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1 intent, as they did in the very next type of Class 3 exemption listed in the regulation (for “the  
2 conversion of existing small structures”).

3 Petitioners’ suggestion that AT&T’s project falls within an exception to the categorical  
4 exemption fares no better. The public rights-of-way are full of existing structures. There is  
5 nothing unusual about AT&T’s proposal to place additional equipment in the rights-of-way.  
6 AT&T’s cabinets are entirely consistent with the existing, developed environment of the public  
7 rights-of-way, and there is no evidence they will have any significant impact on this  
8 environment.

9 Moreover, a stay must be denied because it would harm the public interest. In particular,  
10 a stay would deny many residents of the City the substantial benefits of competition in the  
11 provision of wireline video services where Comcast is the dominant provider of such services in  
12 San Francisco. In addition, a stay would mean fewer jobs, as AT&T intends to hire a significant  
13 number of new employees in connection with its network upgrade. As a result, the Court should  
14 deny petitioners’ request for a stay.

## 15 ARGUMENT

### 16 A. Standard For Issuance Of A Stay

17 In an attempt to avoid the hurdles they must clear to obtain a stay, petitioners misstate the  
18 standard for issuance of such equitable relief. Petitioners wrongly state (at 5) that section  
19 1094.5(g) of the Code of Civil Procedure establishes a rebuttable presumption that a stay should  
20 issue unless it is against the public interest. Petitioners cite no authority for this assertion, and in  
21 fact they are misreading the statute.

22 The first sentence of section 1094.5(g) states that, with an exception not applicable here,  
23 “the court in which proceedings under this section are instituted *may* stay the operation of the  
24 administrative order or decision pending the judgment of the court.” Code Civ. Proc.  
25 § 1094.5(g) (emphasis added). The term “may” is permissive. And while this provision does not  
26 expressly state what factors should guide the court’s discretion, those factors are well-established  
27 in California law: consideration of the movant’s likelihood of success and the relative harms to  
28 the parties.

1           It is a “hornbook principle that an injunction or stay is an equitable remedy,” and hence  
2 “[t]he granting or denying of an injunction or stay necessarily requires a court to exercise its  
3 equitable discretion.” *Webster v. Superior Court* (1988) 46 Cal.3d 338, 345. Indeed, petitioners  
4 admit (at 14) that they are asking the Court to “exercise its equitable discretion.” This involves  
5 consideration of the plaintiff’s likelihood of prevailing and the relative harms to the parties from  
6 granting equitable relief. *See, e.g., Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.  
7 “In the last analysis the trial court must determine which party is the more likely to be injured by  
8 the exercise of its discretion and it must then be exercised in favor of that party.” *Family Record*  
9 *Plan, Inc. v. Mitchell* (1959) 172 Cal.App.2d 235, 242 (citations omitted). Other courts have  
10 applied these same factors in cases seeking to stay construction projects pending a challenge  
11 under CEQA. *See, e.g., The Right Site Coalition v. Los Angeles Unified School District* (2008)  
12 160 Cal.App.4th 336, 341-42, 344 (trial court erred in failing to consider the likelihood that  
13 petitioner would succeed on its challenge under CEQA to the sufficiency of an environmental  
14 impact report); *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118 (challenging the  
15 city’s CEQA exemption finding). As the leading CEQA hornbook notes, “[a]s a practical matter,  
16 when considering an application for a stay under 1094.5(g), trial courts commonly consider  
17 whether the petitioner is likely to prevail on the merits and balance the respective hardships.  
18 Accordingly, an application for a stay order should address these issues.” *Kostka & Zischke,*  
19 *Practice Under the Environmental Quality Act, Section 23.87* (2011).

20           The second sentence of section 1094.5(g) states that “no such stay shall be imposed or  
21 continued if the court is satisfied that it is against the public interest.” It is this sentence that  
22 petitioners suggest should be interpreted to mean a stay should automatically issue unless the  
23 Court concludes it would be against the public interest. But that is not what the statute says. It  
24 says that if the Court concludes a stay would be against the public interest, it *must* deny the stay.  
25 *See Sterling v. Santa Monica Rent Control Bd.* (1985) 168 Cal.App.3d 176, 187 (section  
26 1094.5(g) “mandates that no stay be imposed when a stay would be against the public interest”).  
27 It does not say that in all other circumstances the Court must or should grant a stay, or that the  
28 public interest is the only factor the Court should consider. Instead, the second sentence of

1 section 1094.5(g) makes clear that in addition to the Court's consideration of the traditional  
2 factors governing its equitable discretion to grant a stay, the Court also must determine whether a  
3 stay would be against the public interest.<sup>2</sup>

4 As demonstrated below, the suspension of AT&T's deployment would harm the public  
5 interest by, among other things, continuing to deny many San Francisco residents the benefit of  
6 competition in the market for video services, slowing the deployment of a high-speed broadband  
7 network to meet the ever-growing demand for such services, and even affecting employment  
8 within the Bay Area. By contrast, petitioners' claim that the City's decision violates CEQA, and  
9 thus that there might be some public benefit in issuing a stay, has no merit. As a result, the  
10 public interest requires denial of petitioners' motion.

11 **B. Because AT&T's Proposal Is Exempt From CEQA, Petitioners Have No**  
12 **Likelihood Of Success On The Merits.**

13 Petitioners contend that CEQA requires an environmental review of AT&T's proposal to  
14 deploy up to 726 equipment cabinets in the City's public rights-of-ways. The City properly  
15 rejected this contention, because AT&T's proposal is exempt from the requirements of CEQA.

16 **1. AT&T's proposed network upgrade falls squarely within CEQA's**  
17 **Class 3 categorical exemption.**

18 Contrary to petitioners' suggestion, the City correctly determined that AT&T's proposal  
19 to install equipment in the public rights-of-way falls squarely within the Class 3 exemption,  
20 because it involves the "installation of small new equipment and facilities in small structures."  
21 14 Cal. Code Regs. § 15303. That is, the proposed equipment constitutes "small new  
22 equipment" (the electronics necessary to provide U-verse services) in "small structures" (the  
23 cabinets). See *Surfrider v. California Coastal Comm'n* (1994) 26 Cal.App.4th 151, 156 ("[i]t is  
24 undisputed that the [new parking] fee collection devices are small structures within the meaning  
25 of this exemption").

26 <sup>2</sup> Petitioners note (at 6) that some commentators have suggested the public interest is the only  
27 factor to be considered under section 1094.5(g). That commentary is not binding authority, nor  
28 does it overrule settled common law precedent in California governing the exercise of a court's  
equitable discretion in entering a stay or injunction.

1           Petitioners attempt to add words to this Class 3 exemption, arguing it applies only to the  
2 installation of small new equipment and facilities in *existing* small structures. Mem. at 10. But  
3 that is not what the regulation says. This plain language is not limited to “existing” small  
4 structures. Petitioners’ interpretation also fails the common sense test: it would make no sense to  
5 exempt the placement of small new equipment only in an existing small structure, like an  
6 existing equipment cabinet, but to require CEQA review of the placement of the very same  
7 equipment in an existing large structure, like an existing building. *City of San Francisco v.*  
8 *Martin* (2005) 135 Cal.App.4th 405-406.

9           More importantly, the drafters plainly knew how to refer to “existing” small structures  
10 when that is what they intended. The very next category of the Class 3 exemption refers to “the  
11 conversion of *existing* small structures” (emphasis added). In short, to adopt petitioners’  
12 interpretation, the Court would have to ignore the plain meaning of the regulation and read into it  
13 limiting words that are not present. That would be impermissible. *See, e.g., Gilliland v. Medical*  
14 *Bd. of California* (2001) 89 Cal.App.4th 208, 212 (if the language is clear, there can be no room  
15 for interpretation, and effect must be given to its plain meaning); *Price v. Starbucks Corp.* (2011)  
16 192 Cal.App.4th 1136, 1145 (the rules of statutory construction apply to the interpretation of  
17 regulations). In addition, contrary to petitioners’ suggestion, the plain language of the exemption  
18 does not limit the number of small structures. Mem. at 10; Petition at ¶ 30. While the first  
19 category of Class 3 exemption refers to “limited numbers” of structures, no such limitation  
20 appears in the second category.

## 21           **2. No exceptions to the Class 3 exemption apply here.**

22           Petitioners also assert that even if the Class 3 exemption applies, AT&T’s project  
23 nevertheless falls within an exception to that exemption. Petitioners cite the three exceptions in  
24 sections 15300.2(c), (b), and (f) of the CEQA Guidelines (Mem. at 11), but they fail to  
25 demonstrate that any of these apply here.

26           With respect to the first of these exceptions, petitioners do not and cannot point to any  
27 substantial evidence sufficient to demonstrate a reasonable possibility that AT&T’s project “will  
28 have a significant effect on the environment due to unusual circumstances.” CEQA Guideline

1 § 15300.2(c). This exception applies only where there are both “unusual circumstances” and  
2 those circumstances cause a “significant” environmental impact. *See Santa Monica Chamber of*  
3 *Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800. Petitioners’ claim does  
4 not satisfy either of these requirements.

5 First, there is nothing “unusual” about AT&T’s project to place facilities in the public  
6 rights-of-way. For more than 100 years California has granted telephone companies a statutory  
7 right to “construct” their facilities “along and upon any public road or highway.” Pub. Util.  
8 Code § 7901. Equipment cabinets and other structures are commonly placed in the public rights-  
9 of-way, not only by telephone companies but by the City and other entities (such as the San  
10 Francisco Water Department, the Fire Department, the U.S. Postal Service, PG&E, and  
11 Comcast). *See Kwong Dec.* ¶¶ 3-4. These structures, which number more than 48,000 (*id.*),  
12 include traffic control cabinets, bus shelters, photo enforcement traffic equipment, street  
13 sweeping broom closets, trash receptacles, toilets, advertising kiosks, municipal railway control  
14 cabinets, parking meters, utility poles, streetlight poles, newsstands, and newspaper racks,  
15 mailboxes and mail relay boxes, and electric utility and cable company equipment. In short, as  
16 the Planning Department concluded, “[u]tility-related facilities in the public right-of-way are  
17 common throughout the City’s urbanized environment,” “Lightspeed cabinets are thus consistent  
18 with the existing, developed environment,” and those cabinets “cannot be deemed an ‘unusual  
19 circumstance.’” Feb. 22, 2011 Certificate of Determination, p.4.

20 Petitioners also are unable to identify any substantial evidence that AT&T’s cabinets  
21 could have a significant effect on the environment. The “significance of an environmental  
22 impact is in any event measured in light of the context where it occurs.” *Bowman v. City of*  
23 *Berkeley* (2004) 122 Cal.App.4th 572, 592. Here, AT&T’s proposed cabinets are located among  
24 other utility cabinets and other above-ground structures in the public rights-of-way. That is, as  
25 the Planning Department noted, the “context is urban right-of-way that already supports similar  
26 utility structures dispersed throughout the City.” Feb. 22, 2011 Certificate of Determination, p.  
27 4. “AT&T’s cabinet installations would generally be viewed in the context of the existing urban  
28 background, and the incremental visual effect of the proposed cabinets would be minimal.” *Id.*

1 *Compare Bowman* 122 Cal.App.4th at 592 (“we do not believe that our Legislature in enacting  
2 CEQA . . . intended to require an EIR where the sole environmental impact is the aesthetic merit  
3 of a building in a highly developed area”).

4 The second exception also affords petitioners no refuge, as it applies only to the  
5 significant “cumulative impact of successive projects of the same type in the same place.”  
6 CEQA Guideline § 15300.2(b). AT&T does not propose successive projects “in the same  
7 place,” but intends to deploy its small cabinets (each covering just over 9 square feet) in different  
8 places throughout the 46.7 square miles of San Francisco. *See Hartstein Dec.* ¶ 13. *See also*  
9 *Feb. 22, 2011 Certificate of Determination*, p.7 (“By their minimal nature and widely dispersed  
10 locations . . . the impacts of the cabinets would not aggregate under CEQA to a degree where the  
11 project, by itself, would have cumulative impacts.”).

12 In addition, AT&T’s proposal cannot be deemed to have any significant cumulative  
13 impact in light of the tens of thousands of structures that already exist in the public rights-of-  
14 way, and the miniscule number of cabinets and cumulative space AT&T’s cabinets will occupy.  
15 The City has about 122 *million* square feet of sidewalk. *Kwong Dec.* ¶ 5. Even if all of AT&T’s  
16 cabinets were all placed in the sidewalk, they would at most occupy 0.0055% of the City’s total  
17 sidewalk space. *Hartstein Dec.* ¶¶ 13-15. Similarly, the City tallied nearly 48,000 above-ground  
18 facilities in the public rights-of-way, which does not include the numerous existing facilities  
19 maintained by several entities. *Kwong Dec.* ¶¶ 3-4. In light of this existing environment,  
20 AT&T’s proposal cannot be deemed to have any significant cumulative effects. *See Association*  
21 *for Protection of Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734 (there was “[n]o serious  
22 argument or evidence” that “any sort of cumulative impact could be anticipated” from the  
23 construction of a house in a fully developed neighborhood).

24 As for the third exception, petitioners fail to identify any substantial evidence that  
25 AT&T’s project would “cause a substantial adverse change in the significance of a historical  
26 resource.” CEQA Guideline § 15300.2(f). To the contrary, AT&T does not propose to place its  
27 cabinets in *any* historic, conservation, or preservation districts. *Feb. 22, 2011 Certificate of*  
28 *Determination*, p.5 (“none of the proposed new cabinets would be installed within any

1 designated historic or conservation district”). In addition, the Planning Department specifically  
2 found that even considering potential future historic districts that are not yet designated, the  
3 impact of the cabinets would be “not significant, and would not impair the ability of historic  
4 resources to convey their significance.” *Id.* p.6. Petitioners point to nothing that would cast  
5 doubt upon this conclusion.

6 **3. The City did not impose “mitigation measures” to support the**  
7 **categorical exemption.**

8 Petitioners’ final argument is that, under CEQA, mitigation measures cannot support a  
9 categorical exemption. Mem. at 12-13. The City, however, did not rest its finding of a  
10 categorical exemption upon any mitigation measures. Rather, that finding rests upon the  
11 conclusion that the Class 3 exemption applies because AT&T’s proposal involves the installation  
12 of small new equipment and facilities in small structures, and that no exception applies because  
13 AT&T’s facilities are entirely consistent with the urban right-of-way where small structures  
14 already are common. *See* Feb. 22, 2011 Certificate of Determination, p.8.

15 Petitioners appear to point (at 13) to AT&T’s “Memorandum of Understanding” with the  
16 City (“MOU”) and DPW Order No. 175,566, but neither of those constitutes an improper  
17 mitigation measure. The MOU simply restates AT&T’s commitments regarding its project, its  
18 intent to comply with City regulations, and its willingness to engage in additional community  
19 outreach and process. *See* Hartstein Dec. ¶ 24 & Ex. 5.

20 Similarly, while DPW Order NO. 175,566 requires AT&T to comply with a number of  
21 requirements in order to obtain a permit to place a new structure (such as requirements  
22 concerning pedestrian safety and graffiti abatement), those are not “mitigation” measures.  
23 Rather, they are generally-applicable regulatory requirements that apply to all utility facilities  
24 placed in the public rights-of-way. *Compare Tracy First v. City of Tracy* (2009) 177  
25 Cal.App.4th 912, 934 (the City may rely upon state building standards in determining a project  
26 would not have a significant impact). Moreover, CEQA applies to a private project where an  
27 agency is granting discretionary approval. Pub. Res. Code § 21002. Petitioners’ suggestion that  
28

1 that approval and permitting process itself constitutes a “mitigation” measure would turn CEQA  
2 on its head and nullify the categorical exemption scheme.

3 **C. A Stay Would Block Competition For No Demonstrable Benefit And**  
4 **Would Be Contrary To The Public Interest.**

5 Even if petitioners had some likelihood of success on their CEQA claim (which they do  
6 not), the public interest would mandate that their request for a stay be denied.

7 Petitioners suggest (at 8) that the issuance of a stay is in the public interest because “it  
8 will prevent possible significant environmental impacts pending a hearing on the merits.” But  
9 petitioners offer only speculation, and present no evidence, that any significant environmental  
10 impacts would occur absent a stay. Over the past several years, AT&T has placed thousands of  
11 utility cabinets in the public rights-of-way of hundreds of California municipalities (which have  
12 all found the cabinet exempt from CEQA). *See* Hartstein Dec. ¶ 11. Despite this widespread  
13 deployment, the best purported evidence of a significant environmental impact petitioners can  
14 muster is a photograph of a cabinet allegedly in Oakland tagged with graffiti. Mem. at 1. That is  
15 hardly evidence that AT&T’s deployment would have significant negative “visual impacts.”  
16 Mem. at 12. Graffiti is ubiquitous in urban environments, including on all manner of signs, bus  
17 stops, traffic control boxes, bridges, underpasses, and buildings. Petitioners present no evidence  
18 that AT&T’s cabinets would have any significant impact on the presence of graffiti. In addition,  
19 the City’s SMF Order requires AT&T to label cabinets with a toll free number to report graffiti  
20 and to remove graffiti within three business days of discovering or being notified of the graffiti.  
21 Order No. 175,566 § 8.

22 Petitioners also speculate that the equipment cabinets might “obstruct pedestrian flow” or  
23 affect “traffic safety” (Mem. at 1, 12), but there is no evidence that AT&T intends to place any  
24 facilities in a manner that would endanger traffic or block pedestrian flow in any significant way.  
25 As indicated, even assuming all 726 cabinets were placed on the sidewalks of the City, they  
26 would occupy only 0.0055% of the City’s sidewalk space. Hartstein Dec. ¶¶ 13-15. Moreover,  
27 the City’s ordinary permitting regulations ensure that utility facilities placed in the public rights-  
28 of-way are located such that “the path of travel for pedestrians will not be unreasonably

1 impeded” and traffic signs and signals are not obstructed. DPW Order No. 175,566 § 3(B)(1)(a)  
2 & Exhibit B. Petitioners also miss the mark in asserting (at 8) that the case may “become moot  
3 in many City neighborhoods if the installations are allowed to proceed and the AT&T boxes  
4 become fixtures.” If required, AT&T could feasibly remove any equipment cabinets deployed  
5 during the pendency of this case, and the area(s) of installation could be fully restored. Hartstein  
6 Dec. ¶ 25.


7 In contrast to petitioners’ speculation, AT&T submits herewith declarations establishing  
8 that a stay would cause significant harm to the public interest. AT&T seeks to upgrade its  
9 network and install new equipment in order to provide new video services, as well as  
10 significantly higher-speed broadband services and voice over Internet protocol services. For  
11 many years, Comcast has had limited competition in the provision of wireline cable television  
12 service in San Francisco. Stenzel Dec. ¶ 5; Sosa Dec. ¶ 6. As a result, residents of the City have  
13 been denied the ability to choose their wireline video service provider, and have been denied the  
14 benefits of competition between providers of such services.

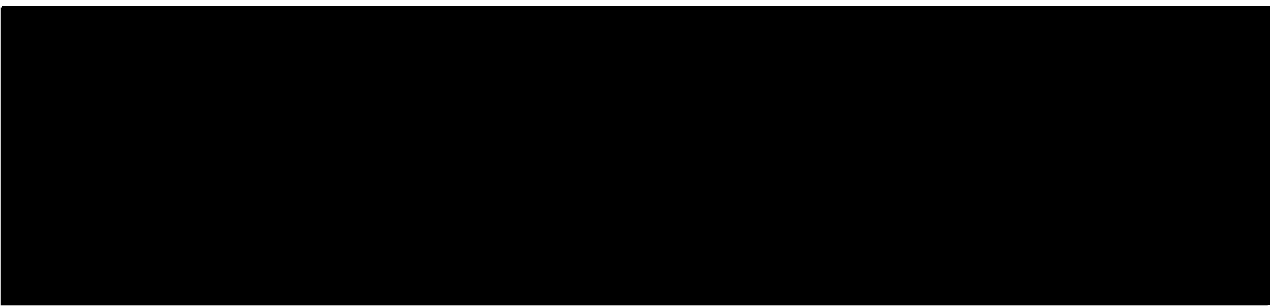
15 The public interest in competition is obvious. FCC studies consistently report  
16 considerable benefits to consumers from wireline competition against incumbent cable  
17 companies like Comcast. Sosa Dec. ¶¶ 10-13. In a February 2011 report, the FCC found that  
18 prices for rival wireline operators are on average 8% lower than those of incumbent cable  
19 companies.<sup>3</sup> Sosa Dec. ¶ 12. As for San Francisco specifically, a 2008 study found that San  
20 Francisco consumers would save between \$23 million and \$34 million *annually* from  
21 competition in the delivery of wired video services. Sosa Dec. ¶ 9. Competition also leads to  
22 non-price benefits, such as improved product and service quality. AT&T’s U-verse video  
23 service offers a number of features and content not available on Comcast television. Stenzel  
24 Dec. ¶ 10. This is consistent with the FCC’s finding that where there is wireline competition for


25 <sup>3</sup> Satellite-based video service has obvious reasons for not being a viable alternative to wireline  
26 cable service. For example, not only do some consumers find the required satellite dish an  
27 unattractive addition to their home, some residents cannot receive satellite service because of the  
28 specific location of their homes. Stenzel Dec. ¶ 7. Even more important to the public interest  
analysis, the FCC has found that satellite service is not as effective at lowering cable television  
prices as video competition from wireline video providers. Sosa Dec. ¶ 12.

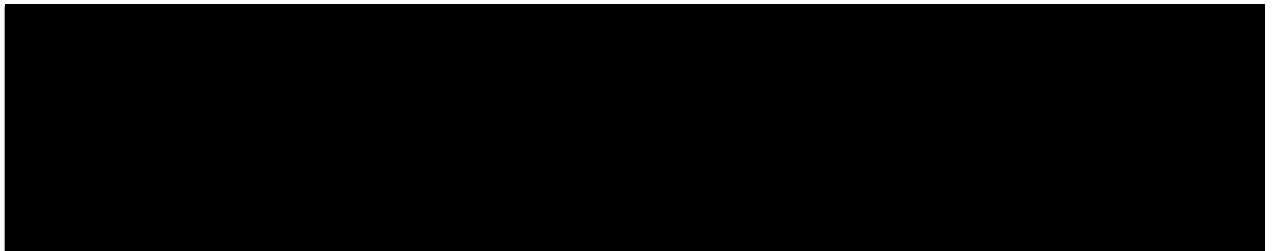
1 video services, both the incumbent cable company and its competitor offer basic subscribers  
2 more channels. Sosa Dec. ¶ 13. Consumers also benefit from improved service quality; for  
3 example, AT&T consistently outscores Comcast in measures of customer satisfaction for video  
4 and telephone service. Sosa Dec. ¶ 15.

5 The public interest in competition is reinforced by the widespread demand for an  
6 alternative to Comcast's wireline video service. For many citizens, their monthly cable bill takes  
7 a significant bite out of their household budget and continually increasing cable charges have led  
8 to strong demand for competitive choice. Vriheas Dec. ¶ 6. Indeed, hundreds of residents  
9 submitted letters to the San Francisco Board of Supervisors in support of AT&T's Lightspeed  
10 upgrade, emphasizing the competitive benefits of AT&T's entry into the video marketplace.  
11 Vriheas Dec. ¶ 9. For example, the letters noted that residents have "waited long enough to have  
12 a choice in cable providers," that AT&T's entry "will provide us with the opportunity to choose  
13 and for the service provider to compete for our business," and provide "much needed  
14 competition." Vriheas Dec. ¶ 9.

15 There is also strong demand for AT&T's U-verse video and other services from owners  
16 of apartment buildings and other multiple-dwelling units. McQueeney Dec. ¶¶ 6-8. 

17 

22 A stay also would be contrary to the public interest because it would affect employment.  
23 In connection with the launch of its U-verse services, 

24 

1 [REDACTED]  
2 [REDACTED]  
3 In short, a stay would be contrary to the public interest. Petitioners' suggestion that a  
4 stay would serve the public interest is pure speculation. The actual evidence establishes that a  
5 stay would harm the public's interest in effective competition and in the other benefits of  
6 AT&T's proposed investment in San Francisco.

7 **D. A Stay Would Cause Significant Harm To AT&T.**

8 A stay would not only be contrary to the public interest, but would also cause significant  
9 harm to AT&T. Based on AT&T's historical experience in expanding its U-verse services in  
10 new markets, [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 **E. If The Court Grants A Stay, A Bond Should Be Required.**

14 Petitioners point out (at 13) that section 1094.5(g) does not mention a bond. That is  
15 beside the point, because section 1094.5(g) "cannot be considered to provide an absolute right to  
16 an unconditional stay." *Venice Canals Resident Home Owners Ass'n v. Superior Court* (1977) 72  
17 Cal.App.3d 675, 679 (upholding imposition of a \$50,000 bond requirement as a condition of a  
18 stay under section 1094.5(g)). The authority to require a bond remains part of the court's  
19 "inherent and equitable power to achieve justice and prevent misuse of processes lawfully  
20 issued." *Id.* See also *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*  
21 (1986) 42 Cal.3d 1157, 1160 n.2 (noting that the Court of Appeal had required a \$25,000 bond  
22 for a stay in a CEQA action).

23 Contrary to petitioners' suggestion (at 14), nothing in *Venice Canals* turned upon  
24 "egregious facts" or "the litigants' bad faith." While the court noted near the end of its opinion  
25 that "[w]e have grave doubts that petitioners have done all possible to present a truthful picture  
26 of the case" (72 Cal.App.3d at 685), nothing in the opinion indicates the court's approval of the  
27 bond turned upon those facts. To the contrary, the court agreed that the trial court had "valid  
28 reasons . . . why the posting of a bond was fair and reasonable," which had nothing to do with

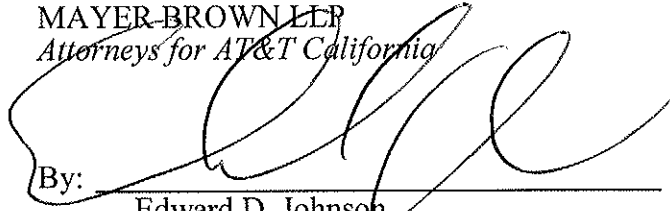
1 misconduct by the petitioners. Rather, those reasons included that the “real parties in interest  
2 made investments and proceeded in good faith” and “are subjected to damages occasioned by  
3 delay in completion” of construction. *Id.* at 680.

4 The same holds true here. As demonstrated above, a stay would cause [REDACTED]  
5 [REDACTED] As a result, if the Court grants a stay, it should be conditioned upon the  
6 posting of a bond sufficient to compensate AT&T for its damages.

7 **CONCLUSION**

8 For the reasons explained above, the Court should deny petitioners’ request for a stay. In  
9 the alternative, if the Court grants a stay it should be conditioned upon the posting of a  
10 substantial bond sufficient to compensate AT&T for the harm it will suffer.

11  
12 DATED: September 21, 2011

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