that "it is in the interest of the people of California for public utilities to continue to make available...surplus space [on their support structures] and excess capacity for use by cable television corporations." By analogy, public policy should likewise support joint use of support structures by telephone corporations.

We agree with PG&E's points. The agreement appears to offer substantial benefits to PG&E's ratepayers. Joint use of utility facilities is to be encouraged in appropriate cases, because of the obvious economic and environmental benefits.

We will grant PG&E the requested authority to dispose of part of its property to the extent necessary to carry out the agreement. Our authority will be subject to conditions, which we discuss in detail below.[7]

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7 PG&E also seeks a Commission order under § 767, which authorizes the Commission to order joint use of utility property when the public convenience and necessity so require. As PG&E acknowledges, this section is designed to resolve disputes when the parties are unable to agree. Although PG&E has located precedent

(Footnote continues on next page)

C. Guidelines Governing Implementation of the Agreement

DRA's protest does not object to our authorizing the agreement. DRA believes, however, that any such authorization should be conditioned on PG&E's acceptance of and compliance with two sets of guidelines to be subsequently developed.[8]

First, DRA urges that the Commission should be notified if the use of the facilities that are subject to the agreement changes in any material way or if the agreement is amended or extended. For example, DRA thinks notice should be given if any cable or fiber enters or leaves PG&E's rate base, if the use of PG&E's right of way changes in any way, or if the right of way enters or leaves PG&E's rate base.

Second, DRA identifies the need for guidelines governing the accounting treatment of materials, construction, and maintenance of the segments of PG&E's system where MCI locates its FOG wire. The guidelines should also cover payments to PG&E, taxes, assessments, and other financial transactions between the parties. The telecommunications services PG&E receives under this agreement may also be used by its unregulated affiliates, and effective accounting is necessary to ensure that there are not improper cross-subsidies between the regulated and unregulated functions.

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that would justify such an order even when the parties agree, as they do here, we find it inappropriate and unnecessary to issue an order under § 767 in these circumstances.

8 DRA's third concern, on the legal basis for our approval of the agreement, is addressed elsewhere in this opinion.

PG&E has no objection to the type of guidelines DRA suggests. In its reply to DRA's protest, PG&E proposes some guidelines to address DRA's concerns.

DRA has identified two areas where we should take steps to make sure that ratepayers receive the full benefits of this agreement. PG&E has taken the helpful step of proposing specific language for these guidelines. We will instruct PG&E and DRA to confer and to submit proposed guidelines on the topics DRA identified for our consideration within 30 days.

D. The Ratemaking Implications of the Agreement

PG&E does not explicitly address the ratemaking implications of the agreement. However, PG&E argues that the agreement will benefit ratepayers by reducing PG&E's costs of telecommunications. The obvious implication is that PG&E will pass these savings on to ratepayers. This implication is underscored by PG&E's representation that "the costs of PG&E's acquisition and development of the Right of Way and installation of the existing fiber optic system (of which the unused Dark Fibers are a component) have already been reflected in PG&E's rate base." (Application, pp. 17-18.)

Expenses such as telecommunications costs are recovered in rates established every three years in PG&E's general rate case. PG&E's general rate case for test year 1993 is currently underway. We will order PG&E to present in the update portion of Application 91-11-036 its revised estimates of the annual telecommunications expenditures, incorporating the savings resulting from this agreement, for the years 1993 through 1995.

E. Will PG&E Receive Adequate Compensation for Allowing Use of Its Facilities?

PG&E estimated the value it will receive from MCI by applying the current tariffs of MCI and AT&T Communications Company to the capacity that PG&E will receive under the agreement. PG&E

would have purchased comparable capacity at these tariff rates if it did not receive the benefits of the agreement.

To determine whether the value PG&E received was commensurate with the value received by MCI, PG&E conducted a study which considered comparable agreements, the terrain of the right of way, costs of construction, and the potential customers and competitors for the services. The study concluded that the values of the agreement to the two parties are roughly equal and that the dollar value received by PG&E exceeds the dollar value received by MCI under the agreement.

PG&E has made an adequate showing that the compensation it will receive for allowing use of its facilities is comparable to similar agreements and is commensurate with the value of the services offered by MCI. This showing is sufficient for the present purposes. PG&E's costs of telecommunications are reviewed once every three years in its general rate cases, and any claim that PG&E could have received greater consideration from MCI should be presented in that forum.

F. The Environmental Effects of the Agreement

PG&E asserts that the modification and replacement of PG&E's facilities under the agreement are categorically exempt from the environmental reviews that would otherwise be required under the California Environmental Quality Act (CEQA). Even if an environmental review were required, PG&E believes that it would conclude that the agreement would not result in a significant adverse effect on the environment.

Rule 17.1(h)(1)(A)(2) of the Commission's Rules of Practice and Procedure (Rules) incorporates the categorical exemption established in § 15301 of the CEQA Guidelines (14 Cal. Code of Regulations § 15000 et seq.). This Rule exempts "minor alteration of existing facilities used to convey or distribute electric power" from CEQA's requirements of environmental review. This exemption covers the installation of FOG wire and splice cases

on PG&E's transmission towers. The replacement of PG&E's static ground wire with FOG wire also qualifies for exemption under Rule 17.1(h)(1)(B)(1), which exempts "the replacement or reconstruction...of existing utility structures and facilities where the new structure or facility will be located on the same site as the replaced structure or facility and will have substantially the same purpose and capacity as the structure replaced." (See also CEQA Guidelines § 15302.)

Although PG&E fails to address specifically the environmental effects of MCI's use of the dark fibers, it appears that any effects of MCI's use will be negligible, and any alterations to PG&E's system required in the exercise of MCI's rights will fall within the categorical exemptions of §§ 15301 and 15303 of the CEQA Guidelines.

PG&E also states that mitigation of potential impacts resulting from the agreement is consistent with its normal operations and maintenance. It has searched the literature to identify known biological, cultural, and wildlife resources in the affected area and will plan to eliminate these impacts. It will work with several state and federal agencies to ensure that all of the modifications are performed with a minimal effect on the environment. PG&E states that this coordination is a normal part of it efforts to ensure that utility service is provided with a minimal effect on the environment.

Because we have concluded that the agreement is categorically exempt from CEQA, we will not address PG&E's additional points, other than to state that we expect PG&E to continue strive to minimize the environmental effects of its activities and to coordinate these efforts with appropriate federal, state, and local agencies.

G. The Need for Hearings

PG&E requested that its application be granted ex parte. Although DRA and GTEC filed protests, neither party specifically

requested hearings in this matter.[9] We have responded to DRA's protest by adopting its proposal to develop guidelines, and we have accommodated many of GTEC's concerns even though GTEC formally withdrew its protest. Because neither protestant has stated "facts the protestant would develop at a public hearing" (Rule 8.4(c)), we conclude that no hearing is necessary in this proceeding.

Findings of Fact

1. PG&E filed this application on April 7, 1992, asking the Commission to approve its agreement with MCI under § 851. GTEC and DRA filed protests. GTEC later withdrew its protest.

2. Under the terms of the agreement, MCI will provide PG&E a certain amount of capacity on MCI's nationwide telecommunications system in exchange for use of two parts of PG&E's system. MCI will receive the right to use a specified number of miles of PG&E's right of way in Northern and Central California. MCI will also receive a right to limited use of PG&E's internal fiber optic telecommunications system.

3. On April 7, 1992, PG&E filed a "Motion for Protection of Proprietary Information."

4. Disclosure of the allegedly proprietary information could disrupt PG&E's and MCI's negotiations of similar agreements.

5. The agreement states that MCI's license is "irrevocable throughout the Term of this Agreement."

6. The exercise of MCI's rights under the agreement will openly alter the physical condition of PG&E's property by resulting in the placement of FOG wire and splice cases along PG&E's right of way.

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9 DRA's protest states that the application should be approved subject to the guidelines discussed previously. GTEC's specific request was to deny the application, but this request was withdrawn.

7. Under the agreement, the static ground wire currently used in utility service will be replaced in some locations by MCI's FOG wire. The FOG wire in these locations will take over the utility functions of safety and system protection. In addition, the agreement grants MCI the right to construct facilities on substation sites that PG&E owns in fee and uses in the provision of electrical service.

8. All costs associated with MCI's use of the right of way and the dark fibers will be borne by MCI.

9. The agreement appears to offer substantial benefits to PG&E's ratepayers.

10. DRA proposes that PG&E's performance under the agreement should be subject to guidelines in two areas. First, the Commission should be notified if the use of the facilities that are subject to the agreement changes in any material way or if the agreement is amended or extended. Second, guidelines should govern the accounting treatment of materials, construction, and maintenance of the segments of PG&E's system where MCI locates its FOG wire.

11. PG&E represents that "the costs of PG&E's acquisition and development of the Right of Way and installation of the existing fiber optic system (of which the unused Dark Fibers are a component) have already been reflected in PG&E's rate base."

12. PG&E has made an adequate showing that the compensation it will receive for allowing use of its facilities is comparable to similar agreements and is commensurate with the value of the services offered by MCI.

13. Neither DRA nor GTEC specifically requested hearings in this matter.

Conclusions of Law

1. California has a strong policy favoring disclosure of documents pertaining to the operation of its public agencies.

2. PG&E's "Motion for Protection of Proprietary Information" should be granted, subject to the following limitation. The protection granted herein should be limited to two years from the

date of this decision. The protections and limitations on protection from disclosure adopted for PG&E's materials should also apply to the sealed supplement to DRA's protest.

3. A license is an authority to do a particular act on the property of another. A license does not create an interest in the land of the licensor, and it is revocable at any time at the will of the licensor.

4. The characterization of MCI's rights as a license is inaccurate, because the rights are stated to be irrevocable.

5. "Encumber" in § 851 should be interpreted as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility's plant, system, or property.

6. The agreement encumbers PG&E's plant, system, or property within the meaning of § 851.

7. By permitting PG&E's investments in its right of way and internal fiber optic telecommunications network to be placed in rate base, we necessarily determined that the assets were "used and useful" in providing service to customers.

8. When an asset is in rate base, it is devoted in its entirety to the provision of service to ratepayers, and under § 851 parts of the asset may not be disposed of without our prior approval.

9. Section 851's presumption that property transferred to a purchaser, lessee, or encumbrancer in good faith for value is not useful or necessary in the utility's business is intended to protect innocent purchasers from having their transactions invalidated solely on the ground that the utility's action in transferring the property was beyond its authority.

10. Section 851 applies to the agreement between PG&E and MCI.

11. PG&E's request for an exemption from § 851 should be denied. The public interest is better served by subjecting the agreement, and others like it, to at least the minimal scrutiny required under § 851.

12. Joint use of utility facilities should be encouraged in appropriate cases, because of the obvious economic and environmental benefits.

13. PG&E should be authorized under § 851 to permit use of and access to part of its property to the extent necessary to carry out the agreement.

14. It inappropriate and unnecessary to issue an order under § 767 in these circumstances.

15. PG&E and DRA should be directed to confer to develop proposed guidelines on the topics identified in DRA's protest.

16. PG&E should be ordered to present in the update portion of Application 91-11-036 its revised estimate of the annual telecommunications expenditures for the years 1993 through 1995. The revised estimates must incorporate the savings resulting from this agreement.

17. Rule 17.1(h)(1)(A)(2) of the Commission's Rules of Practice and Procedure exempts "minor alteration of existing facilities used to convey or distribute electric power" from CEQA's requirements of environmental review. This exemption covers the installation of FOG wire and splice cases on PG&E's transmission towers. The replacement of PG&E's static ground wire with FOG wire also qualifies for exemption under Rule 17.1(h)(1)(B)(1).

18. Any effects of MCI's use of the dark fibers will be negligible, and any alterations to PG&E's system required in the exercise of MCI's rights will fall within the categorical exemptions of §§ 15301 and 15303 of the CEQA Guidelines.

19. No hearing is necessary in this proceeding.

20. Because the agreement offers substantial benefits for ratepayers and because MCI has a pressing need for use of the FOG wire by the end of 1992, this decision should be effective on the date signed.

INTERIM ORDER

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized to allow the use of and access to part of its property to the extent necessary to fulfill the Right of Way Agreement dated February 19, 1992 (Agreement) with MCI Telecommunications Corporation.

2. PG&E's "Motion for Protection of Proprietary Information" is granted. The protection from disclosure granted is limited to two years from the date of this decision. This protection and limitation shall also apply to the sealed supplement to the protest of the Division of Ratepayer Advocates (DRA).

3. PG&E's request for an exemption from Public Utilities Code § 851 is denied.

4. PG&E and DRA shall confer and shall propose guidelines on notification and accounting treatment, as proposed in DRA's protest. The proposed guidelines shall be filed within 30 days of the effective date of this decision.

5. PG&E shall present in the update portion of Application 91-11-036 its revised estimate of the annual telecommunications expenditures for the years 1993 through 1995. The revised estimates shall incorporate the savings resulting from the Agreement.

This order is effective today.

Dated July 1, 1992, at San Francisco, California.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners