

B.C. AND THE WHEELBASE BOGEY

The Sunday Leader has been analytically dealing with the relevant cogent issues pertaining to the privatisation of Sri Lanka Telecom - a crucially important public utility for the process of national development and growth of this country. Eventhough the privatisation of Sri Lanka Telecom was one of the major privatisation transactions handled by the government, it appears to have been carried out, closeted away from public glare and view, sans the required public discourse, discussion and scrutiny.

Ironically this had been so, notwithstanding the Public Enterprise Reform Commission [PERC] persistently professing, pontificating and publicising that they are acting "*watchful in the public interest*". If PERC was really and genuinely so acting "*watchful in the public interest*", there is no need to closet transactions away from the public glare and view, with lack of confidence to subject the processing of such major privatisations to public discourse, discussion and scrutiny, moreso particularly, in this much professed era of high profile transparency and public accountability.

BELATED PUBLIC DISCOURSE



**Minister Mangala
Samaraweera — Does the
seminar amount to locking
the stable door, too late?**

Interestingly, the Law & Society Trust, a live wire behind which is Dr. Neelan Tiruchelvam, has organised a seminar for limited discourse and discussions on the subject of Financing of Telecom Infrastructure; Policy, Process and Regulation, with a key-note address by the Minister of Media, Posts and Telecommunications, Mangala Samaraweera and with the participation of panelists, amongst others, Secretary Ministry of Telecommunications, K.C. Logeswaran, former Director General Securities & Exchange Commission and former Member PERC, Aritha Wickramanayake and Director General PERC, Mano Tittawella.

Regretfully however, such seminar for such limited public discourse and discussion is long after the event, akin to locking the stable door, after the horse had bolted, as it were ! The ramifications and complex implications of privatisation of the telecommunication sector, is not a subject that could be comprehensively dealt with, in such a limited seminar. On the contrary, the whole process

of evolution and formulation of the privatisation process of such a major public utility, such as Sri Lanka Telecom, ought to have been subjected to public discourse, discussion and scrutiny during such very process, to harness the widest possible spectrum of public review and opinion, if one were to have acted, to protect public and national interests, as has been so proclaimed.

Questionably, there appears to be a lack of confidence, on the part of the government to do so, even during such an era of professed high profile transparency and public accountability. Ironically, on the contrary, there is evidence, that PERC has documentarily required strict confidentiality from parties in PERC's dealings with such parties, in carrying out its process of privatisation. Why such shrouded confidentiality and secrecy ?

WHY NO PUBLIC OWNERSHIP ?

It is in such background, that one must consider the answer given by the Deputy Minister of Posts, Telecommunication and Media, H.L.A.M. Hisbullah to an oral question by Kandy District UNP M.P. Tissa Attanayake, whereby it had been revealed, that the government will shortly divest its remaining 65% equity shareholdings of Sri Lanka Telecom to Nippon Telegraph & Telephone Corporation, as was reported in *The Island* of December 3, 1997.

The Island report also stated that according to Deputy Minister Hisbullah, the government would retain the control of pricing in the future. Whatever such controls may be, according to reports of the Agreement entered into by the government with Nippon Telegraph & Telephone Corporation, the government has already agreed, that the annual minimum price increases for the ensuing 5 years, 1998, 1999, 2000, 2001 and 2002, shall not be less than 25%, 25%, 20%, 15% and 15% respectively, without any public disclosure of any rational justification to have done so.

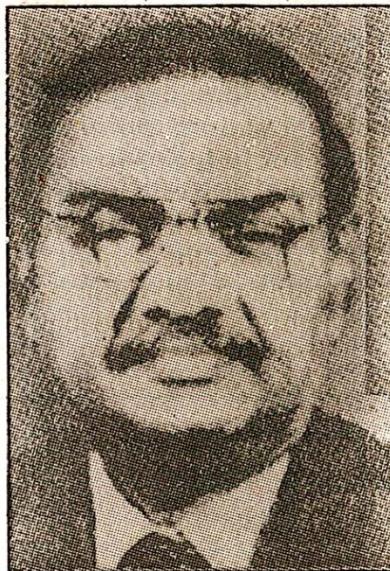
If as announced, the balance 65% shareholdings of Sri Lanka Telecom is also to be vested with Nippon Telegraph & Telephone Corporation, then, where would be the participation of the public of this country, in the ownership of Sri Lanka Telecom, as a broadbased listed public company ? According to the PERC's Act No. 1 of 1996, for the purpose of discharging PERC's functions, PERC may exercise and perform the following powers and duties as set out in Section 5(e) therein - i.e. "to make recommendations to the Government on the sale or disposal to the public, of shares in, or assets of, companies registered under the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act No. 23 of 1987".

Presumably, the sale of shareholdings of Sri Lanka Telecom would fall within the ambit of such legal provision, clearly enunciated in the PERC Act No. 1 of 1996. In such context, how could PERC carry out the privatisation of Sri Lanka Telecom selling 100% of its shareholdings to a foreign company, Nippon Telegraph & Telephone Corporation, which would clearly not constitute a sale or disposal of shares to the public, as provided for in the said PERC Act ? Would this then not be a clear violation of the statutory powers and duties of PERC, as defined in the said Act ? If not, what would it be ? How could a statutory authority and/or the government act in contravention of the statutory provisions, that such statutory authority and/or the government is legally bound to conform to ?

In the process of privatisation, creation of listed public companies would not only develop the growth of this nascent capital market and the Colombo Stock Exchange, but more importantly, it would also subject the management of such privatised ventures to public disclosure of operational and financial performances, and the management of such privatised ventures would thereby be subjected to carrying responsibility of public accountability in a transparent manner. Would not such feature be even much more important, in the case of a privatised public utility, that very much concerns the public of this country ?

RAILWAY LOCOMOTIVE CONTROVERSY

The Sunday Leader last week also brought into focus the government's announcement that canvassing and/or lobbying for a tender would disqualify such bidder or firm, with consequences of blacklisting of any such bidder, contractor or commission agent, found canvassing a Minister, Deputy Minister or any official in support of any bid made. At the same time, *The Sunday Leader* carried the startling exposure on the controversy on the evaluation of a tender for the Sri Lanka Government Railways to procure 10 Railway Locomotives; the final short listed bidders having been General Motors of Canada, Samsung of South Korea and GEC Alsthom of France - all internationally well known and reputed railway locomotive manufacturers.



B. C. Perera —“The tender board made the right recommendation”

The Cabinet Appointed Tender Board had comprised of one of the most senior and respected public servants, coming from the traditional era of the Civil Service, the Secretary, Ministry of Finance & Planning, B.C. Perera, Transport Ministry Secretary, Cecil Amarasinghe and Addl. Secretary to the President, Cyril Gunapala. According to the normal procedure, the Cabinet Appointed Tender Board would obviously have been assisted with a Technical Evaluation Committee. No doubt there are guidelines and procedure laid down, in relation to government tender procurement procedure, on the appointment and functioning of Technical Evaluation Committees and Cabinet Appointed Tender Boards.

It is a relevant and pertinent issue, as to whether such laid down guidelines and procedure, permits a Minister, in this instance the relevant line Ministry being the Ministry of Railways, the Minister of Railways, to participate directly or indirectly in the deliberations of the Cabinet Appointed Tender Board, directing and/or influencing the decisions of such Cabinet Appointed Tender Board ?

In this instant case, the Cabinet Appointed Tender Board had been chaired by the Secretary, Ministry of Finance & Planning, according to current practice, that the Secretary of another Ministry should chair the Cabinet Appointed Tender Board, other than the Secretary of the relevant line Ministry. Here too, the question arises, as to whether, simply because the Secretary, Ministry of Finance & Planning chairs the Cabinet Appointed Tender Board, the Minister of Finance & Planning could participate in discussions and/or deliberations, directing and/or influencing the deliberations of the Cabinet Appointed Tender Board ?

The cogent question that arises, is as to whether the regulatory framework, that governs the appointment and functioning of Technical Evaluation Committees and Cabinet Appointed Tender Boards permits the participation by a Minister ? On the other hand, if it was so deemed required that a Minister ought to participate, then the regulatory framework would undoubtedly have provided for the relevant Minister to chair such Cabinet Appointed Tender Board. On the contrary, no doubt, there has been much rational thinking gone into the formulation of the regulatory framework for the appointment and functioning of Technical Evaluation Committees and Cabinet Appointed Tender Boards for government tender procurements.

In the context of the recently proclaimed prohibition, on canvassing of a Minister, Deputy Minister or any official, in support of any bids made by a firm or institution, how does one then interpret the interference with a Cabinet Appointed Tender Board, by any person ? It is perhaps interesting, relevant and pertinent to consider, what the views of the Special Presidential Commission of Inquiry had been, in relation to such practice, as allegedly had transpired, at the inquiry into the privatisation of the Nylon 6 Plant, where the conduct and actions of then Minister Power and Energy, the late Chandra Bandara was brought into question ?

CABINET SUB - COMMITTEE

The Cabinet however, would certainly have a right to appoint a Cabinet Sub- Committee to advise the Cabinet on the report and recommendations of the Cabinet Appointed Tender Board, who ought to have deliberated and made decisions independently and autonomously, only amongst themselves, devoid of any interference, from whatsoever quarter. The Cabinet Appointed Tender Board would, however, have the right to summon members of the Technical Evaluation Committee and/or the concerned parties/bidders, to seek clarifications and/or explanations, which otherwise could not be easily ascertained from the review of documentations and/or call for any further relevant expert advice and opinion to assist them.

In this instance, Ministers Ratnasiri Wickremanayake, Lakshman Jayakody, Lakshman Kadirgamar and Kingsley T Wickramaratne were reportedly appointed to the Cabinet Sub-Committee to advise the Cabinet.

The famous written words of Minister Lakshman Kadirgamar, in the not too distant past, in relation to his review and examination of the Puttalam Cement privatisation transaction with Thawakkal, if one were to recall, were - "What has occurred in the Puttalam Cement affair is a gross

and calculated fraud on the government and people of this country I repeat, that I am deeply troubled. Those of us, who wish to see that at least the basic tenets of honest government are observed by our government, cannot rest content until this matter is fully investigated". Later however, what did actually really transpire and did Minister Kadirgamar, himself, act to uphold such written word ? Or on the contrary did Minister Kadirgamar compromise, without any rational reason therefor, and without following the best Westminster traditions of resignation without compromising on such stand taken on principle ?

What is lost in all this controversial confusion, is that one is called upon to make a business and a commercial decision, in this instance, on the procurement of 10 Railway Locomotives in the best interests of the public of this country. The primary objective no doubt, in proper business sense, would be to procure the best or appropriately requisite technology, quality and performance, at the best possible price for the public of this country, after all whose money it is, that is being expended to provide a public transportation service.

TECHNICAL SPECIFICATIONS ?

The total specifications for Railway Locomotives would be much more complex than what a lay person could easily comprehend and understand and hence a competent and qualified Technical Evaluation Committee is called upon to examine and evaluate. In the context of such complexities of specifications, as long as the basic configurations and specification are met, would not the Technical Evaluation Committee and/or the Cabinet Appointed Tender Board have a right and degree of flexibility, vis-a-vis, not so material specifications, to enable and facilitate best commercial decisions to be made, which most certainly would be, not to buy at the highest price, but at the lowest to protect and safeguard public interest.

On the contrary, would on the other hand, the volume of complex specifications be interpreted, biblically and religiously, and offers considered on such rigid basis, without any room for practical flexibility, particularly when it is quite well known, that technical specifications can sometimes be fixed and/or fine tuned to benefit a particularly offerer ? This is a well known practice in this game of tender business in relation to government procurement and this would be the very reason, why practical and pragmatic business and commercial considerations should over-ride, the decision making process in the interest of the public.

The Sunday Leader investigations reveal, that this much controversial technical specification or configuration had been in relation to the specification of the distance between the sets of the locomotive wheels, as referred to as the *Bogey Wheel Base*. The tender documents had specified the *Bogey Wheel Base*, that is the distance between wheel sets, to be 10' 6".

General Motors Canada, as well as Samsung, South Korea, *which were equipped with General Motors engines*, however had offered locomotives with a *Bogey Wheel Base* of 10' 9½" i.e. 3½" more, but these much cheaper offers are reported to have been in conformity with all other specifications and configurations. GEC Alstom of France had, however, offered locomotives in conformity with the *Bogey Wheel Base* of 10' 6".

The reality and fact of life is that the Sri Lanka Government Railways in fact have and operate locomotives with *Bogey Wheel Base* even as much as 11' 2". This specification of the *Bogey Wheel Base* is essentially relevant to the curvature of the railway tracks, on which these locomotives are expected to operate on.

The specifications of the curvatures of the railway tracks, on which these railway locomotives are to be operated on being known, an expert opinion could easily have been obtained, as to whether the *Bogey Wheel Base* of 10' 9½" was suitable or not, for the curvatures of the tracks that these locomotives were to operate on.

From a lay point of view, given the fact that the Sri Lanka Government Railways have been operating and operate locomotives with a *Bogey Wheel Base* of 11' 2" on the same tracks, gives rise to the question of specifying and insisting upon a *Bogey Wheel Base* of 10' 6", when it is known, that General Motors locomotives are not made to such *Bogey Wheel Base* specification.

COMMERCIAL & ECONOMIC ISSUES

Another cogent issue from a business and commercial point of view, is the feature of standardisation, in that, the Sri Lanka Government Railways has a fleet of General Motors locomotives, which locomotives have built up a reputation in the Sri Lanka Government Railways to be the locomotives that have traditionally given the best performance. In such circumstances, the Sri Lanka Government Railways is not only geared with technical competence to repair and maintain such locomotives, but also carry stocks of spares for the fleet of General Motors locomotives, which they already have and operate.

On the other hand *The Sunday Leader* reliably understands, that Sri Lanka Government Railways do not have or operate any GEC Alsthom locomotives and the procurement of which, would result in developing maintenance and repair capabilities and in addition, carrying separate inventories of GEC Alsthom spare parts for GEC Alsthoms locomotives.

These no doubt, are all relevant considerations that have a economic significance and bearing on the procurement decision. It is in the background of the foregoing, that one has to justify the procurement of GEC Alsthom locomotives at a cost in excess of Rs. 359,290,210 as reported in *The Sunday Leader* over the cost of General Motors locomotives - most certainly a very cognisable sum of money to be taken into reckoning, given the economic parameters of this country. The decision unquestionably has to be to protect and safeguard public interest and not in the interest of any foreign supplier.

In this background, let alone in an era of high profile transparency and public accountability, normal decision making processes would warrant logical and rational public justification for the Cabinet Sub Committee to make a decision to reject the recommendations of the Cabinet Appointed Tender Board and make a decision otherwise.

This is particularly moreso, when a very senior and respected public servant, Chairman of the Cabinet Appointed Tender Board, Secretary Ministry of Finance & Planning, B.C. Perera has been reported in *The Sunday Leader* to have said, that the Cabinet Appointed Tender Board made the right recommendation for good reasons. If the much professed policy of high profile transparency and public accountability is to be given life and meaning to, without any question of credibility, then this instant case demands public disclosure, as to what the good reasons were, upon which the Cabinet Appointed Tender Board, headed by the very experienced and respected Secretary, Ministry of Finance & Planning, B.C. Perera, made, what they considered a right recommendation.

In such context, to reject such right recommendation made for good reasons, then the Cabinet Sub-Committee should give their own rational reasons and justifications for rejecting, such good reasons and right recommendation of the Cabinet Appointed Tender Board, and justify the decision made otherwise, with reasons to make such different decision. In the absence of such public disclosure and accountability, this episode will continue to be shrouded with dubious controversy.

- *Published in The Sunday Leader on 7.12.1997 by Nihal Sri Ameresekere under the pseudonym 'Bismark'*