



OglethorpePower

An Electric Membership Corporation

March 28, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549

Re: Security Ratings; Release No. 33-9186; 34-63874; File No. S7-18-08

Ms. Murphy:

Oglethorpe Power Corporation (An Electric Membership Corporation) ("**Oglethorpe**") appreciates the opportunity to submit these comments in response to the Securities and Exchange Commission's (the "**Commission**") proposed rulemaking relating to security ratings, Release No. 33-9186, 34-63874; File No. S7-18-08 (the "**Proposed Release**"). The Commission's adoption of the Proposed Release is of concern to Oglethorpe and, if adopted as proposed, Oglethorpe would lose its current ability to file short-form registration statements on Form S-3.

I. OGLETHORPE POWER CORPORATION

Oglethorpe is a Georgia electric membership corporation incorporated in 1974 and headquartered in metropolitan Atlanta. Oglethorpe is owned by its 39 retail electric distribution cooperative members and its principal business is providing wholesale electric power to its members and the approximately 4.1 million persons they serve. As with cooperatives generally, Oglethorpe operates on a not-for-profit basis. Oglethorpe is the largest electric cooperative in the United States in terms of assets, kilowatt-hour sales to members and, through its members, consumers served. Oglethorpe is also the second largest power supplier in the state of Georgia.

Oglethorpe currently has approximately \$3.0 billion of outstanding debt securities held by investors which consist of approximately \$2.0 billion taxable first mortgage bonds and approximately \$1.0 billion of tax-exempt securities. Oglethorpe first entered the registered capital markets in 1986 and since that time has filed reports pursuant to the Securities Exchange Act of 1934 (the "**Exchange Act**") and has remained current in its reports at all times. Over the past couple of years, Oglethorpe has become more active in the public debt markets and has taken advantage of its eligibility to register securities on Form S-3 and sell securities on a delayed or continuous basis pursuant to Rule 415 promulgated under the Securities



Act of 1933 (the “**Securities Act**”). Prior to 2009, Oglethorpe had issued \$800 million of taxable first mortgage bonds in offerings exempt from registration pursuant to Rule 144A under the Securities Act. In 2009, Oglethorpe migrated from Rule 144A offerings to Rule 144A offerings with registration rights and completed two registered *Exxon AB* exchange offers with an aggregate principal amount of \$750 million. In 2010, Oglethorpe filed two shelf registration statements on Form S-3 and registered a total of \$2 billion of debt securities.¹ Later in 2010, Oglethorpe drew down \$450 million from one of the registration statements. Oglethorpe’s current financing plans anticipate taking advantage of the flexibility and efficiency of its effective registration statements. These plans include a draw of approximately \$400 million on one of its Form S-3’s later in 2011.

Oglethorpe’s market activity and outstanding first mortgage bond obligations have generated a market following among institutional investors. Oglethorpe’s registered bond issuances have been tracked and reported on by the *Wall Street Journal* and Bloomberg, and Oglethorpe has approximately 167 institutional holders of its debt securities.

As an electric membership corporation, Oglethorpe cannot issue equity securities. Therefore, Oglethorpe must rely on eligibility criteria that apply to an issuer of debt securities.

II. EFFECT OF THE PROPOSED RULE ON OGLETHORPE

The Commission has proposed to replace one of the eligibility criteria to file a registration statement on Form S-3, currently based on investment grade debt securities, with a test based on the Commission’s definition of a well-known seasoned issuer (“**WKSI**”) under Rule 405 of the Securities Act. The proposed standard requires that an entity issue at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act in the prior three years to be eligible. Oglethorpe does not meet this standard. Oglethorpe believes that its participation in the registered debt markets results in significant savings in interest rates compared to its prior non-registered financings, and losing Form S-3 eligibility would likely increase the cost of and decrease the flexibility associated with accessing the capital markets.

Oglethorpe issues debt based on its capital needs. These needs can be sporadic, are often project specific, and do not fit well within a rolling three-year window. When Oglethorpe does access the bond market, it has generally offered and sold long-term debt securities; currently, with an average maturity of 23 years.

¹ SEC File Nos. 333-167135 and 333-171342.

To date, Oglethorpe has not issued medium-term notes that would be refunded every few years, a financing strategy much better suited to a rolling three-year window.

Adoption of the Proposed Rule, without modification or grandfathering, would force Oglethorpe to either offer securities pursuant to an exception from registration, likely Rule 144A with registration rights, or file a registration statement on Form S-1; both are more costly and time-consuming alternatives.² This result would contradict the Commission's general goal to encourage issuers to register securities offerings.

III. ALTERNATIVE CRITERIA FOR THE PROPOSED RULE

As the Commission recognizes in the Proposed Rule, a central reason to permit issuers to file shelf registrations is that they have a wide market following. The threshold to issue \$1 billion of non-convertible securities, other than common equity, for cash in primary offerings registered with the Commission over the previous three years, although appropriate for a WKSI, is overly restrictive for Form S-3 eligibility. Currently, a registrant's eligibility as a WKSI entitles it to additional flexibility and benefits pursuant to the Commission's rules and regulations beyond Form S-3 eligibility. Applying the same standard to Form S-3 eligibility raises the bar and narrows the spectrum of eligible registrants. The Commission has recognized that this is not the intent of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**").³

A. *Total Debt Securities Outstanding*

Oglethorpe's preferred alternative is that the Commission adopt eligibility criteria that measures total debt securities outstanding rather than during a rolling three-year period. As noted above, Oglethorpe has a total of approximately \$3.0 billion of taxable and tax-exempt first mortgage obligations. The majority of these obligations are held by institutional investors, and this volume has created secondary market activity and a following by analysts and institutional investors. This market following is consistent with the SEC's purpose of granting registrants the ability to register and offer securities on a continuous or delayed basis pursuant to Rule 415. Further, the focus on primary offerings during a rolling three-year window completely ignores the secondary market.

The three-year time period creates an incentive to incur short to medium-term debt so as to keep a continuous stream of volume in the rolling window. These

² Oglethorpe also notes that it would lose the ability to incorporate its reports filed under the Exchange Act into a registration statement on Form S-4.

³ See the Proposed Release, p. 5, FN 20 and p. 13.

maturities are unsuitably short for Oglethorpe. In contrast, Oglethorpe's taxable debt securities, which were primarily issued to finance capital assets with long useful lives, are long-term first mortgage bonds which have maturities that extend from 2019 to 2040.

It should also be noted that adopting criteria based on total debt securities outstanding would be consistent with certain of the Commission's rules regarding eligibility for equity securities. Specifically, a registrant with equity securities only needs to maintain a \$75 million public float, not issue \$75 million in equity on a rolling three-year basis. Of course, Oglethorpe recognizes that there are fundamental distinctions between the nature of debt and equity securities; however, the overarching concept that the total float (whether debt or equity) is an appropriate measure is not foreign to the Commission.

B. Broaden the Scope of Offerings Eligible for the \$1 Billion Threshold

As noted above, one problem with the three-year window is that since it continuously rolls forward, once an issuer becomes ineligible, it is very difficult to regain eligibility. Should Oglethorpe lose the ability to register debt securities on Form S-3, its most likely alternative is to offer debt securities pursuant to Rule 144A with registration rights in order to maximize flexibility and efficiency when accessing the capital markets, rather than register securities on the less flexible and more time consuming Form S-1.

Oglethorpe further requests the Commission consider including debt from registered exchange offers, excluding any registered exchange offers to avoid double counting with the underlying Rule 144A offering. Registered *Exxon AB* exchange offers increase public and market access to information about the issuer and are appropriate for inclusion. In 2009, Oglethorpe issued \$750 million of first mortgage bonds through two Rule 144A offerings followed by registered *Exxon AB* exchange offers. By expanding the scope of eligible offerings that count toward the \$1 billion threshold, registrants may regain eligibility in appropriate circumstances even if it is temporarily lost due to a period of market inactivity.

C. Lower the \$1 Billion Threshold

A third alternative that the Commission should consider is to lower the \$1 billion threshold. As noted above, the WKSI standard of \$1 billion over the previous three years may be an appropriate threshold for a WKSI; however, it is overly restrictive for Form S-3 eligibility. Oglethorpe requests that the Commission lower the threshold to a level that would allow not only it, but substantially all of the registrants currently eligible to utilize Form S-3, to maintain eligibility. However,

this option alone does not solve the problem that once an issuer loses eligibility, it becomes very difficult to regain eligibility.

IV. GRANDFATHERING OF REGISTRANTS CURRENTLY ELIGIBLE

If the Commission moves forward and adopts the Proposed Rule in a manner in which Oglethorpe becomes ineligible to utilize Form S-3, the Commission should grandfather in Oglethorpe and other companies currently eligible to register securities on Form S-3. A grandfathering period is appropriate as it will give registrants an opportunity to appropriately react and complete or make alternative plans for capital raising activities both efficiently and without undue cost or burden.

At a minimum, any grandfathering should permit registrants with effective registration statements on Form S-3, for which registrants have paid applicable filing fees, to utilize the remaining eligibility on such forms. As noted above, Oglethorpe has two effective Form S-3 registration statements with an aggregate remaining capacity of \$1.55 billion. Oglethorpe's financing plans over the next few years include the issuance of registered debt on a delayed basis pursuant to Rule 415 under one or both of its effective registration statements.

V. CONCLUSION

Oglethorpe's ability to utilize short-form registration statements on Form S-3 has given it significant flexibility to access public debt markets, reduced its overall cost of capital and ultimately benefitted the 4.1 million persons served by Oglethorpe's member systems. Oglethorpe recognizes that the Commission must act pursuant to the Dodd-Frank. However, Oglethorpe requests that the Commission revise Form S-3 eligibility in a manner that does not restrict registrants who currently are eligible and actively utilizing the benefits provided by Form S-3 from continuing to utilize those benefits in the future.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Elizabeth B. Higgins", with a long, sweeping horizontal flourish extending to the right.

Elizabeth B. Higgins
Executive Vice President and
Chief Financial Officer

cc: Herbert J. Short, Jr., Esq.