

Utility Companies with Wildfire Liability Exposure Pose Unique Considerations for Investors

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The greater frequency and scale of wildfires in the last several years have created new operational and fiscal challenges for electric utility companies. They have had to both improve their fire preparedness and deal with an increasing number of class actions and other lawsuits arising out of both single catastrophic fires and multiple smaller fires. Pacific Gas & Electric Company (“PG&E”) made headlines in 2019 when it filed for bankruptcy protection after a series of at least 17 major California wildfires that regulators tied to its operations.¹ Before emerging, it reached a settlement with wildfire victims to fund a \$13.5 billion trust, half in cash and the other in equity in the reorganized company. The fallout from the PG&E bankruptcy changed the landscape for electric utility companies, providing a framework for handling wildfire liability and spurring in changes in the law in California.

More recently, Hawaiian Electric Industries (“HEI”) became the target of a flurry of litigation brought by the County of Maui and individual plaintiffs relating to the deadly August 2023 fire that tragically destroyed the town of Lahaina.² While this incident was extraordinary and the causes of the destruction remain to be determined, other utilities also are

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¹ Russell Gold et al., *PG&E Sparked at Least 1,500 California Fires. Now the Utility Faces Collapse*, The Wall Street Journal (Jan. 13, 2019), <https://www.wsj.com/articles/pg-e-sparked-at-least-1-500-california-fires-now-the-utility-faces-collapse-11547410768>; see Press Release, *CPUC Holds PG&E Accountable for Flawed Implementation of Fall 2019 PSPS Events*, California Public Utilities Commission (May 26, 2021).

² Press Release, *Hawaiian Electric Provides Update on Lahaina Fires, Response*, Hawaiian Electric Industries (Aug. 27, 2023), [clearygottlieb.com](https://www.hei.com/press-releases/hawaiian-electric-provides-update-on-lahaina-fires-response)



facing increasing amounts of potential tort liability related to other recent wildfire activity. For example, Oregon-based PacifiCorp is the subject of similar lawsuits and has both settled litigation and had judgments assessed against it based on various wildfires in the West that occurred between 2020-2022. PacifiCorp's attorneys at one time stated that its potential liability for just one of these cases could be as high as \$11 billion.³

This article addresses common issues relating to wildfire liability that should be accounted for when considering an investment into an electric utility company. Specifically, this article looks at the typical theories of liability asserted against utilities; some of the unique operational, risk management and regulatory considerations that may increase a utility's potential for liability or limit its strategy for defraying and passing on such costs; and the various strategies that may be pursued to resolve litigation in the wake of wildfires, both in the ordinary course of business and through a bankruptcy process.

Company Operations, Risk Mitigation Measures and Capital Expenditures

As part of their regular operations, electric utility companies are either expected or required to follow certain practices and adopt policies that will mitigate the risk of wildfires or their spread, particularly in recent years as environmental changes have resulted in an uptick in fires over time. These risk-mitigation measures may include the proper maintenance of

power lines, updates to the power grid, trimming back vegetation, potentially reinforcing or burying powerlines in high-risk areas, and developing public safety power shutoff ("PSPS") plans to implement during periods of dry heat and high winds.⁴ These measures are capital intensive—for example, PG&E estimated it would spend \$18 billion to implement its 2023-2025 Wildfire Mitigation Plan.⁵ As discussed below, electric utility companies typically must obtain regulatory approval to borrow money or pass through such capital expenditures to customers through rate increases, if they are allowed to do so at all, which may slow adoption. Where a PSPS plan is adopted, it also must actually be followed properly at the right times. For example, the California Public Utilities Commission fined PG&E \$106 million for its "flawed implementation" of its PSPS plan in Fall 2019.⁶ An electric utility company's PSPS plans, its history of inspections and documentation, and its capital expenditure program are all important indicators of its potential litigation exposure in the event of wildfire. PSPS plans also may be subjected to scrutiny in hindsight, given the tension between the desire to maintain an active grid where possible, including to the extent the grid may be necessary or helpful in times of a weather event, and the additional fire risk that may result from not shutting off some or all of a grid during a severe storm. At the time of the Lahaina wildfire, Hawaiian Electric had a draft Wildfire Mitigation Plan in place internally that it subsequently shared with the Hawaiian Public Utilities Commission

³ See Ryan Haas, *Oregon Jury Finds Electric Utility PacifiCorp Liable in Devastating Wildfires*, Oregon Public Broadcasting (June 15, 2023), <https://www.klcc.org/crime-law-justice/npr-top-stories/2023-06-15/oregon-jury-finds-electric-utility-pacificcorp-liable-in-devastating-wildfires>.

⁴ A "Public Safety Power Shutoff" is a last-resort, temporary power outage proactively implemented by electric companies when there is increased risk of wildfire to an area in its network. See *Pacific Power*, "Public Safety Power Shutoff," <https://www.pacificpower.net/outages-safety/wildfire-safety/public-safety-power-shutoff.html>; *Pacific Gas & Electric Company*, "What is a Public Safety Power Shutoff?" <https://www.pge.com/en/outages-and-safety/safety/community-wildfire-safety-program/public-safety-power-shutoffs.html>.

However, PSPS plans are not universally adopted and can be controversial due to the secondary consequences of shutting off electric systems, such as shutting off air-conditioning and essential

medical devices. In West Maui, the water system relies on electricity to pump water through water network and to fire hydrants, complicating the decision of whether and when to shut off the electric system. Hawaiian Electric's proposed wildfire mitigation measures, proposed after the August 8 Lahaina wildfire, do not include a PSPS as part of the program. *Hawaiian Electric Industries*, "Wildfire Safety,"

<https://www.hawaiianelectric.com/safety-and-outages/wildfire-safety>.

⁵ *Pacific Gas & Electric Company*, 2023-2025 Wildfire Mitigation Plan 68 (March 27, 2023),

<https://www.pge.com/content/dam/pge/docs/outages-and-safety/outage-preparedness-and-support/2023-wildfire-mitigation-plan.pdf>.

⁶ See Press Release, *CPUC Holds PG&E Accountable for Flawed Implementation of Fall 2019 PSPS Events*, California Public Utilities Commission (May 26, 2021).

in September 2023.⁷ That plan has been the focus of ongoing scrutiny since the wildfire.

Theories of Wildfire Liability

Cataclysmic events like wildfires may result in various property damage and even personal injuries or loss of life in the worst scenarios. In the wake of a fire, electrical utilities typically have faced various class actions filed in the following days or weeks, where the complaints may take years to resolve, with additional appeals to follow, absent dismissal or settlement. Claims brought against a utility tend to fall within several recurring categories, although investors should understand the unique theories of liability that may vary by state and affect the likelihood claims will succeed. These claims including the following:

1. Negligence

Negligence claims are often core to cases brought against electric utility companies following a disastrous wildfire, and may include claims for punitive damages.⁸ Among other grounds, plaintiffs base negligence claims on the failure to properly design, construct, inspect, repair or otherwise maintain the company's equipment and electrical system; the failure to deenergize power lines during weather events that could give rise to wildfires; the failure to implement policies and procedures to avoid causing wildfires; and/or the failure to properly implement vegetation management plans.⁹ In certain cases, such as with a complaint brought by the Sonoma County District Attorney against PG&E related to the 2019 Kincadee fire in Sonoma County, California, utility companies may even face charges of gross or criminal negligence or recklessness.¹⁰

⁷ See Letter from Shelee M. Kimura, President and CEO of HEI, to the Honorable H. Morgan Griffith, Chair, Subcommittee on Oversight and Investigations, U.S. House of Representatives (Oct. 27, 2023),

https://www.hawaiianelectric.com/documents/about_us/news/2023/20231027_house_CEC_responses.pdf.

⁸ See *Cnty. of Maui v. Maui Elec. Co.*, Case No. 2CCV-23-0000238, at 37, 39 (2d Cir. Ct. Haw., filed Aug. 24, 2023) (seeking punitive damages related to both simple and gross negligence claims).

⁹ See, e.g., Complaint, *Eder v. Maui Elec. Co.*, Case No. 1CCV-23-0001045 (1st Cir. Ct. Haw., filed Aug. 12, 2023); Complaint,

Utility companies have become particularly aware of the potential award of non-economic and punitive damages associated with negligence claims, seeking to settle or appeal particularly large awards. In June 2023, PacifiCorp announced it intended to appeal the verdict in the *James* case, a case covering more than 242 wildfires in Oregon, after the jury awarded the 17 named plaintiffs extensive noneconomic and punitive damages amounting to a total award of \$90 million, of which only \$4 million represented economic damages. In December 2023, PacifiCorp entered into settlement agreements totaling \$299 million with 463 individual plaintiffs related to the 2020 Archie Creek Complex Fire in Douglas County, Oregon, as well as a \$250 million settlement with ten commercial timber plaintiffs related to the same fires.¹¹ More recently, in February 2024, nine class members from the *James* class-action lawsuit requested that a Multnomah County court enter a limited judgment and money award of \$61 million following a jury verdict that found PacifiCorp liable for \$5.2 million of economic damages and \$56 million of non-economic damages for the nine plaintiffs.¹² PacifiCorp has announced its intent to appeal this latest judgment as part of its broader appeal of judgments related to the 2020 wildfires.

2. Inverse Condemnation

Inverse condemnation claims permit property owners to recover the value of property that a public entity has seized for public use without properly exercising the

Wheeler v. PG&E Corp., Case No. CGC-23-607657 (S.F. Cnty. Sup. Ct., filed July 13, 2023).

¹⁰ Complaint, *People v. Pac. Gas & Elec. Co.*, Case No. SCR-745228-1 (Sonoma Cnty. Sup. Ct., filed Apr. 6, 2021). See also Complaint, *Cnty. of Maui v. Maui Elec. Co.*, Case No. 2CCV-23-0000238 (2d Cir. Ct. Haw., filed Aug. 24, 2023) (alleging both negligence and gross negligence).

¹¹ PacifiCorp, "Information on Wildfire Litigation,"

<https://www.pacificorp.com/about/information-wildfire-litigation.html>.

¹² Final Verdict, *Cuozzo v. PacifiCorp*, No. 20-CV-33885 (Cir. Ct. Or. Jan. 24, 2024).

power of eminent domain.¹³ The availability and contours of inverse condemnation claims—which arise under a state’s constitutional takings clause—vary significantly by state, including with respect to whether inverse condemnation claims may be asserted against privately owned utility companies, and whether the standard is strict liability or negligence.

Under California law, private and public utilities may be held strictly liable in inverse condemnation actions brought by property owners for destruction or damage to their properties caused by wildfire where the fire was the result of improperly maintained utility company equipment. Such liability was a precipitating factor to PG&E’s ultimate decision to seek chapter 11 protection.¹⁴ By contrast, Oregon requires both negligence and proof of the defendant’s intent to take the property for public use, and as such plaintiffs have not succeeded on these claims against PacifiCorp in that state.¹⁵ No precedents exist in Hawaii for making an inverse condemnation award against a private actor

on a strict liability theory, so it remains to be determined whether these claims may be viable there.

3. Other Theories of Liability

Plaintiffs also typically assert various other claims derived from property law, including public nuisance, private nuisance, and trespass.¹⁶ These claims generally require showing unwanted interference in an owner’s property and have been found to be valid causes of action in at least one of the class actions.¹⁷ In addition, utility companies may face allegations based on more novel theories, such as ultrahazardous activity¹⁸ and community health impact claims.¹⁹ The case law is rapidly evolving in this area, and investors should monitor new litigation trends. While negligence claims typically serve as the main allegation in wildfire litigation, property-based claims, such as nuisance and trespass, can and do show up with some frequency and can provide alternative ways for plaintiffs to seek non-economic damages.²⁰

¹³ See e.g., *Pac. Bell v. City of San Diego*, 81 Cal. App. 4th 596, 602 (2000) (“A successful inverse condemnation action must prove that a public entity has taken or damaged its property for a public use. . . . Damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered under inverse condemnation.”).

¹⁴ See *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 752 (1999) (destruction by acquiring authority); *Aetna Life & Cas. Co. v. City of Los Angeles*, 170 Cal. App. 3d 865, 873 (Ct. App. 1985) (applying strict liability); *Pac. Bell v. City of San Diego*, 81 Cal. App. 4th 596, 607 (2000) (applying strict liability); *Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 208 Cal. App. 4th 1400, 1408 (Cal. 2017) (recognizing that public and private utilities can be liable for inverse condemnation).

¹⁵ See Final Verdict, *James v. PacifiCorp*, No. 20-33885 (Cir. Ct. Ore. June 9, 2023). Unlike California, Oregon does not apply strict liability and requires showing that (a) a person was negligent in causing or contributing to the cause of a wildfire or causing it to spread, and (b) the alleged act was done with the intent to take the property for a public use. See Or. Rev. Stat. Ann. 477.092 (West) (liability requires negligence and causation); *City of Ashland v. Hoffarth*, 84 Or. App. 265, 270 (1987) (applying a three-element test to inverse condemnation, “(1) a taking of private property (2) by an agency or subdivision of the state having the power of eminent domain, and (3) the property must be property that is subject to being taken for a public use”); *Vokoun v. City of Lake Oswego*, 335 Or. 19, 27 (2002) (requiring a showing that the acts were done with the intent to take the property for public use.).

¹⁶ See e.g., Complaint, *Hitchcock v. Pac. Gas & Elec. Co.*, Case No. 34-2020-00290833, at 9-10 (Sacramento Cnty. Sup. Ct., filed Dec. 16, 2020) (including a private nuisance claim); Complaint, *Cnty. of Maui v. Maui Elec. Co.*, Case No. 2CCV-23-0000238, at

44 (2d Cir. Ct. Haw., filed Aug. 24, 2023) (asserting a claim for trespass).

¹⁷ The final verdict in the class action lawsuit, *James v. PacifiCorp*, found PacifiCorp guilty of private nuisance, public nuisance and trespass, in addition to simple and gross negligence. The only claim that PacifiCorp was not found guilty of was for inverse condemnation. Final Verdict, *James v. PacifiCorp*, No. 20-33885 (Cir. Ct. Ore. 2023).

¹⁸ See, e.g., Complaint, *Eder v. Maui Elec. Co.*, Case No. 1CCV-23-0001045, at ¶ 124 (1st Cir. Ct. Haw., filed Aug. 12, 2023) (alleging Hawaiian Electric carried on an “abnormally dangerous activity by maintaining power in their power lines during a High Wind Watch and Red Flag Warning that specifically cautioned that high winds could topple power poles and that any fire that started would likely spread rapidly”); see also Complaint, *Cnty. of Maui v. Maui Elec. Co.*, Case No. 2CCV-23-0000238, at 41 (2d Cir. Ct. Haw., filed Aug. 24, 2023) (alleging substantially similar).

¹⁹ See, e.g., Complaint, *Wheeler v. PG&E Corp.*, Case No. CGC-23-607657 (S.F. Cnty. Sup. Ct., filed July 13, 2023) (asserting a claim that PG&E caused “significant exposure to wildfire smoke and other toxic, carcinogenic substances at levels that are far higher than normal”).

²⁰ These claims have been successfully asserted in Oregon in at least one suit, pending appeal, related to the 2020 Labor Day fires, see Final Verdict, *James v. PacifiCorp*, No. 20-33885 (Cir. Ct. Ore. 2023), appeal docketed, Case No. A183140 (Or. Ct. App. Jan. 4, 2024), and have been pled in many of suits against Hawaiian Electric more recently, *Eder v. Maui Elec. Co.*, Case No. 1CCV-23-0001045 (1st Cir. Ct. Haw. filed Aug. 12, 2023); *Cnty. of Maui v. Maui Elec. Co.*, Case No. 2CCV-23-0000238 (2d Cir. Ct. Haw., filed Aug. 24, 2023).

In the devastating instances where wildfires claim lives, family members and the estates of victims also pursue wrongful death claims against utility companies associated with the fire.²¹ These types of claims typically are founded in allegations of negligence, recklessness or other tortious conduct by the utility, such as failing to properly maintain electric equipment or implement and follow regulations intended to avoid fire ignition, and the damages sought may include non-economic and special damages. While class actions may include wrongful death subclasses, as seen in one of the recent suits filed in Hawaii seeking certification of a Wrongful Death Subclass,²² these types of claims are specific to the fire as well as the permutations of state law requirements and are less frequent than the main theories of liabilities discussed above.

Additional Regulatory Complexities

Privately-owned electric utility companies are highly regulated by state public utility commissions (“PUCs”) or equivalent agencies. PUCs set the terms and conditions of the utility business, and have approval authority over many public utility projects, as well as all consumer rate increases. PUCs’ authority over rate-setting is significant because utility companies typically recover the costs of almost all of their expenditures, including capital expenditures to

maintain the power lines, modernize the grid and implement other wildfire mitigation plans, through customer rates. That said, utilities have successfully gone to the market to finance the improvement of their operations. For example, since 2021, Southern California Edison Company (“SCE”) has successfully issued numerous secured recovery bonds for the purpose of wildfire mitigation and capital expenditures.²³ PUCs also may limit a utility company’s ability to recover costs associated with wildfire liability through ratepayer assessments, particularly where such ratepayers are from the same community that suffered the losses.²⁴

The PUCs’ regulatory authority to approve rate changes continues even in bankruptcy, and with respect to exit financing needed to fund a plan of reorganization and emerge from chapter 11. For example, PG&E had to submit its plan of reorganization to the California PUC (“CPUC”) for approval.²⁵ CPUC considered the rate impacts of the proposed plan, negotiated modifications, and ultimately approved the plan.²⁶ While CPUC’s approval was the only required government sign-off, PG&E went a step further and requested Governor Newsom’s approval of the plan before submitting the plan to CPUC and the bankruptcy court to ensure it complied with the then-newly passed Assembly Bill

²¹ See e.g., Complaint, *Hitchcock v. Pac. Gas & Elec. Co.*, Case No. 34-2020-00290833 (Sacramento Cnty. Sup. Ct., filed Dec. 16, 2020); Complaint, *Eder v. Maui Elec. Co.*, Case No. 1CCV-23-0001045 (1st Cir. Ct. Haw., filed Aug. 12, 2023).

²² See *Eder v. Maui Elec. Co.*, Case No. 1CCV-23-0001045 (1st Cir. Ct. Haw., filed Aug. 12, 2023) (seeking certification of a Wrongful Death Subclass).

²³ Financing Order Authorizing the Issuance of Recovery Bonds Pursuant to Assembly Bill 1054, California Public Utilities Commission (November 10, 2020).

²⁴ For example, in 2017, the California PUC (“CPUC”) denied San Diego Gas & Electric Company’s (“SDG&E”) application to recover costs of \$379 million related to 2007 wildfires given that it failed to “reasonably manage and operate its facilities” prior to those wildfires, thus falling short of the CPUC’s “prudent manager” standard. Decision Denying Application, Decision No. 17-11-033, Public Utilities Commission of the State of California (December 6, 2017). In 2020, PG&E’s bankruptcy settlement with wildfire victims totaled \$13.5 billion, with half paid in new equity in the reorganized PG&E and half paid in cash, neither paid for through rate-increases. *In re PG&E Corp.*, No. 19-30088 (DM) (Bankr. N.D. Cal. June 20, 2020). In June 2023, PacifiCorp filed a

request with the Public Utility Commission of Oregon seeking to defer the incremental costs associated with third-party claims related to 2020 wildfires. See Application for Authorization of Deferred Accounting Related to Wildfire Claims, In the Matter of PacifiCorp, (June 15, 2023), <https://edocs.puc.state.or.us/efdocs/HAA/um2292haa17246.pdf>.

While PacifiCorp states that the company is not currently seeking to recover these deferred costs through increases in rates, the company is seeking “to preserve its ability to seek recovery in the future event the outcome could potentially impact the financial stability of the Company, which would result in higher costs to customers.” *Id.* at 3.

²⁵ Press Release, *CPUC Approves PG&E’s Reorganization Plan, Requiring Governance and Oversight Changes*, California Public Utilities Commission (May 28, 2020).

²⁶ In order to secure CPUC approval for its plan, PG&E committed to a rate-neutral \$7.5 billion securitization transaction to finance costs in a manner that benefitted customers and accelerated payment to victims, to not seek recovery of amounts paid to victims in customer rates, and to not reinstate common stock dividends until it had \$6.2 billion in non-GAAP core earnings. See *id.*

1054 (“AB 1054”).²⁷ Governor Newsom initially rejected PG&E’s plan before endorsing a modified version of the plan. Investors in a utility should consider the impact the regulator may have in determining where losses are borne within a utility’s capital structure and on the requirements imposed on the utility should it need to restructure its debts.

Beyond PUCs, utility companies are subject to the scrutiny of additional stakeholders. By nature of serving the public, as well as the sweeping impacts of wildfire damage, they also must be responsive to the public, the news media, other government agencies, and politicians, as well as their own investors and shareholders, when developing their strategic plans and responding to disasters. In the wake of catastrophic wildfires, it is expected that utilities may seek relief from lawmakers to shield them from wildfire liability. For example, PacifiCorp, through its subsidiary Pacific Power, is also seeking to get the PUC of Oregon to prospectively limit damages in catastrophic wildfire-related litigation to actual damages, prohibiting the recovery of other types of damages.²⁸ In California, utility companies may now avail themselves of the multi-billion dollar California Wildfire Fund, which was established with the passage of AB 1054 in 2019 to pay or reimburse participating utility companies for eligible claims that result from a wildfire after it has been determined that the participating utility caused the fire.

Resolution of Wildfire Claims in Bankruptcy

While most utilities are able to manage wildfire litigation and satisfy such claims as part of the ordinary course of their operations, a catastrophic wildfire has the potential to materially change a utility company’s financial health and even drive it into

bankruptcy, as happened with PG&E. To date, the cause of the Maui fires has not been finally determined and HEI has continued to operate outside of bankruptcy protection even where the Federal Emergency Management Agency (“FEMA”) and the Pacific Disaster Center (“PDC”) have estimated that the cost to rebuild in Lahaina, Maui could exceed \$5.5 billion—a figure two times HEI’s market capitalization in 2022.²⁹ Similarly, PacifiCorp has continued to defend various litigation in Oregon and California related to fires from September 2020 that covered more than 500,000 acres, as well as the 2022 McKinney Fire, which was the largest wildfire in California in 2022. PacifiCorp is still facing fresh litigation related to those fires, including a new wave of suits filed by wineries in the region alleging that the fires damaged their harvests in succeeding years. Further, as noted above, PacifiCorp has portended that its potential liability in just one class action lawsuit may be as much as \$11 billion once damages are determined for the rest of the class beyond the named plaintiffs—this at a time when its net worth was \$10.7 billion.³⁰ However, future wildfires associated with these or other companies could change the calculus of whether to seek protection for a specific company.

The use of bankruptcy courts to resolve mass tort claims has garnered significant headlines recently, as companies perceive substantial benefits to the finality of the bankruptcy process in the appropriate situation. A bankruptcy case enables the company to channel and resolve all claims under a single plan of reorganization (or liquidation), although there are limits to what the court itself can resolve.

Bankruptcy courts are granted limited jurisdiction; while they can determine most claims filed against a debtor, under 28 U.S.C. § 157(b)(2)(B), they cannot

²⁷ Assembly Bill 1054 imposes certain requirements on electrical utility companies in order to access the Wildfire Fund, which is intended to serve as a “revolving liquidity fund” for eligible electric utilities to pay for certain claims related to catastrophic wildfires. See Assembly Bill 1054 (Cal. 2019).

²⁸ Advice No. 23-018—Rule 4—Application for Electrical Service, PacifiCorp (October 24, 2023),

<https://edocs.puc.state.or.us/efdocs/UAA/uaa153525.pdf>.

²⁹ Press Release, *Pacific Disaster Center and the Federal Emergency Management Agency Releases Fire Damage*, County

of Maui, Hawai’i (Aug. 20, 2023),

<https://www.mauicounty.gov/CivicAlerts.aspx?AID=12683>.

³⁰ See Claire Rush and Gene Johnson, *Oregon Jury: PacifiCorp Must Pay Punitive Damages for Fires, Plus Award That Could Reach Billions*, AP News (June 14, 2023),

<https://apnews.com/article/oregon-wildfires-pacificcorp-lawsuit-damages-b525debb59e83f3fd623c74f3329e80e> (“[An attorney for PacifiCorp] said the utility could face bankruptcy if punitive damages exceed its net worth of \$10.7 billion”).

finally determine the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims. However, a claim process is approved in bankruptcy that identifies all potential claimants, and the debtor may reorganize after compromising such claims under a bankruptcy plan. Under 11 U.S.C. § 502(c)(1), a bankruptcy court also may estimate the value of claims for the purposes of confirming a plan and distribution where waiting out the litigation would cause “undue delay” to the administration of the chapter 11 case.³¹ A bankruptcy court also may permit an Article III judge to handle claims estimation proceedings where novel or complex issues are present. In PG&E, at the bankruptcy court’s recommendation, the district court oversaw certain claims estimation-related issues, including determining the value of claims arising from emotional distress or similar theories of recovery, the value of property damage claims, and the correct approach to estimating liabilities arising from more than 20 separate wildfires, as it was not clear that such issues fell within the bankruptcy court’s jurisdiction.³² Ultimately, PG&E and the Official Committee of Tort Claimants reached a settlement agreement that resolved all individual fire claims at issue before the district court was required to issue a decision.³³

A litigation trust typically is created to hold plan consideration and make plan distributions to tort victims over time. PG&E’s reorganization plan ultimately established three distinct vehicles for victims’ claims—the Fire Victim Trust, the Subrogation Wildfire Trust, and the Public Entities Wildfire Claims—administering and funding each category of claims separately. PG&E funded the latter two trusts with cash: \$11 billion to pay out insurers

and their assignees, and \$1 billion to pay out public entities. By contrast, it funded the Fire Victim Trust with a combination of \$6.75 billion in cash and \$6.75 billion in value of common stock of the reorganized company.³⁴ A key sticking point related to the litigation trust structures PG&E utilized concerned what it meant for Fire Victim Trust claimants to be “paid in full” since the value of the trust was based on stock that’s value was volatile.³⁵ In each case, the determination of the appropriate size of the trust and the necessary plan consideration will be heavily negotiated or litigated among the various parties in interest in the case.

Financing Judgments and Settlements

The regulatory context in which utility companies operate imposes additional constraints and considerations on financing mass tort judgments and settlements. As discussed above, a utility company’s ability to pass-on litigation-related costs to customers is contingent on the approval of the relevant PUC. Other reasons—such as public relations—may cause a utility company to decide not to seek to recover litigation-related costs from its customers. For example, PG&E committed to compensate fire victims without seeking to recover those costs through rate increases and instead sought a rate-neutral securitization for financing, raising \$9 billion through issuances of new PG&E common stock.³⁶ Additionally, the PG&E plan contemplated the incurrence of \$4.75 billion of new debt at the holding company, and \$33.35 billion of debt at the operating utility consisting of \$9.575 billion of reinstated prepetition senior notes, \$11.85 billion of new senior secured notes to be issued to holders of prepetition

³¹ 11 U.S.C. § 502(c)(1).

³² See Recommendation for Withdrawal of Reference of Proceedings in Part, *In re PG&E Corp.*, Case No. 19-30008-DM (Aug. 21, 2019) (discussing the numerous novel issues presented in the case complicating the bankruptcy court’s jurisdiction over the claims estimation process).

³³ *Id.*

³⁴ Some parties considered the financing of the Fire Victim Trust to be controversial given that it was 50% funded by stock in a company that was likely to be volatile as it emerged from bankruptcy. Shortly after emerging from bankruptcy in March 2020, PG&E issued additional common stock increasing the Fire

Victim Trust ownership interest from 20% to 22.19%. See Pacific Gas & Electric Corp., Current Report (Form 8-K) (June 11, 2020).

³⁵ In January 2023, the Fire Victim Trustee announced that it would increase pro-rata payments from 45% to 60% after selling additional PG&E stock. Press Release, *Fire Victim Trust to Increase Pro Rata Payments to California Fire Survivors from 45% to 60% Based on Recent Stock Sales*, Fire Victim Trust (Jan. 11, 2023).

³⁶ Press Release, *CPUC Approves PG&E’s Reorganization Plan, Requiring Governance and Oversight Changes*, California Public Utilities Commission (May 28, 2020).

senior note claims, \$5.925 billion of new senior secured notes or credit facilities to be issued in the market for cash and \$6 billion of new short-term debt expected to be refinanced after the effective date. Existing creditors, including financial creditors of a debtor, will need to account for the amount of debt that may need to be incurred to support plan distributions and provide fresh working capital to the company after exit, including to improve fire readiness for the future.

Leveraging Organizational Structure to Maximize Investment Protections

Private utility companies usually have complex organizational structures that knit together holding companies, subsidiaries, affiliates, and operating companies, including affiliates that may have operations unrelated to the utility business. It is critical for potential investors to distinguish which entities hold which assets and liabilities when evaluating potential exposure to wildfire liability. Entities involved in service provision, equipment or electric system maintenance and monitoring, and decision-making on PSPS and other wildfire management plans are likely the most exposed, whereas other entities may be removed from those functions, requiring plaintiffs to plead alter ego theories of liability, which can be difficult to successfully prosecute. However, other affiliates may be negatively impacted by significant financial impairment at the utility entity, and intercompany arrangements and corporate guaranties may impact sources of recovery for potential creditors.

Conclusion

As the risk and impact of catastrophic wildfires continues to rise across broader swaths of the country, investors need to take stock of the unique position that electric utility companies occupy in this space. Given the increasing occurrence of wildfires and the expectation utilities are modernizing their operations to account for such risks, electric utility companies and their investors need to well versed in these issues. Investors looking to increase their exposure to the utility segment should carefully consider how well positioned a given electric utility company is to

respond to wildfire allegations, the potential impact on specific issuances of financial debt from a catastrophic event, and the likely course of a restructuring if one were needed.

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