UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Security Ratings	)	**SEC Release Nos. 33-9186 and 34-63874 – File No. S7-18-08**

COMMENTS OF THE EDISON ELECTRIC INSTITUTE

I. Many Electric Utilities Use Form S-3 and Should Continue to Be Able to Do So

The Edison Electric Institute (EEI) is filing these comments in response to the proposed amendments to Form S-3 rule published by the Securities and Exchange Commission (Commission or SEC) at 76 Fed. Reg. 8946 on February 16, 2011 (Release). In the Release, the Commission proposes to replace reliance on security ratings in a number of its forms and regulations governing securities issuances with a "$1 billion in non-convertible securities over 3 years" test,[1] and the Commission invites comments on other alternatives the Commission should consider. The Commission requested comments by March 28, 2011.

EEI is the association of the United States shareholder-owned electric companies, international affiliates, and industry associates worldwide. Our U.S. members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70 percent of the U.S. electric power industry. Our members include vertically integrated electric utilities as well as disaggregated generation, transmission, and energy services companies, both within holding company systems and as stand-alone companies (together, electric utilities).

For more than 50 years, the Commission's rules have allowed many companies in the electric utility industry, among the most capital-intensive industries, to use the SEC Form S-3 or the form's predecessors to issue securities without the need for issuance-by-issuance applications and approvals that can often entail significant additional costs and extensive and time-consuming Commission review. Currently, many of these utilities rely on the securities ratings eligibility provision that the Commission has proposed to eliminate. Yet electric utilities are frequent and well-known issuers that are widely and carefully followed by market analysts,

[1] Specifically, at 76 Fed. Reg. 8949, the Commission proposes to allow use of the Forms S-3 and F-3 for "primary offerings of non-convertible securities if an issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least $1 billion in non-convertible securities in offerings registered under the Securities Act, other than common equity, over the prior three years." At 76 Fed. Reg. 8954, the Commission proposes corresponding changes to the Forms S-4 and F-4, Schedule 14A, and Rules 138, 139, and 168.

investors, federal, state and local utility regulatory authorities (which impose separate public filing and reporting obligations), and the public. These parties have access to substantial information about the electric utilities, which also meet a number of creditworthiness criteria. The utilities should be able to continue to use Form S-3.

EEI members have relied and continue to rely on Form S-3 and associated regulations to offer new securities to the public promptly as needed. They carefully time the issuances of those securities (a) to correspond to infrastructure development and other capacity obligations and (b) to benefit where possible from favorable interest rates and market conditions, thus keeping our industry's cost of financing and cost of capital relatively low with corresponding benefits for customer rates. As capital intensive businesses, utilities must be able to raise capital when and as needed to finance utility infrastructure and otherwise meet their financing needs.

Without the ability to continue relying on Form S-3 or its equivalent, electric utilities would incur significant additional costs and delays involved in issuance-by-issuance application for SEC approval or would be forced to rely on private placements. Also, the companies might not be able to take advantage of favorable interest rates and market conditions, which change rapidly and could be unavailable by the time an issuance-by-issuance approval process would be completed. Disruptions in the capital markets that occur from time to time further heighten the utilities' need for Form S-3 flexibility. The issuance-by-issuance approval process can also result in costly delays in infrastructure development or greater interest expenses on debt capital raised further in advance of the date the applicable funding obligation arises, due to the inability to predict the timing of when capital will need to be raised.

While recent events in the global economy have called into question the appropriateness of relying on securities ratings as a condition to facilitating quicker access to the capital markets generally, there can be no denying that the publicly-issued securities of electric utilities that comprise EEI membership have proven to be among the most stable and safest investments over recent decades and thus worthy of streamlined access. Therefore, EEI strongly encourages the SEC to continue to allow electric utilities to rely on Form S-3 or an equivalent approach that avoids the need for transaction-specific approvals in issuing securities.

Unfortunately, substituting only the proposed "$1 billion in non-convertible securities over 3 years" test for the investment-grade test would prevent many electric utilities from continuing to use Form S-3. The electric utility industry would be uniquely disadvantaged by this proposal because many electric utilities are subsidiaries of parent companies that own their stock, and the utilities themselves do not have a public float of equity. Electric utilities would have to rely more heavily than others on the proposed new test, and many would not meet the test.

Furthermore, the proposed test does not recognize indicia of a company's creditworthiness that are reflected in credit ratings. The proposed test would move from away from a test that evaluates such indicia to a test that looks only at the volume of debt issued in the past three years (encouraging companies to issue more debt). We believe the proposed test is too narrow a replacement for the credit-rating test. In addition, we believe that the proposed test's look-back period is too long and its dollar amount threshold is too high. Many utility subsidiaries are strong sources of credit and are Securities Exchange Act of 1934 (1934 Act) reporting companies that should qualify to use Form S-3.

As a better alternative to the proposed debt-issued test, EEI requests that the Commission adopt seven independent tests, any one of which should authorize electric utilities and others to continue relying on Form S-3 to issue securities, as discussed below. These alternatives more broadly reflect indicia of creditworthiness, and they use more reasonable thresholds, than the proposed test.[2]

II. The Proposed $1 Billion Test Would Adversely Impact a Large Number of Issuers, Including Many Electric Utilities, Causing Substantial Negative Consequences

EEI believes that the proposed change to a "$1 billion in non-convertible securities over 3 years" test would prevent far more issuers from using Form S-3 than the Commission has estimated. The Commission estimates that 45 issuers currently eligible to use the form would no longer be eligible to do so.[3] However, EEI already knows of at least 30 electric utilities that would be prevented from using the form, or could be prevented from using it in time, including the largest utilities in a number of states. Based on this preliminary information, we assume that many more electric utilities will be adversely impacted now and in the future, especially given the cyclical nature of utility capital expenditure requirements and evolving state and federal regulatory requirements. And this is just looking at our sector. The total number of affected companies is likely to be substantially higher than 45 just within the electric utility industry,[4] and higher still when other industries are considered. This impact of the Release appears to run counter to the Dodd Frank Act legislative history, which the Commission says does not indicate that Congress intended to change the types of issuers and offerings that could rely on the Commission's forms.[5]

Ironically, this adverse impact of the Release would result from the somewhat unique structure of the electric utility industry, not because of a lack of a close following or interest in electric utility securities. In raising capital in the electric utility industry, common stock is typically issued at the parent holding company level, while most debt is issued at the regulated utility subsidiary level. As a result, these subsidiaries cannot meet the $75 million public equity float requirement for stand-alone companies to use Form S-3 for primary offerings, and they do not

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[2] EEI assumes that the Commission will retain the other criteria for using Form S-3 discussed in footnote 23 of the proposed rule, such as having a public float in excess of $75 million. So we are not separately addressing those criteria.
[3] Release at footnotes 58 and 90 and associated text.
[4] The Securities Industry and Financial Markets Association (SIFMA),at page 7 of its comments filed in this proceeding on March 18, identified approximately 120 electric utility industry filers who rely on the Form S-3. Of these, SIFMA estimated that at least 60 currently rely on the investment-grade ratings test, are subsidiaries that would not meet the $75 million public float test, and would not meet the proposed "$1 billion over 3 years" test.
[5] Release at footnote 20.

meet the market capitalization threshold to qualify independently as a "well known seasoned issuer" (WKSI), because their common stock is held by the parent holding company. In most cases, however, these subsidiaries are of sufficient size that they would be eligible to use Form S-3 for all types of offerings if their common stock were held by the public instead of by the holding company (whose common stock *is* held by the public). Many of these utility subsidiaries have assets well in excess of $1 billion and common stockholder equity well in excess of the $75 million public equity float requirement for stand-alone companies to use Form S-3 for primary offerings.

Many of these operating subsidiaries routinely file Form S-3 registration statements for substantial debt issuances. However, because of the cyclical nature of major utility infrastructure construction projects and the utilities' corresponding capital needs, many utilities may not now, or in the future consistently, meet the proposed "$1 billion in non-convertible securities over 3 years" test. Positive near-term cash flow impacts related to bonus depreciation rules will also likely dampen utilities' debt issuances in the next several years, making it more difficult for certain utilities to meet a test requiring $1 billion of new debt issuances over a three-year period.

By denying utilities the flexibility to use Form S-3, the Release would unfairly and unnecessarily disadvantage affected electric utilities compared to less financially sound and widely followed companies that would be able to use the form by virtue of having market capitalization of at least $75 million in common equity. Yet electric utilities are large and creditworthy issuers, and there is no discernable legislative intent or practical market justification for such an outcome.

The Release would decrease the speed and efficiency with which affected electric utilities can access the capital markets. The Release would likely increase the companies' financing costs and costs of capital, in turn increasing the cost of electricity to consumers. A significant percentage of public offerings of securities by utilities are done pursuant to Form S-3. As the Commission has noted in the Release, Form S-3 offerings provide issuers flexibility in quickly accessing the public markets from time to time in response to changes in market conditions and other factors.[6] The Release would negatively affect many issuers that file with the Commission closely followed periodic and current reports, simply because of a period of inactivity in their debt issuances, without regard to the volume of registered debt outstanding. The Release would increase their funding costs, with no corresponding informational or other benefit to investors or the market. In fact, most registered offerings of non-convertible securities by electric utilities are sold to institutional investors, who do not need the additional scrutiny of the Form S-1 registration process.

Form S-3 allows shelf registrations to be updated automatically through incorporation by reference to the issuer's subsequently filed periodic and current reports without the need for additional Commission review. Although a shelf offering can be registered on Form S-1, this does not include a delayed offering. Moreover, although previously filed periodic and current

[6] Release at 8947.

reports may be incorporated by reference in Form S-1 in certain instances, future periodic and current reports may not.

As a result of the time and expense that would be associated with continually updating registration statements on Form S-1, issuers could be increasingly forced to rely on private offerings of their securities, principally Section 4(2), Rule 144A, and Regulation S offerings. Such financings could put the issuers at a disadvantage compared to other companies that use Form S-3 to register public offerings with the Commission, even though the other companies may not be as well known or followed and may not be issuing high quality securities but meet the proposed "$1 billion in non-convertible securities over three years" test. Further, for operating subsidiaries subject to the reporting requirements of the 1934 Act, there would be no corresponding benefit to investors of electric utilities filing and continuously updating shelf registration statements on Form S-1, as such entities are required to file quarterly, annual, and interim reports with the Commission to keep information on the companies up-to-date.

The proposed changes could thus reduce electric utility company access to broader, public sources of liquidity, prevent retail investors from being able to purchase what historically have been considered lower risk securities, and increase non-registered offerings. These results would be contrary to the rationale behind the Commission's adoption of Form S-3 and the Commission's 2005 Securities Offering Reform rules, which were designed at least in part to encourage registered deals and to facilitate access to public markets through use of WKSI automatic shelf registration statements.

III. The Commission Should Adopt a Number of Independent Alternatives to the Proposed $1 Billion Test, Thus Permitting Many Electric Utilities to Continue Relying on Form S-3

Since the 1950s, using a variety of approaches, including the current investment-grade provision of Form S-3, the Commission has allowed many electric utilities to use the form and the form's predecessors to issue securities without having to register and seek approval for securities on an issuance-by-issuance basis. We ask the Commission to continue doing so. As the Commission recognizes in the Release, even though the Dodd-Frank Act directs the Commission to remove direct reliance on credit ratings from its regulations, the Act allows the Commission to substitute such standards of creditworthiness as the Commission determines to be appropriate.[7] In this section of these comments, we are proposing seven such independent standards.

Electric utilities are often well established and highly regulated companies that have substantial assets, reliable income, a long history of honoring their debts, and strong cash flows necessary to support payment of regular dividends. Indeed, that industry profile is one of the reasons electric utilities have been a traditional area of investment for investors seeking a relatively stable and dependable return on their investments. In fact, during the recent credit crisis, utilities were one of the few successful issuers of debt during a time when many companies,

[7] Release at 8946.

including those who had issued substantial amounts of debt in the past, were effectively shut out of the market.

In many instances, electric utilities are subsidiaries of WKSI parents, and the utilities' assets and revenues comprise all or a substantial portion of the assets and revenues of their WKSI parent holding company and the value of the WKSI parent's common stock. Many of these operating subsidiaries are as well known as or more well known than the parent holding company and are as widely followed by the market, both independently and in connection with their parent holding company, even if they do not independently qualify as a WKSI. Also, some of the largest and most widely followed public utility holding companies have multiple utility subsidiaries. The Release would cause the illogical and unfortunate result that the utility subsidiaries that issue a lot of debt could remain eligible to use Form S-3 while others that are equally creditworthy or have the same level of information available to the public would not.

In addition, the electric utility industry is heavily regulated at both the federal and state or local levels. As a result, there is often substantial oversight of such companies, stability of their operating revenues, and large amounts of information about them available to the marketplace. Federal, state, and local utility regulatory commissions typically oversee electric utility acquisitions, sales, mergers, securities issuances, and rates in great detail. Those regulators also require the companies to act prudently and for the public good and to provide detailed information about company assets, operations, and finances, and the vast majority of that information is available to the public. All of these factors contribute to the creditworthiness and wide public following of the securities of these issuers.

For these reasons, and given the substantial negative effects of electric utilities not being able to continue relying on Form S-3 (as discussed in the preceding section of these comments), EEI encourages the Commission to adopt the following seven independent eligibility standards in place of the current credit-rating test and the proposed replacement "$1 billion over 3 years" test. Each of these seven standards by itself should suffice to allow a company to file the Form S-3 in place of the current creditworthiness test.

A. Provide Form S-3 Eligibility for WKSI Subsidiaries

For utility subsidiaries of a WKSI parent, the Commission should permit the subsidiary to use Form S-3 registration. The subsidiaries will be filing extensive information and required financials with the SEC, both through the consolidated reporting of the holding company and on an individual basis by the subsidiary, especially if the subsidiary is a 1934 Act reporting company. All that information is likely to receive public scrutiny because the subsidiary is part of a WKSI.

This option should be available without regard to the size or activity level of the subsidiary because WKSI subsidiaries are typically followed by analysts and investors independently and as components of the WKSI itself. But if the Commission believes that a size or activity level requirement is needed, a subsidiary should qualify to use Form S-3 if the utility is a significant subsidiary (as defined in Regulation S-X), or is of significant size (e.g., larger or more active than stand-alone companies that qualify to use Form S-3 for primary offerings, looking for example at net assets or net outstanding debt securities), or comprises a significant portion of the WKSI parent holding company's operations (perhaps e.g. 10%). In these circumstances, the operating subsidiary is already likely to be well followed, either directly or in connection with the parent holding company's securities.

B. Provide Form S-3 Eligibility for Federal, State, and Locally Regulated Utilities

Federal, state, and local regulators, typically through public utility commissions, regulate the operations of many U.S. investor-owned electric utilities. The commissions require detailed reporting of company assets, finances, and operations, and require pre-approval for most major acquisitions and sales. Often, a regulated utility may not issue debt securities without the prior approval of its state or local utility commission, or in some cases the Federal Energy Regulatory Commission. Through rate approval, the commissions also ensure a reliable stream of income to manage company obligations. As a consequence, the risk attendant to utility debt securities is low.

This regulatory oversight of electric utilities, from which investors may take assurance that electric utilities will be able to perform their obligations under their securities, provides support for our position that electric utilities should be allowed to continue to use Form S-3. The protections provided by Form S-1 statements are unnecessary. Moreover, allowing the use of Form S-3 in reliance on such regulatory oversight is analogous to the current Form S-3 transaction eligibility standard which – rather than predicating Form S-3 issuances on meeting some particular level or value of such issuances – instead recognizes that detailed financial scrutiny by an independent body (here, the relevant federal, state, or local utility regulatory agency) constitutes an appropriate basis for allowing Form S-3 issuances to proceed.

Therefore, in response to questions 4 and 19 in the Release, EEI recommends that the Commission retain Form S-3 eligibility for federal, state, or locally regulated electric utilities.[8]

C. Provide Form S-3 Eligibility Based on Outstanding Debt

The "debt float," or the amount of outstanding debt of an issuer, provides a measure of general market interest in debt securities, along the lines that "public (equity) float" does for equity securities. The more debt an issuer has outstanding, the greater is the number of investors holding that debt or holding larger amounts of the debt. In either case, the investors are more likely actively to monitor developments related to the issuer. Also, the more the debt, the

[8] Some utility subsidiaries are regulated by federal or local regulators in addition to, or instead of, state regulators. Also, some such subsidiaries have both common stock (held by their parent) and preferred stock (held by non-affiliates) outstanding. Instead of describing Form S-3 eligibility in terms of offerings of non-convertible securities, other than common equity, by "wholly-owned state regulated operating subsidiaries" (as referenced in question 4), describing such eligibility in terms of such transactions "by a regulated utility operating company" would be more consistent with providing eligibility to all such issuers.

more likely there is to be a robust secondary market for the securities and a wide following in the marketplace. In fact, when issuers are marketing a new issue, the market tends to look to secondary trades in prior issues to determine appropriate pricing levels. In addition, debt issuers file annual and quarterly reports, so there is plenty of information available to the market. Current SEC rules, such as Rule 15c2-12 under the 1934 Act, provide disclosure to investors as to debt.

Accordingly, we encourage the Commission to modify the current $75 million or more equity float transaction eligibility requirement to use Form S-3 to provide eligibility also to companies that have sufficient debt float. Because of differences between debt and equity, we recommend that the Commission consider setting the debt float level at $250 million. This is the minimum used for index eligibility of individual debt series (e.g. Barclays Capital U.S. Bond Index).

D. Allow Use of Form S-3 for Companies with Adequate Assets

The SEC also should allow use of Form S-3 if a company has sufficient assets to ensure that it is substantial, likely to be well followed in the marketplace, and creditworthy. Whether measured by looking at a company's net worth, outstanding securities, or assets with an expected life longer than one year, having substantial assets is a primary feature of electric utilities, and it can demonstrate long-standing and durable presence in the market. EEI recommends $1 billion in assets as benchmark.

E. Reduce the Amount and Extend the Look-Back Period for Recent-Debt-Issued Form S-3 Eligibility

The proposed $1 billion threshold for debt issued over a three-year period is substantially too high over too short a period of time and would result in a significant number of active and well-followed electric utility subsidiary issuers being excluded. Even a significantly reduced threshold (e.g. $250 million) would greatly reduce the number of issuers that would continue to qualify from time to time. While the $1 billion debt issuance test or a similar measure may be an appropriate test for automatically effective registration statements of a WKSI, such a test would represent a dramatic change to the requirements for a standard Form S-3 registration statement. If the Commission believes a debt issuance or similar test is appropriate, EEI recommends extending the look-back period to five years and reducing the required issuance amount to $250 million. The Commission also should allow a WKSI parent's subsidiaries' debt to be aggregated to meet the threshold.

F. Reinstate Form S-9 Criteria as Bases for Using the Form S-3

In footnote 27 of the Release, the Commission mentions criteria that allowed use of Form S-9, a predecessor to Form S-3. Those criteria included that: a company had net income for the last five fiscal years; during that period, it had not defaulted in the payment of principal, interest, or sinking funds on any long term debt; and it had a fixed charge coverage ratio as of the end of its most recent fiscal year of not less than 1.5. The non-default provision is already reflected in General Instruction I.A.5 as to Form S-3. Together with the other two Form S-9 criteria, these would be reasonable indicia of a company's ability to manage its debt. For companies meeting such criteria, the additional expense and delay that would be entailed by Form S-1 statements would be unnecessary. In adopting the Form S-9 criteria, as an option to a 1.5 ratio at the end of the most recent fiscal year, the Commission should allow a fixed charge coverage ratio of 1.5 or better in four of the most recent five years, to accommodate an occasional drop in the ratio for a material write off that does not affect longer term creditworthiness.

G. Grandfather Utilities that Currently Qualify to Use Form S-3 But Do Not Meet One or More of the Above Criteria

Though the above criteria should cover most electric utilities that currently can use Form S-3, EEI encourages the Commission to provide grandfathering relief to a company that is currently eligible to use the form but would not be able to do so under changes the Commission does adopt. At a minimum, a company that currently is eligible to use the form should be able to request SEC staff approval to continue using the form, subject to periodic review of that decision by the SEC staff. Also, grandfathered status should survive merger and acquisition activity or other corporate restructurings.

IV. Any Changes in Eligibility Standards Should be Phased In

As noted above, most electric utility issuers use the Form S-3 registration process in connection with the issuance of debt securities. As the Commission modifies the Form S-3 and associated regulations, issuers with currently effective Form S-3 registration statements should be able to continue to sell securities in reliance on such statements filed to comply with rule 415(a)(5), so long as the issuer continues to meet the current eligibility requirements, for a period of at least two years after the effective date of any rule changes. That would permit these issuers to complete debt issuances planned in the near-term without incurring the additional time and expense that would be necessary for filing a new registration statement on a different form under any revised eligibility standards.

V. Conclusion

EEI requests that the Commission take steps necessary to ensure that electric utilities can continue to use Form S-3 for their securities issuances, as described in the preceding comments. Our recommendations are consistent with the purpose and current use of the form and will ensure that, in appropriate circumstances, electric utilities can continue to issue securities without unnecessary cost and delay and can continue to act quickly to benefit from favorable rates and market conditions, to the benefit of their customers.

If the Commission has any questions about these comments, please contact either me, Richard McMahon at rmcmahon@eei.org or (202) 508-5571, or Henri Bartholomot at hbartholomot@eei.org or (202) 508-5622. Thank you.

Respectfully submitted,

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March 28, 2011