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August 26, 2011

TO: ISDA Credit Derivatives Determinations Committee (Americas)

FROM: Aurelius Capital Management, LP
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RE: Texas Competitive Electric Holdings Company LLC – Requested Determinations re Bankruptcy Credit Event

I. DEFINITIONS

Capitalized terms used but not defined herein shall have the meaning set forth in the 2003 Credit Derivatives Definitions, as modified by the 2009 ISDA Credit Determinations Committee, Auction Settlement and Restructuring Supplement to the 2003 Credit Derivatives Definitions published on July 14, 2009 (as so amended, the "**ISDA Definitions**").

Except as otherwise noted, section references are to sections of the ISDA Definitions.

"**Committee**" means the ISDA Credit Derivatives Determinations Committee.

"**TCEH**" means Texas Competitive Electric Holdings Company LLC, a direct, wholly owned subsidiary of EFCH, and an indirect wholly owned subsidiary of EFH. TCEH is the Reference Entity to which this request pertains.

"**EFCH**" means Energy Future Competitive Holdings Company, a wholly owned subsidiary of EFH, and the immediate parent of TCEH.

"**EFH**" means Energy Future Holdings Corp., the direct parent of EFCH and the indirect parent of TCEH.

II. QUESTIONS POSED

This request relates to transactions subject to the decisions of the Committee, including Standard North American Corporate CDS and bullet LCDS contracts, for which the Reference Entity is TCEH. We are requesting the Determination Committee to answer two questions:

> Question 1: Has a Bankruptcy Credit Event under Section 4.2(b) occurred by virtue of TCEH's insolvency?

Question 2: Did such Credit Event occur on or after the Credit Event Backstop Date?

We believe the answer to both of these questions is resoundingly "yes."

We believe the answer to Question 2 cannot be "no" unless the Committee reaches one of the following conclusions:

> (x) TCEH is not insolvent (so the answer to Question 1 is "no"). In this event, it would be important for the Committee to report that determination, so holders of TCEH CDS will know that this request was premature and can be re-raised at a later date if the circumstances so warrant.
>
> (y) TCEH is insolvent, but the associated Credit Event is for some reason determined not to have occurred on or after the Credit Event Backstop Date. In this event, we hereby request the Committee to report the date on which that Credit Event occurred, so market participants will learn to assert insolvency at a point that might otherwise appear premature to responsible market participants (as it did to us in the present instance).

We wish to ensure that our request is not misconstrued when it reaches the public domain. Nothing herein asserts a claim against, alleges a default by, or seeks any remedy from TCEH. Rather, we seek a determination that holders of TCEH credit protection are now entitled to realize the benefits of that protection as against sellers of that protection. Accordingly, TCEH should have no interest in this matter, and we would not expect TCEH to respond to or otherwise involve itself in this request. If TCEH (or an affiliate) nonetheless involves itself in the Committee's consideration of this request, we would request the opportunity to review and respond to its submission and ask reasonable questions of its knowledgeable representatives.

III. PUBLICLY AVAILABLE INFORMATION

This submission refers to (among other things) Publicly Available Information in the form of the following SEC filings by EFCH and EFH, TCEH's direct and indirect parent companies, respectively:

2011Q2 10-Q:
http://www.sec.gov/Archives/edgar/data/1445049/000119312511201265/d10q.htm (EFCH's Form 10-Q for the quarter ended June 30, 2011, filed with the SEC on July 29, 2011).

8/15/2011 Registration Amendment:
http://www.sec.gov/Archives/edgar/data/1023291/000119312511223285/dposam.htm (EFH's Post-Effective Amendment No. 1 to a Registration Statement, filed with the SEC on August 15, 2011).

7/13/11 8-K: http://www.sec.gov/Archives/edgar/data/1023291/000119312511187687/d8k.htm (The Form 8-K filed by EFH and EFCH with the SEC on July 13, 2011).

10-K: http://sec.gov/Archives/edgar/data/1445049/000119312511039697/d10k.htm (EFCH's Form 10-K for the year ended December 31, 2010, filed with the SEC on February 18, 2011).

TCEH is not itself an SEC reporting company but is part of the EFCH and EFH consolidated reporting groups. Besides TCEH, all of EFCH's material subsidiaries are wholly owned subsidiaries of TCEH. (2011Q2 10-Q at page 4.)

The EFCH SEC filings provide both consolidated and condensed consolidating financial statements for EFCH and its subsidiaries, including TCEH. The most recent consolidating statements appear at Note 14 to the financial statements contained in 2011Q2 10-Q, starting at page 37. The consolidating statements differentiate between EFCH (referred to in the consolidating statements as the "Parent Guarantor"), TCEH (referred to as the "Issuer"), the many TCEH subsidiaries that have guaranteed TCEH's debts (referred to as "Other Guarantors"), and the remaining subsidiaries that are not guarantors (referred to as "Non-guarantors").

IV. DEFINITION OF INSOLVENCY

The present request relates to Section 4.2(b), which provides that a Bankruptcy (a form of Credit Event; see Sec. 4.1) occurs if a Reference Entity:

> "(b) becomes insolvent or is unable to pay its debts or fails or admits in writing in a judicial, regulatory or administrative proceeding or filing its inability generally to pay its debts as they become due".

In context it is clear that Section 4.2(b) uses the term "insolvent" in accordance with its most common modern definition: liabilities exceed the fair value of assets. The U.S. Bankruptcy Code, the Uniform Fraudulent Transfer Act, the New York Debtor and Creditor Law, and various provisions of Delaware law applicable to TCEH as a Delaware limited liability company all define "insolvent" in this precise fashion.[1] Black's Law Dictionary offers both this definition and the alternative of inability to pay one's debts;[2] but Section 4.2(b) includes inability to pay one's debts as another kind of "Bankruptcy," distinct from insolvency. Thus, for purposes of Section 4.2(b), "insolvent" must mean liabilities exceed fair value of assets.[3]

An "insolvency" does not require a default, a formal filing of bankruptcy, a failure to pay debts or an admission of an inability to pay debts as they become due, as these provisions are all separately addressed in Section 4.2 or other Credit Events. (That said, as we observe below, TCEH has admitted insolvency.)

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[1] See Title 11, Section 101(32)(A) of the United States Code, 11 U.S.C. §§ 101 ("the term 'insolvent' means … financial condition such that the sum of such entity's debts is greater than all of such entities property, at a fair value ….) ; Delaware Code, Title 6, Section 1302(a) (for purposes of fraudulent conveyance law in the state in which TCEH is organized, "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation.")**;** Uniform Fraudulent Transfer Act, § 2(a) (same definition as in Delaware Code just cited); N.Y. Debtor and Creditor Law, Art. 10, Sec. 271(1) ("A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured."). Cf. Del. Code, Title 6, Sec. 18-607(a) ("A limited liability company [such as TCEH] shall not make a distribution … to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company … exceed the fair value of [its] assets ….").

[2] See Black's Law Dictionary (Seventh Edition) (1999).

[3] To read insolvency as duplicative with other Credit Events would ignore its most common usage and also offend the black letter principle that "provisions of a … contract should be interpreted to give effect to all language employed." Allstate Insurance Company v. Leslie Hernandez, 282 A.D.2d 451, 723 N.Y.S.2d 65 (2d Dep't 2001).

V. THE INSOLVENCY CREDIT EVENT SHOULD BE HONORED, NOT SIDE-STEPPED

It can be more complicated to determine whether an insolvency (or any other event covered by Section 4.2(b)) has occurred than whether a payment default or a voluntary Chapter 11 case has occurred. While it may be tempting to side-step that task through some expedient, we are confident the Committee appreciates the importance of evaluating this request fully and fairly, and providing transparency to the market as to the Committee's conclusions and reasoning. The insolvency Credit Event is a clear term of the contractual relationship between protection buyer and protection seller, and it deserves to be honored no less than any other Credit Event. The financial markets depend on respect for contract rights, and the CDS market is no exception.

Moreover, ***side-stepping the insolvency Credit Event could jeopardize the regulatory capital of many regulated financial institutions***. The definition of Bankruptcy sets forth a comprehensive compendium of bankruptcy-type default events commonly (though not universally) found in debt agreements. The comprehensiveness of that definition is in turn essential to ensuring that the events that can trigger CDS protection subsume the default events creditors often find in debt agreements. If that comprehensiveness did not exist – or was in practice rendered illusory – CDS would lose its efficacy as a means of credit mitigation for regulatory purposes, and the present regulatory capital ratios of many institutions would be called into serious question.

It is therefore not surprising that the language of Section 4.2(b), including its reference to insolvency, has striking parallels in banking regulations. For example, in order for CDS to mitigate credit exposure for risk-weighting purposes, the UK's Financial Services Authority insists that the CDS satisfy the following requirement (among others):

> "Additional requirements for credit derivatives
>
> "For a credit derivative to be met the following conditions must also be met.
>
> "(1) Subject to (2) [inapplicable], the credit events specified under the credit derivative must at a minimum include … (b) the bankruptcy, insolvency or inability of the obligor to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and analogous events …."[4]

Basel II imposes the same requirement in order for CDS to reduce risk-weighting of assets:

> "Additional operational requirements for credit derivatives
>
> "191. In order for a credit derivative contract to be recognized, the following conditions must be satisfied: (a) The credit events specified by the contracting parties must at a minimum cover:…bankruptcy, insolvency or inability of the obligor to pay its debts, or failure or admission in writing of its inability generally to pay its debts as they become due, and analogous events…"[5]

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[4] Section 5.7.13 of the Prudential Sourcebook for Banks, Building Societies and Investment Firms, a module of the FSA Handbook (Aug. 2011) (https://fsahandbook.info/FSA/handbook/BIPRU.pdf).

[5] Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards: A Revised Framework: Comprehensive Version, Section 191 (Jun. 2006) (http://www.bis.org/publ/bcbs128.pdf).

In the U.S., the same requirement has been adopted by the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision:

> "*Eligible credit derivative* means a credit derivative in the form of a credit default swap…approved by the [regulator], provided that:
>
> "(3) If the credit derivative is a credit default swap … the contract includes the following credit events: … (ii) Bankruptcy, insolvency, or inability to of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events…."[6]

These requirements go to the capital adequacy of major financial institutions, a topic receiving much attention these days. Surely the regulators adopting these requirements did so with the expectation that banks will have the practical ability to realize the benefits of credit protection if the reference credit is insolvent. It would obviously undermine that objective if requests such as the present one were not given serious and objective consideration, or if procedural provisions were construed so as to make it virtually impossible for such requests to be submitted and substantiated in the real world.

VI. TCEH IS INSOLVENT

Although determinations of insolvency can be challenging, we believe this one is straightforward. Simply put, there is overwhelming evidence that TCEH is insolvent. The items discussed below are the most straightforward and publicly observable indicia of insolvency, but we do not believe that any responsible financial analysis would indicate that the TCEH is solvent.

A. TCEH HAS ADMITTED INSOLVENCY

The following statement appears in the 8/15/11 Registration Amendment at the bottom of page 9:

> "Valuation analyses of TCEH's business indicate that the principal amount of its outstanding debt exceeds its enterprise value."

This is a flat-out admission that TCEH is insolvent: according to the only valuation analyses cited by EFH, indeed the valuation its accountants appear to have relied upon, TCEH's enterprise value[7] is less than the principal amount of its debts (even before counting other liabilities).

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[6] See definition of "eligible credit derivative" in Section 2 of the capital adequacy guidelines of the above agencies, 72 FR 69288 at 69399 (Dec. 7, 2007) (http://edocket.access.gpo.gov/2007/pdf/07-5729.pdf).

[7] Consistent with common commercial parlance, EFCH uses the term "enterprise value" as equivalent to "fair value of assets." This is evident from 10-K at p.52: "Under this goodwill impairment analysis, if the reporting unit's [TCEH's] carrying value exceeds <u>its estimated fair value (enterprise value)</u> …" (emphasis added). Likewise, that disclosure provides a description of how EFCH determines TCEH's enterprise value, using methodologies that plainly are designed to estimate the fair value of its assets:

> "EFCH uses a combination of <u>three fair value inputs to estimate enterprise values</u> of its reporting unit [TCEH]: internal discounted cash flow analyses (income approach), comparable company values and any recent pending and/or completed relevant transactions. The income approach involves estimates of future performance that reflect assumptions regarding, among other things,

Reinforcing this point, the next sentence in this disclosure states:

> "We may have difficulty successfully implementing any refinancing of our debt or obtaining additional financing due to the valuation of our assets."

B. TCEH HAD VERY NEGATIVE BOOK EQUITY AT JUNE 30, 2011

At June 30, 2011, the EFCH consolidated group's book equity was negative $6.9 billion. (2011Q2 10-Q at p. 3.) On a separate-company basis, EFCH had $9 million of assets (other than investment in TCEH) and $918 million of liabilities. (2011Q2 10-Q at p. 44.) By removing these amounts, we establish that the TCEH consolidated group had a negative net worth of $6.0 billion at June 30, 2011.

Similarly, on a separate-company basis, TCEH had book equity of negative $6.1 billion at June 30, 2011. (2011Q2 10-Q at p. 44; see "Total equity" under the "Issuer" column.)

While negative book equity is a function of GAAP and is not synonymous with insolvency, we believe it is relevant in this instance for two reasons: (1) it helps to corroborate the other indicia of insolvency cited herein, and (2) a negative book equity of this magnitude is virtually impossible to accomplish without the company being insolvent.

C. TCEH HAS BEEN BADLY HURT BY THE EPA RULE ADOPTED IN JULY

The foregoing negative book equity does not reflect an impairment charge of approximately $400 million (before deferred income tax benefit) announced by EFH and EFCH in the 7/13/11 8-K. This charge resulted from a burdensome rule adopted by the EPA on July 6, 2011, known as the Cross-State Air Pollution Rule ("**CSAPR**"). Effective January 1, 2012, the CSAPR will require TCEH and its subsidiaries (which collectively house all of EFH's affected generating facilities) to reduce certain pollutants dramatically. Previously proposed versions of the CSAPR exempted Texas, which is where TCEH's generating plants are situated. The final rule adopted last month abruptly removed that exemption, leaving TCEH insufficient time to comply with the new rules in an efficient manner.

In the subsequently filed 2011Q2 10-Q (at pp. 75-76), EFCH described its costly options to cope with the CSAPR. It concluded by saying:

> "In connection with these actions, we will likely incur material capital expenditures and operating costs and experience material revenue decreases due to reduced generation and

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forward natural gas and electricity prices, market heat rates, generation plant performance and retail sales volume trends. Another key variable in the income approach is the discount rate, or weighted average cost of capital. The determination of the discount rate takes into consideration the capital structure, debt ratings and current debt yields of comparable companies as well as an estimate of return on equity that reflects historical market returns and current market volatility for the industry. Enterprise value estimates based on comparable company values involve using trading multiples of EBITDA of those selected companies to derive appropriate multiples to apply to the EBITDA of the reporting units. This approach requires an estimate, using historical acquisition data, of an appropriate control premium to apply to the reporting unit values calculated from such multiples. Critical judgments include the selection of comparable companies and the weighting of the three value inputs in developing the best estimate of enterprise value." (10-K at p. 52; emphasis added.)

wholesale power sales volumes, and we may incur material asset (including goodwill) impairment charges." (Emphasis added.)

D. TCEH'S DEBT AND CDS ARE TRADING AT DEEPLY DISTRESSED LEVELS

Trading prices for TCEH's debt and CDS provide overwhelming proof that the fair value of TCEH's assets is well less than the amount of its debts.

As shown in the table below, ***TCEH's debt is trading at a discount to face conservatively estimated at $9.7 billion***.

TCEH Debt Issue (a)	Maturity	Price at 8/15/11 (b)	Amt. Out. 6/30/11 (MM) (c)	Mkt. Val. 8/15/11 (MM)
Pollution Control Revenue Bonds				
Brazos River Authority				
5.40% Fixed Series 1994A	5/1/29	29.00	$ 39	$ 11
7.70% Fixed Series 1999A	4/1/33	34.00	111	38
7.70% Fixed Series 1999C	3/1/32	34.00	50	17
8.25% Fixed Series 2001A	10/1/30	36.00	71	26
8.25% Fixed Series 2001D-1	5/1/33	36.00	171	62
6.30% Fixed Series 2003B	7/1/32	31.00	39	12
6.75% Fixed Series 2003C	10/1/38	32.00	52	17
5.00% Fixed Series 2006	3/1/41	27.00	100	27
Sabine River Authority of Texas				
6.45% Fixed Series 2000A	6/1/21	31.00	51	16
5.20% Fixed Series 2001C	5/1/28	28.00	70	20
5.80% Fixed Series 2003A	7/1/22	29.00	12	3
6.15% Fixed Series 2003B	8/1/22	30.00	45	14
Senior Secured Facilities:				
Revolving Credit Facility - Non-Extended	10/10/13	84.00	195 (d)	164
Term Loan Facilities - Non-Extended	10/10/14	76.00	3,809	2,895
Revolving Credit Facility - Extended	10/10/16	67.50	427 (d)	288
Term Loan Facilities - Extended	10/10/17	73.00	15,370	11,220
Letter of Credit Facility - Extended	10/10/17	70.00	1,020	714
Other:				
10.25% Fixed Senior Notes	11/1/15	42.00	2,046	859
10.25% Fixed Senior Notes	11/1/15	41.00	1,442	591
10.50%/11.25% Senior Toggle Notes	11/1/16	46.50	1,485	691
11.50% Senior Secured Notes	10/1/20	86.00	1,750	1,505
15.00% Senior Secured Second Lien Notes	4/1/21	65.50	336	220
15.00% Senior Secured Second Lien Notes	4/1/21	65.50	1,235	809
			$ 29,926	$ 20,217
			Discount to Par	**$ (9,709)**

Notes to above table:

(a) The debts listed in the table represent those obligations for which we have reliable prices. The debts not listed include approximately $725 million of Pollution Control Revenue Bonds, $42 million Letter of Credit Facility due 2014, and approximately $100 million of other TCEH debt.

(b) Per various major dealer price indications available to us.

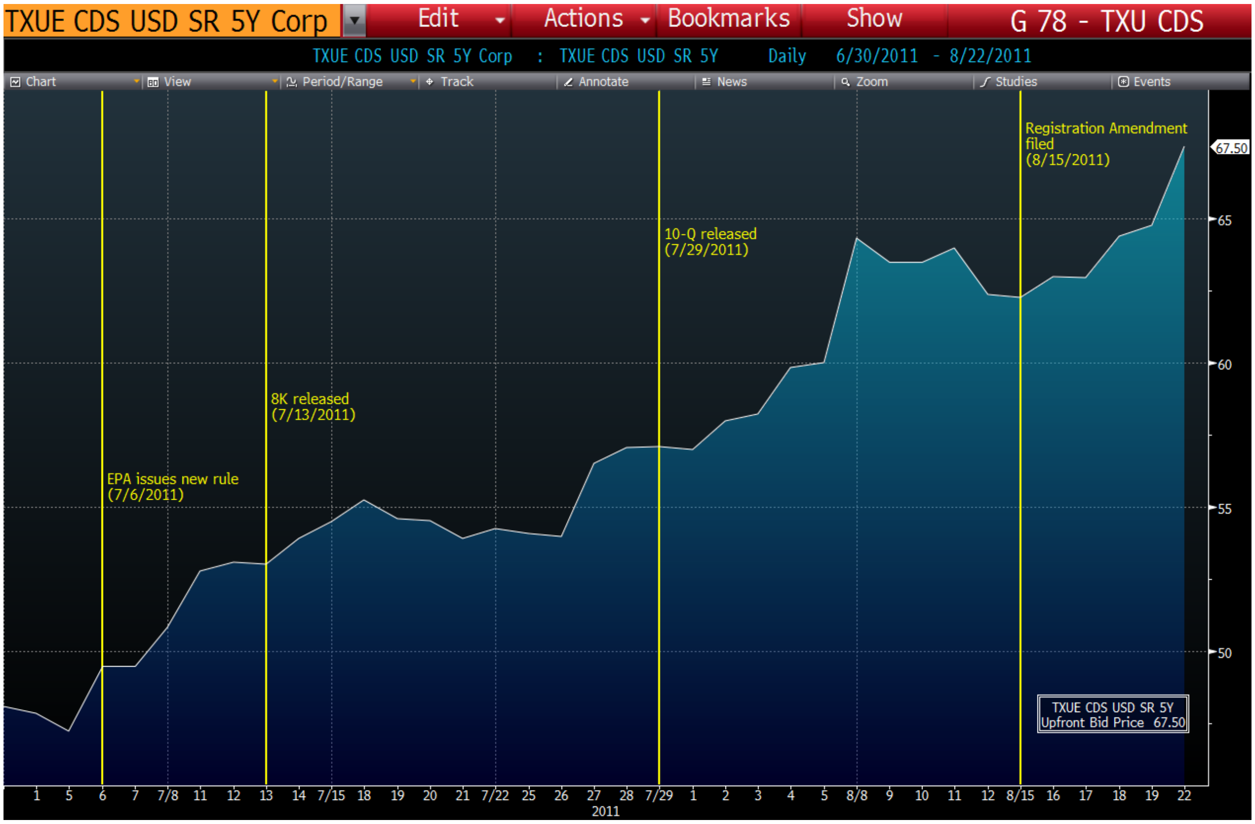
(c) As of June 30, 2011, per 2011Q2 10-Q, Note 5 to financial statement.

(d) We have calculated the market value of the revolving credit facilities as the amount drawn at June 30, 2011 multiplied by the corresponding market price. We believe our methodology understates the discount, because the revolving credit facilities are not fully funded, so the effective price after the "net back" would be less than the price we have used.

Similarly, using the same prices as above, TCEH's benchmark first-lien, second-lien and senior unsecured debts were trading at deeply distressed yields:

Obligation	Rank	Yield to Maturity	Spread to Treasuries (bp)
Term Loan Facilities due 2014	First Lien	14.62%	1,419
Term Loan Facilities due 2017	First Lien	13.19%	1,181
11.50% Senior Secured Notes due 2020	First Lien	14.27%	1,207
15.00% Senior Secured Second Lien Notes due 2021	Second Lien	24.45%	2,218
10.25% Fixed Senior Notes due 2015	Unsecured	39.57%	3,881

As shown in the graph below, five-year TCEH CDS has widened dramatically during the current quarter and is trading at levels that imply not only a high risk of default but also a very low level of expected recovery. The graph also shows the four key events during this period, which are discussed elsewhere in this submission. These CDS prices are thus further strong evidence that TCEH is insolvent. The TCEH five-year CDS is now trading at the widest levels since TCEH and its affiliates were acquired in October 2007.



E. FORWARD GAS PRICES HAVE FALLEN DRAMATICALLY

It is widely known that TCEH's prospective cash flow, hence its enterprise value, depends heavily on natural gas prices. Lower gas prices reduce the marginal selling price of power in TCEH's market, which in turn lowers the prices TCEH achieves for the power it generates mostly using coal. EFCH has repeatedly acknowledged this in its SEC filings. For example:

> "In [the Texas market], the wholesale price of electricity is largely correlated to the price of natural gas." 2011Q2 10-Q at p. 26.

The adverse effect on TCEH's cash flow from a fall in gas prices will be progressively greater in upcoming years, as TCEH's existing hedges expire. The volume of gas covered by TCEH's existing hedges will decline dramatically over the next few years, leaving TCEH completely unhedged in 2015. 2011Q2 10-Q pp. 46-47. Of course, TCEH might purchase new hedges, but the new hedges will only protect TCEH from further declines in natural gas prices. New hedges would provide no additional protection against the loss of cash flow that the present gas curve portends.

As shown in the table below, the forward gas curve dropped meaningfully from the end of the first quarter of 2011 to the end of the second quarter, and continued to drop during the present quarter. These drops have been particularly significant in the outer years, when TCEH is less hedged or (in the case of 2015) unhedged.

Date	Forward Market Prices for Calendar Year ($/MMBtu) (a) 2011(b)	2012	2013	2014	2015
March 31, 2011	$ 4.57	$ 5.06	$ 5.41	$ 5.73	$ 6.08
June 30, 2011	4.47	4.84	5.16	5.42	5.70
August 15, 2011	4.16	4.60	5.03	5.31	5.55

Date	% Change From March 31, 2011 Forward Market Prices 2011	2012	2013	2014	2015
June 30, 2011	-2.2%	-4.3%	-4.6%	-5.4%	-6.3%
August 15, 2011	-8.9%	-9.0%	-7.1%	-7.4%	-8.8%

(a) Based on NYMEX Henry Hub prices
(b) Consistent with the methodology disclosed in the EFCH 2Q2011 10Q, March 31, June 30 and August 15 natural gas prices for 2011 represent the average forward prices for April through December, July through December and September through December, respectively.

Based on our model, this change in the gas curve reduced TCEH's enterprise value by $2.05B after the end of the first quarter of 2011. Other models might reach a slightly different effect, but any responsible model would show this fall in the gas curve having a material adverse effect on TCEH.

VII. THIS REQUEST IS TIMELY

The applicable Credit Event Backstop Date occurred on or after June 30, 2011, hence this request is timely. This submission describes a confluence of events and inputs on or after June 30, 2011 that establish that TCEH became insolvent since then. Insolvency is always preceded by a period of deterioration, but we believe the tipping point occurred only recently. We do not expect anyone will attempt to prove to the Committee that TCEH has been continuously insolvent for more than the last 60 days, but we would appreciate the opportunity to respond were that to occur.

Even if someone could establish that TCEH has been continuously insolvent for more than the last 60 days, this request would nonetheless be timely: as explained below, the insolvency Credit Event recurs as long as the insolvency continues, with each successive day of uncured Credit Event generating its own Credit Event Backstop Date.

Under the ISDA Definitions as they existed before the Big Bang Protocol in 2009, holders of credit protection were not required to invoke a Credit Event within a particular period following its occurrence. In other words, there was no "statute of limitations" for invoking a Credit Event following its occurrence.[8] This made compelling sense:

[8] Then as now, a Credit Event had to be invoked within 14 days after the Termination Date of each CDS transaction, but that still allowed holders of five-year CDS to invoke a Credit Event years after it occurred. Of course, there would be no reason for a protection holder to delay for that period once the Credit Event was discovered and substantiated.

- A protection holder has no incentive to delay for long invoking a Credit Event once it is known. To the contrary, if a protection holder delayed, it would continue to pay the running spread for the period of that delay.
- A market participant's ability to discover a Credit Event, and then to prove its occurrence to the satisfaction of the pertinent arbiter (now the Committee), is heavily dependent on disclosures that the Reference Entity itself makes. Reference Entities are only required to release financial statements quarterly, and they are generally allowed to release those statements 45 or 90 days following a quarter- or year-end, respectively. Moreover Reference Entities have strong incentives to delay disclosure of the sort of information that would reveal or substantiate a Credit Event, and to make such disclosures equivocally and imprecisely.
- Credit Events encompass a very diverse universe of events. Some might be quickly disclosed; others might be disclosed months after they occurred; and others could be revealed through a series of piecemeal and evolving disclosures unfolding over many quarters. Upon disclosure, some Credit Events might be immediately recognizable and provable, while others might require considerable time to evaluate, clarify and confirm and then substantiate to the satisfaction of the arbiter.
- Especially in light of the importance CDS plays in the regulation of financial institutions (discussed in Section V of this submission), it would be counterproductive – and perhaps systemically disruptive – to subject protection holders to "Catch-22" requirements or "gotcha" pitfalls that would render the protection illusory.
- Imposing a "statute of limitations" on the assertion of a Credit Event would incentivize protection holders to err on the side of asserting Credit Events prematurely, for fear of otherwise losing the right to do so, rather than acting more patiently and responsibly and asserting Credit Events when they are more clearly established.

In sum, a statue of limitations would offer no benefit and have many detriments; and it would be impossible to pick one statute of limitations period that would fit a diverse range of Credit Events and attendant circumstances.

ISDA first adopted the concept of a Credit Event Backstop Date, as well as Succession Event Backstop Date, as part of the 2009 Big Bang Protocol. ISDA has announced that there was only one purpose for these backstop dates:

> "The purpose of these backstop dates is to achieve consistency between transactions. Under the Definitions (before amendment by the Supplement) if an entity entered into a credit derivative transaction on January 1 and then entered into an offsetting transaction on February 1, even where the Reference Entity, Obligations and all other terms were identical, those two transactions would not be completely back to back and the entity would not be fully hedged. This is because, if a Credit Event occurred for example on January 15, the first trade would be triggered but the second trade would be unaffected by that event (since it occurred prior to the Effective Date of that second transaction). The entity could, therefore, have found itself in a position where, as Protection Seller under the first transaction it had to pay out but was not entitled to claim any payment as Protection Buyer from the Protection Seller under the second trade.

> "By creating a single look back period applicable to all trades (that incorporate the Supplement), two offsetting transactions will have identical terms and allow entities to hedge their positions fully even if they cannot be entered into and be effective on the same date. This also facilitates the compression of CDS transactions."[9]

Thus, the Credit Event Backstop Date concept was introduced in order to give each market participant a reasonable window within which to flatten its exposure. The concept was not introduced for the purpose of imposing for the first time a statute of limitations on holders of credit protection. To use the illustration ISDA itself offered in the excerpt above, the entity that entered into one CDS transaction on January 1 and an offsetting one on February 1 would have a flat exposure regardless whether the January 15 Credit Event was invoked on March 1 or June 1 of that year. Indeed, the hypothetical says nothing about when the Credit Event is invoked.

Consistent with this purpose of the Credit Event Backstop Date, 60 days is reasonable as a period for flattening exposures, but would, for the reasons given above, be wholly unworkable as a one-size-fits-all statute of limitations period for invoking Credit Events.

Given that a strict 60-day-from-occurrence statute of limitations period would be a dramatic departure from past practice, and would in many circumstances eviscerate the ability of protection holders to assert all but the most obvious and immediately disclosed Credit Events, it is simply inconceivable that the excerpt quoted above would have omitted that a second purpose of the Credit Event Backstop Date was to force protection holders to discover, substantiate, marshal convincing proof for, and invoke Credit Events in a very compressed timeframe without regard to whether the relevant information had even reached the public domain. It is hard enough to imagine ISDA would ever intend such a perverse and draconian rule. It is harder still to imagine it would neglect to mention it or explain its purpose in ISDA's only official pronouncement on the purpose of the backstop dates.

The language of the ISDA Definitions can be harmonized with the stated purpose of the Credit Event Backstop Date (and with common sense as well). The ISDA Definitions require that the Credit Event must have "occurred on or after the Credit Event Backstop Date"[10] (i.e., within 60 days before the protection holder gives notice of the Credit Event). For this purpose, does a Credit Event "occur" only on the first day on which it exists, or does it also occur each successive day that it continues? Do the ISDA Definitions differentiate between an event that lasts a day and an event that lasts three months? To use a conventional example, does a Failure to Pay "occur" only when it starts, or does it occur so long as the failure continues?

We believe the only sensible reading is that a Credit Event occurs each day it remains outstanding. This interpretation is most consistent with the language of the ISDA Definitions, which notably says "occurs," not "first occurs" or "starts." Further, were one to interpret "occurs" as "starts," a protection holder would fare better with a Credit Event that gets cured and then recurs a few months later than with a Credit Event that simply stays uncured for a few months. Moreover, our interpretation harmonizes with the stated purpose of the Credit Event Backstop Date concept, without giving the bum's rush to holders of credit protection, rendering

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[9] "What are the Credit Event and Succession Event Backstop Date provisions, what do they do and why?" in Big-Bang Protocol, Frequently Asked Questions, found at http://www.isda.org/bigbangprot/bbprot_faq.html.

[10] Sections 1.30 and 3.3.

the protection illusory, and incentivizing protection holders to invoke Credit Events prematurely and again every 60 days thereafter for fear of losing the protection they are counting on.[11]

Even if one disagreed with our interpretation with respect to Credit Events generally, we submit it must be applied to the insolvency Credit Event at issue here (or some other interpretation must be found in order to give meaning to the insolvency Credit Event). The inclusion of insolvency as a Credit Event is intended to pick up some situations where more readily observable and time-specific Credit Events – such as a default in a scheduled payment or the commencement of a Chapter 11 proceeding – have not yet occurred.

It necessarily follows that the ability of a protection holder to discover and prove insolvency is particularly dependent on the timing and adequacy of disclosures by the Reference Entity itself. It is easy to imagine circumstances where insolvency cannot be ascertained and proved until several months after it first occurs. For example, suppose a company releases its year-end financial statement 75 days after year-end, and it becomes instantly obvious to everyone that the company was insolvent at year-end. Surely no one would be heard to argue that it is too late for the insolvency Credit Event to be invoked!

More likely, there would not be one definitive "ah hah!" moment, when everyone would recognize or agree that the company is insolvent. Suppose a protection holder saw evidence of insolvency but felt it was not yet convincingly established. What should that protection holder do? If the holder waits for more inputs and the next financial statement confirms the earlier evidence, the protection holder will risk being told that it should have acted a quarter earlier, and now it is too late. If the holder jumps the gun instead, it will be advancing an argument it is not yet convinced of, and the Committee will likely conclude that the holder acted rashly and wasted the Committee's time. Surely this is not the result the Committee desires.

While similar pitfalls and unintended consequences can occur even with more familiar Credit Events (which is why we think the Credit Event Backstop Date should be construed as we state above), they are endemic to the insolvency Credit Event (and others covered by Section 4.2(b)). To apply a strict 60-day-from-occurrence-whether-or-not-disclosed statute of limitations to the insolvency Credit Event would generate a host of unintended consequences and render it a nullity in many, if not most, real-world scenarios. This could not have been what ISDA intended in 2009; and, as we note in Section V above, it would evidently disqualify ISDA CDS under the bank regulatory regimes in many countries.

These considerations also make clear why we think it so important that the Committee be transparent in its ruling in this matter and the reasons therefor, and addresses the questions as we have parsed them in Section I above. Doing so would be best practice in any event, but it would be of particular benefit in this instance by providing market participants with important guidance as to how the insolvency Credit Event and the Credit Event Backstop Date are construed and applied.

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[11] Our interpretation also poses no realistic risk of protection holders somehow gaming the system through prolonged delay. First, we fail to see any benefit a protection holder would gain from doing so. Second, a prolonged delay would expose the protection holder to the risk that a subsequent disclosure (e.g., the next financial statement) would show the Credit Event to have been cured more than 60 days earlier. Third, surely before long the Credit Event would be recognized and acted upon by others.

VIII. CONCLUSION

We are grateful for the Committee's consideration of this request. We appreciate that insolvency is not meant to be an everyday Credit Event, but we believe the present situation provides a compelling case for it. We believe it is beyond rational dispute that TCEH is insolvent.

We hope the Committee and its members will be interactive with us both formally and informally, and will afford us a full opportunity to address any questions or concerns they may have.