

PG&E Bankruptcy Presents Questions on Inverse Condemnation

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PG&E has [filed](#) for bankruptcy amidst an outcry from key investors. Roughly one month ago, the investor-owned utility announced plans to file for Chapter 11, prompting investors to offer emergency funds in an effort to keep the company afloat—one investor group offered \$4 billion to help avoid bankruptcy. Despite these pleas from shareholders, PG&E has nonetheless launched the bankruptcy proceedings—recently, it signed a commitment letter with several large banks, thereby obtaining \$5.5 billion in DIP financing. Using this combination of revolving credit and term loans, PG&E will be able to continue its operations while it restructures.

At the same time, the PG&E bankruptcy has triggered fear among regional power producers. Energy companies (such as NextEra Energy, Inc.) generate power and sell it to PG&E. In an effort to reduce its financial obligations during the bankruptcy proceedings, PG&E may seek to void or invalidate its power purchase agreements. As such, NextEra and its subsidiaries have [filed](#) an action before the Federal Energy Regulatory Commission, seeking an injunction which would prevent PG&E from abrogating or amending the terms of its power purchase agreements.

Further still, while the bankruptcy and attendant legal disputes continue, ordinary consumers are worried that PG&E will raise rates as it tries to cover the cost of its contingent liabilities. Altogether, the utility company is embroiled in a legal mess, entangled in a web of various competing interests and financial obligations. The question presents itself: how did PG&E end up drowning in \$30 billion of potential liability, swallowed in a morass of legal proceedings, and demonized by consumers who fear a rate increase? The answer lies in the doctrine of inverse condemnation.

The doctrine is typically invoked when the government takes or damages private property without paying the ‘just compensation’ required by eminent domain law. Essentially, where the government appropriates or damages private property for public use, the owner is entitled to just compensation. Where the government initiates a ‘taking’ of private property without compensating the owner, the doctrine of inverse condemnation provides an avenue for the property-owner to recover damages. Importantly, the doctrine can be invoked when the government has expropriated property, or when the government has damaged property so irreparably that it is no longer usable by the owner.



For example, in the midst of Hurricane Harvey, the Army Corps of Engineers released water from swollen reservoirs, causing nearby homes to flood. This was a necessary measure, helping to redirect the torrent and thereby averting far greater property damage in downstream communities. In short, they damaged private property, in order to serve the broader public good. Inverse condemnation [provided](#) a means for the flooded homeowners to seek redress; the Army Corps was forced to compensate the homeowners for the damage to their houses. How does inverse condemnation relate to PG&E's bankruptcy?

Traditionally, inverse condemnation has been applied to government "takings." It allowed private property-holders to extract compensation from public agencies. However, CA courts have [ruled](#) that investor-owned, publicly traded utilities are subject to the inverse condemnation doctrine as well. Thus, where investor-owned utilities (such as PG&E) take or damage private property, they can be forced to 'justly compensate' the property-holders. Importantly, damages arising from wildfires technically constitutes a 'taking'—that is, if a utility is found to have proximately caused a wildfire that, in turn, causes damage to private property, then the utility can be held liable under the inverse condemnation doctrine. And, perhaps most importantly, liability does not require a showing of negligence—so long as the utility caused the damage or taking, it is liable.

This brings us to PG&E's current troubles. In the past few years, California has been ravaged by wildfires, shattering the lives of thousands across the state as entire towns have been engulfed in flames. It is believed that PG&E's operations caused many of these tragic fires. Altogether, the utility is facing up to \$30 billion in liability. This contingent liability is what prompted PG&E to file for bankruptcy.

As the company spirals into legal and financial turmoil, the PG&E case raises important questions about the doctrine of inverse condemnation. Why should inverse condemnation apply to non-governmental agencies? Why should a doctrine intended for government takings be used to hold investor-owned, publicly traded utilities liable? And wouldn't allowing PG&E to pass the cost of its liability on to ratepayers defeat the purpose of the doctrine? Supposedly, by imposing strict liability on utilities for property damage, we encourage these utilities to take more-than-reasonable, higher-than-ordinary care. But if utilities can simply shift liability costs along to consumers, then companies like PG&E have little incentive to invest in taking such extraordinary care. Altogether, the complex PG&E crisis may prompt state lawmakers to reconsider the value of an inverse condemnation doctrine with respect to publicly traded utilities.