



October 10, 2002

Dr. Harlan L. Watson
Senior Climate Negotiator and Special Representative
U.S. Department of State
2201 C Street, N.W.
Room 4330
Washington, D.C. 20520

Dear Dr. Watson:

The Edison Electric Institute (EEI) was heartened by the U.S. delegation's presentation last June in Bonn on "Effective Participation" in the process of the Framework Convention on Climate Change (FCCC) and the sessions and meetings of the Conference of the Parties (COP) and its subsidiary bodies. However, we have reviewed two recent documents that give us concern, and therefore we provide these comments as the delegation prepares for COP-8.

The first document of concern is a September 13 note by the FCCC Executive Secretary (FCCC/SBI/2002/13), which includes on the cover page a footnote that it "has been submitted at this time because of the need to undertake extensive internal consultations" and a summary that explains that the note "sets out the current practice concerning participation of observer organizations" in workshops and "limited-membership bodies" under the FCCC and the Kyoto Protocol. In the case of workshops, the secretariat's note begins by emphasizing that there are more than "500 IGOs and NGOs" (inter-

governmental organizations and non-governmental organizations) accredited as observers to FCCC sessions and that the sessions have “attracted more than 3,000 representatives of these organizations.” The secretariat then admits for the first time, to our knowledge, in an FCCC document that it has established an “informal constituency system” for selecting (through “focal points of the constituencies”) participants for the workshops, while also noting that the “need for efficiency and effectiveness implies that the number of participants must be limited.” The secretariat contends that these “procedures have generally worked in practice” and that “individual concerns have been addressed by the secretariat as they arise.” We disagree, and we assume that the U.S. delegation shares our view.

These statistics about participants are misleading when it comes to “intersessional” workshops as well as consultations, such as those recently scheduled prior to the start of the eighth Conference of the Parties (COP-8) in New Delhi, and so-called “limited-membership bodies” (which apparently is a new term coined by the secretariat). They relate largely to such sessions as COP-1, 3 and 4 and the two parts of COP-6. In the case of COP-7, there were 20 IGO’s and 194 NGO’s, according to FCCC/CP/2001/13, Part One. In the case of the 16th session of the subsidiary bodies, the total number of participants, including delegations of Parties, was 1130 people, of which 257 people were represented from 89 NGO’s. That is a far cry from the above figures of 500 and 3,000. In fact, only recently has the secretariat developed a more accurate account of attendees at COP and subsidiary bodies sessions, and now only counts actual attendees as opposed to counting those who notify the secretariat that they will attend, but in fact do not.

Further, as the U.S. delegation said last June, many NGO organizations do not seek to attend such workshops or consultations because they are generally intersessional and not connected with a COP or subsidiary body, or because of a lack of interest in the subject matter, travel and related costs, other commitments, or a combination of these and other factors. Thus, this reference to such large numbers of NGO's is irrelevant.

As to the "informal constituency system," we note, as the U.S. did last June, that it was apparently devised by the secretariat without any apparent notice to the COP, the subsidiary bodies, or the Parties. Further, we disagree that it has "worked in practice" and that the "concerns have been addressed," particularly in the case of business, industry, agriculture and labor constituencies. This is due in part to the secretariat deciding to select which constituency to use for this purpose without any known consultation with the wide range of representatives (such as EEI) in these groups to determine, for example, whether the International Chamber of Commerce (ICC) or any other such organization adequately serves this purpose. In addition, as we have pointed out previously to your Department, some groups, like the ICC, have a policy of preference for its members over non-members. While that may be a legitimate policy for the ICC, its application is inappropriate in the context of this so-called "constituency system." In addition, the secretariat has not afforded adequate advance notice and has arbitrarily imposed limits, in advance, on the number of participants from each constituency group because of a perceived "need for efficiency and effectiveness of workshops."

Despite its contention that all “concerns have been addressed,” the secretariat has suggested some “options,” including the publication on the “web” of “procedures for the participation of observer organizations” and having the subsidiary body chairs “review the number of invitations sent to observers.” First, we believe that FCCC Article 7.6 and the COP rules of procedure, as applied, are adequate without the need for written “procedures” on the web or otherwise by the secretariat that could memorialize the “informal constituency system” and ultimately become more restrictive than now provided under the FCCC and such rules. Certainly, such option should not be considered independently of the COP and its rules, as applied, and the Parties. Second, we have no illusions that a “review” of “invitations” by the chairs of the subsidiary bodies would solve the problem.

What is needed is for the secretariat to realize that, based on experience rather than speculation, NGO’s are not likely to flood the FCCC process with requests for attendance (even assuming that the advance notice process for these workshops, consultations, etc. improves substantially), and that arbitrary attendance limits set in advance of a receipt of any requests are unnecessary and counter-productive. Also, as we previously said and the U.S. delegation reiterated, the constituency groups are capable of working with the secretariat and the chairs to ensure in any given situation that any overabundance of requests is fairly resolved without causing undue problems for the secretariat. However, thus far, the secretariat has not, to our knowledge, approached the groups and their participants for that purpose. Thus, the U.S. delegation’s June intervention was timely

and the consideration of this issue at the request of the U.S. by the Subsidiary Body for Implementation (SBI) and the COP is welcome.

The second document of concern is the first report of the Protocol Article 12 executive board (FCCC/CP/2002/3). The secretariat's note also addresses the issue of participation by observers in meetings of the executive board, the potential compliance process and expert groups. In the case of the board, its report and the above note of the secretariat indicate that the board has adopted *verbatim* the provision in the decision recommended by the COP in the Annex to decision 17/CP.7, which provides that board meetings be "open" for observers to attend and which treats FCCC Party observers -- whether or not a Party to the Protocol -- as well as NGO observers, who are not members of the board, the same way. The provision includes an "exception" that allows the board to decide differently about such attendance by the Parties and NGO's. In addition, the board, as you know, has "requested the secretariat to secure for its meetings a viewing room for about 50 observers" and requires all such observers to "register with the secretariat" three weeks or more before the meeting.

Both the recommended COP decision in the Annex to decision 17/CP.7 and the board's restatement of the provision are inconsistent with FCCC Article 7.6 and the relevant COP rules and corresponding Protocol Articles 13.2 and 15.2 -- which apply to subsidiary bodies -- with regard to Parties, and with Protocol Article 13.8, insofar as NGO's are concerned. Possibly the secretariat's use of the new term "limited-membership bodies" in its cover note is suggesting or claiming, indirectly, that the executive board, which is

specifically provided for in Article 12, is not a subsidiary body and therefore not subject to Protocol Article 15.2. If so, we do not know the basis for such a suggestion or claim in the FCCC, the Protocol or a COP decision. To our knowledge, the COP has not so decided, nor have the subsidiary bodies recommended such a result. The board is a subsidiary body. In any event, the term “limited-membership bodies” cannot be relied upon to undermine FCCC Article 7.6 and Protocol Article 13.8. More importantly, none of these Articles authorizes the above-referenced “exception” applicable either to Parties or NGO’s.

We look forward to discussing these matters with you prior to or at COP-8. If you have any questions, please contact me at (202) 508-5617 or Eric Holdsworth, Director, Climate Programs, at (202) 508-5103.

Sincerely,

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Deputy General Counsel and Climate Issue Director

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