United States of America
Securities and Exchange Commission

Replacing Rule and Form Requirements Under the Securities Act of 1933 and The Securities Exchange Act of 1934 That Rely on Security Ratings with Alternative Requirements	)	**SEC Release Nos. 33-8940 and 34-58071 File No. S7-18-08**

Comments of the Edison Electric Institute

I. Introduction

The Edison Electric Institute ("EEI") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission's") proposed rule amendments ("proposed rule changes") to the eligibility requirements for the use of Form S-3 under the Securities Act of 1933 (the "Securities Act"). The Commission published the proposed rule changes at 73 Fed. Reg. 40106 on July 11, 2008 ("proposed rule"), and invited comments by September 5, 2008.

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.

EEI supports the Commission's goal of reducing conflicts in the credit rating process, fostering comparability among credit rating agencies ("CRAs"), and increasing transparency of the credit ratings process. However, with respect to most debt securities, we believe that CRA "investment grade" ratings provide an appropriate basis for determining eligibility for use of Form S-3, in particular because investment grade companies are generally widely followed. Should the Commission determine that revisions to the eligibility requirements related to security ratings are necessary, we believe that the Commission's proposed eligibility standard would adversely impact many electric utilities without corresponding benefit to investors and would not achieve the Commission's goal of reducing market reliance on credit ratings. Therefore, if change is warranted, the Commission should consider alternatives for new eligibility standards.

The following comments will further detail EEI's concerns with the Commission's proposed rule changes and a number of suggested alternatives.

II. <u>EEI Comments on the Commission's Proposals</u>

A. The Proposed Rule Changes Are Unnecessary for Traditional Debt Securities[1] and Will Not Reduce Reliance on Ratings

The recent market turmoil that has led to the proposed rule changes principally involved asset-backed securities ("ABS") and, more specifically, ABS related to mortgages and collateralized debt obligations, as noted by the Commission in the proposed rule, the President's Working Group on Financial Markets *Policy Statement on Financial Market Developments* (March 2008), and the Technical Committee of the International Organizations of Securities Commissions' *Consultation Report: The Role of Credit Rating Agencies in Structured Finance Markets* (March 2008). In contrast to such securities, the metrics used by the CRAs to determine the ratings for traditional non-ABS debt securities issued by industrial companies, utilities, and others are well established, time-proven, and have not been called into question during the recent market turmoil. These ratings historically have provided, and continue to provide, investors a strong and reliable analytic tool to use, along with other available information, in making their investment decisions. Therefore, with respect to non-ABS issuances, we believe that recent market events do not indicate any need to alter the Commission's position on the ratings assigned by CRAs for such investment grade issuances.

EEI concurs with the position stated in both the *Adoption of Integrated Disclosure System, Release No. 33-6383* (March 3, 1982), and the Commission's current proposed rule, that investment grade debt securities[2] generally are purchased on the basis of interest rates and securities ratings. Historically, not only investors but also state electric utility regulators have relied on securities ratings. State regulators frequently require debt issued by regulated electric utilities to qualify as investment grade. We do not believe that changing the eligibility requirements for the use of Form S-3 with respect to the registration of investment grade debt will lessen this historic reliance. For example, we feel certain that delivery of CRA ratings letters will remain a standard closing condition in debt securities offerings. Moreover, we do not view, nor do we believe that investors view, the use of ratings as a Form S-3 eligibility criteria as a direct or even indirect endorsement by the Commission of the ratings or the metrics used by the CRAs.

Given the strong reliance on securities ratings in evaluating non-ABS investment grade debt, we believe that the existing regulation of the CRAs and their ratings methodology, as well as the Commission's newly proposed requirements for additional disclosure to investors regarding such methodology and the potential risks inherent therein,[3] are more effective ways to protect investors in non-ABS debt securities.

---

[1] The changes would impact preferred stock issuances as well since relevant instruction pertains to investment grade non-convertible securities.
[2] The final rule in 1982 was expanded to include preferred stock as well.
[3] *Proposed Rules for Nationally Recognized Statistical Rating Organizations*, Release No. 34-57967 (Jun. 16, 2008).

B. The Proposed Requirements Would Adversely Impact a Large Number of Issuers

We respectfully submit that the number of issuers adversely impacted by the proposed rule changes would be significantly larger than that indicated by the Commission's preliminary review, contrary to the Commission's goal of not significantly reducing the number of Form S-3 issuers. In fact, at least 25 to 30 electric utilities would be negatively affected, including the largest utilities in a number of states, and many more could be adversely impacted in the future given the cyclical nature of utility capital expenditure requirements and evolving state and federal regulatory requirements. We suspect that the Commission's low estimate of impacted companies discussed in the proposal for the rule changes reflects the short time period during which the sample was taken combined with a higher interest rate environment during that time period in which most electric utilities and other companies elected not to issue new debt securities.

It is typical in the electric utility industry for common stock to be issued at the parent holding company level and, as a result of state-law regulations, for most debt to be issued at the regulated operating subsidiary level. If their common equity were held by the public instead of by a holding company (whose common equity is held by the public), in most cases these regulated utility subsidiaries are of sufficient size that they would be eligible to use Form S-3 for all types of offerings (many have assets well in excess of $1 billion and even annual net income well in excess of the $75 million public equity float requirement for stand-alone companies to use Form S-3 for primary offerings). While many of these operating subsidiaries routinely file Form S-3 registration statements for debt issuances, they do not meet the $700 million market capitalization threshold to qualify as a well known seasoned issuer ("WKSI") because their common stock is held by the parent holding company.

In addition, 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 from time to time, meet the proposed $1 billion debt issuance threshold over a three-year period proposed by the Commission in the proposed rule changes or under the current WKSI standard. Furthermore, in the future, additional companies may be negatively affected by the proposed rule changes in the event their regulators require them to segregate assets or activities from holding company or other operations or to implement other such changes.

In many instances, the assets and revenues of these operating subsidiaries comprise all or a substantial portion of the assets and revenues of the WKSI parent holding company's common stock. We believe that many of these operating subsidiaries are as well known as the parent holding company and are as widely followed by the market, both independently and in connection with their parent holding company. In addition, some of the largest and most widely followed public utility holding companies have multiple utility subsidiaries. These affiliated subsidiaries often maintain investment grade securities ratings. The proposed rule would cause the illogical and unfortunate result that certain of the utility subsidiaries of the heavily followed parent company would remain eligible to use Form S-3 while others that are equally high-quality or have the same level of information available to the public would not. Further, because of the regulated nature of the electric utility industry, there often is substantial oversight of such companies, stability of operating revenues, and additional information available to the marketplace. As such, the use of the more complex Form S-1 is not necessary.

The Commission's proposed rule changes would put many of these issuers at an unfair disadvantage and likely result in increased interest and issuance expense. In particular, the proposed changes would decrease the efficiency with which the affected electric utilities can access the capital markets. The changes also would likely increase the companies' costs of capital, in turn increasing the cost of electricity to consumers. Almost all of the offerings by these operating subsidiary issuers are done pursuant to shelf registrations. As noted by the Commission in the current proposal, shelf offerings provide issuers flexibility in quickly accessing the public markets as a result of changes in market conditions and other factors. The proposed rule changes would negatively affect many frequent issuers that timely file closely-followed periodic reports, simply because of a period of inactivity in their debt issuances. The changes would increase their interest and issuance expenses, with no corresponding informational or other benefit for the market.

As a result of the time and expense that would be associated with continually updating shelf registration statements on Form S-1, we believe these issuers would be forced increasingly to rely on private offerings, principally Section 4(2) or Rule 144A offerings, in connection with their debt financings, putting the issuers at a disadvantage compared to other companies that may not be as well known or followed and may not even be issuing investment grade securities but have issued a greater amount of debt over the previous three years. The proposed changes would thus reduce company access to broader, public sources of liquidity, provide less information to potential investors, prevent retail investors from being able to purchase what historically have been considered lower risk securities, and increase non-registered offerings. These impacts would be contrary to 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.

C. The Proposed Requirements are Too Narrow

Should the Commission determine that revisions to the Securities Act and Exchange Act eligibility requirements related to securities ratings are necessary, EEI encourages the Commission to adopt the following eligibility standards as a group in place of the proposed rule changes relating to the Form S-3, to ensure that electric utilities, including holding company subsidiaries, will continue to qualify to use the Form S-3.

1. Provide Form S-3 Eligibility for WKSI Subsidiaries.

For operating subsidiaries of a WKSI, permit the operating subsidiary to use Form S-3 registration for non-ABS investment grade debt and preferred stock issuances, at least if the subsidiary is of a significant size or comprises a significant portion of the parent holding company's revenues or assets. We question whether a size requirement or activity threshold is needed for WKSI subsidiaries, because the subsidiaries are likely to be followed in the market as a component of the WKSI itself. But if the Commission believes that a size requirement is needed, where an operating subsidiary is of significant size (i.e. larger than stand alone companies that may use Form S-3 for primary offerings) or comprises a significant portion of the WKSI parent holding company's operations, meeting either criterion should suffice because it is likely that the operating subsidiary already is well followed in connection with the parent holding company's securities. Also, the Commission should set a lower dollar level of activity for WKSI subsidiaries to qualify directly as WKSIs, especially for 1934 reporting companies. Even so, these provisions alone may not suffice because utility subsidiaries in bigger holding company systems may not meet a "significant size" test. So the following provisions should also be adopted.

2. Provide Form S-3 Eligibility for All State Regulated Utilities.

State regulators, typically through public utility commissions, regulate the operations of many U.S. investor owned electric utilities. Typically, a regulated utility may not issue debt securities without the prior approval of its state utility commission, which premises approval on a determination that the issuance is consistent with the public good. Also, the utilities are authorized to earn an appropriate rate of return on their equity. As a consequence, the risk attendant to their debt securities is low, and the protections provided by Form S-1 statements are unnecessary. Therefore, the Commission should retain Form S-3 eligibility for state-regulated utilities, especially if they also are investment grade.

3. Provide Form S-3 Eligibility Based on "Debt Float."

We believe that "debt float," or the amount of outstanding debt of an issuer (including 144A offerings, tax-exempt debt, and other privately placed debt), provides debt investors with a reliable measure of general market interest, to the same extent that "public float" provides investors in equity securities with such a measure. The more debt that is outstanding, the more likely there is to be a robust secondary market. Also, current SEC rules, such as Rule 15c2-12 under the 1934 Act, provide additional disclosure to investors as to debt.

4. Reduce the Amount and Extend the Look-Back Period for Form S-3 Eligibility.

We believe that the proposed $1 billion threshold for debt issued over a three-year period is substantially too high and would result in a significant number of active and well-followed issuers to be excluded. Even a significantly reduced threshold (e.g. $250 million) would greatly reduce the number of issuers that would continue to qualify. While the $1 billion debt issuance test or a similar measure may be an appropriate test for the ability to use automatically effective registration statements, such a test would represent a dramatic change to the requirements for use of a standard Form S-3 registration statement. If the Commission believes a debt issuance or similar test is essential, we suggest extending the look-back period and greatly reducing the required issuance amount.

D. Any Changes in Eligibility Standards Should be Phased In

As noted above, most electric utility issuers use the shelf registration process in connection with the issuance of debt securities. If the Commission determines that the proposed rule changes are necessary, we believe that issuers with currently effective shelf registration statements should be able to continue to sell securities off of such shelf or any new shelf filed to comply with rule 415(a)(5), so long as they continue 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 those issuers to complete debt issuances planned in the short-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.

III. <u>Conclusion</u>

In summary, while EEI supports the Commission's goal of reducing conflicts in the credit rating process, fostering comparability among credit rating agencies, and increasing transparency of the credit ratings process, we do not believe the proposed rule changes will further that goal. If the Commission determines that some form of the proposed rule changes are necessary, we would request the Commission adopt the group of alternatives discussed above in order to minimize the impact on issuers currently able to rely on the securities rating criteria.

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

Respectfully submitted,

David K. Owens

David K. Owens
Executive Vice President
Business Operations Group
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 508-5000

September 5, 2008