PERC MAKES NO "IMPACT" WITH REPLY

The privatisation transaction of Sri Lanka Telecom Ltd., that had been carried out by the Public Enterprise Reform Commission [PERC], had not been one of the best of deals for the public of this country, contrary to what it had been hailed and trumpeted to have been by PERC through its media blitz in August 1997, without the disclosure of the totality of the facts of the transaction to the public; PERC reneging on the high profile policy on transparency and public accountability that had been committed to be upheld by the People's Alliance government.

However both PERC, or the Ministry of Telecommunications remain questionably silent on the several cogent and important issues and questions that have been raised in the public interest on this major privatisation transaction of Sri Lanka Telecom Ltd., an economic infrastructure facility, that provides an essential and vital service to the public of this country - notwithstanding also the fact, that such very infrastructure facility was primarily valuable public property. It would appear, that contrary to repetitively and emphatically enunciated policy, that there appears to be a lack of public transparency, accountability and responsibility.

PERC ON AIR LANKA

Nevertheless, on the other hand, PERC had endeavoured through its Director General, Mano Tittawella, to address a few issues that had been espoused in an interview given to a monthly news magazine – *"Impact"* – published by The Associated Newspapers of Ceylon Ltd., a government owned and controlled media institution. The said interview by Director General, PERC, Mano Tittawella captioned – "Sri Lanka stands to benefit by AirLanka – Emirates Deal", had been published as the cover story in the June/July 1998 issue of the said magazine.

The said interview, by Director General, PERC, Mano Tittawella, however, had failed to address a number of pertinent and relevant core issues that had been highlighted, particularly that of the comparative advantage and benefit for future development and growth for AirLanka in a deal with Continental Airlines, that is not a competitor of AirLanka in this region, and which strategic alliance would have afforded AirLanka a wide global network.

The basic question in any case had been, as to why, there had been no parallel competitive negotiations with Continental Airlines and Emirates Airlines, to get the best possible deal for the country – PERC, through its own agent, having invited Continental Airlines for the privatisation of AirLanka in the very first instance? One cannot dispel the looming question, as to why such a common sense basic business strategy had been abandoned, and as to why PERC had pursued exclusive negotiations with Emirates Airlines only – that too, a competitor of AirLanka in this region? Would it not appear that there had been a gross lacuna of basic business sense and strategy?

CREDIBILITY IN QUESTION

One of the few issued attempted to be answered by the Director General, PERC, Mano Tittawella in the said interview with *Impact* had been the question – "that PERC had acted ultra vires and that AirLanka does not come under the purview of the PERC Act. Is this correct ?" The answer given, inter-alia, had been – "The PERC Act No. 1 of 1996 in Part II, Section 5, Subsection (t) states that one of the powers and duties of the Commission is 'To act as the agent of the Government, in Sri Lanka or abroad, for the purpose of any matter or transaction if so authorised' ". This, in fact, had been the very reply to such very question that had been given by the Deputy Minister of Finance, G.L. Peiris, under the purview of whose Ministry PERC functions, during the debate on the privatisaton of AirLanka in Parliament.

It is abundantly clear that the PERC Act No. 1 of 1996 had only envisaged the dealing with companies formed under the Conversion Act No. 23 of 1987. If PERC was to have acted on mere Cabinet Decisions, then why was there a need to have had an Act of Parliament at all in the first instance, with accountability to the public through Parliament?

Quite significantly, Director General, PERC, Mano Tittawella in the said interview given to *Impact* goes on to state - "In 1995, the Cabinet approved the restructuring strategy proposed by the PERC to divest 40 per cent shares together with management in AirLanka. The Director General of PERC was authorised to co-ordinate this transaction". The irony is that in 1995 there was no PERC Act No. 1 of 1996 and accordingly, there was no Section 5(t) thereof, to have taken such cover thereunder! What an incredible answer by PERC!!

SHAREHOLDER AND THE BOARD

One of the other questions answered by PERC via the aforesaid *Impact* interview had been – as to how PERC could negotiate this transaction without the participation of the Board of Directors of AirLanka?" The answer to this question, inter-alia, had been – "A Board of Directors represent the shareholders and the shareholders have the right to make decisions regarding their shareholding. In this case the owner of AirLanka was the government of Sri Lanka and therefore the government of Sri Lanka, as the owner of the shares, has the right to decide regarding its shares. This is a restructuring process carried out by the government as a shareholder and not a day-to-day management decision that has to be taken by the Board of Directors".

If this had been so, why then had the Board of Directors of AirLanka been called upon to approve and sign voluminous contractual agreements, which the Chairman, AirLanka, Harry Jayawardene had been reported to have signed with an endorsement of reservation and qualification of not having had any time to have apprised himself thereof? Therefore, who takes the responsibility therefor ? Does not the aforesaid answer by the Director General, PERC, Mano Tittawella, admit by implication that the Board of Directors of AirLanka had not participated in the negotiations.

Undoubtedly, dealing with its shares is the business of any shareholder. On the contrary, entering into Management Agreements, Airbus Purchase Agreements, etc., is the business of the Board of Directors of AirLanka. These were the cogent and important issues that had been raised, but quite apparently such issues have been deftly avoided by the above answer! Did not the Board of Directors of AirLanka, carry the statutory duty and obligation of due diligence and proper deliberation, examination and evaluation, prior to having made decisions, in addition to having ensured, that the procurement processes applicable at AirLanka had been fully adhered to?

Would any shareholder, whether government or otherwise, have had a right to usurp such authority of a Board of Directors of a Company and/or interfere therewith? Does this not violate the very fundamental and basic company governance and practice? To the question – "Has the AirLanka Chairman endorsed the transaction?", - the answer, inter-alia, had been –"Once the Cabinet of Ministers had approved the transaction, the Board of Directors were instructed to carry out the decision of the shareholder". Had the Cabinet of Ministers deliberated upon all aspects of the AirLanka privatisation transaction, as a Board of Directors would have done? Could the onus of the duties, functions and responsibilities of a Board of Directors of a company be replaced and/or usurped by a Cabinet of Ministers? Could the Director General of the Securities & Exchange Commission [SEC] Kumar Paul, who is also a Member of PERC clarify on this issue?

Ironically, there was a front page news report in the *Sunday Leader* under the caption – "Million rupee packages for Emirates bosses", that the Chief Executive Officer and other expatriate staff of AirLanka are to be paid US $ 12,500 to 10,000 per month, with other perquisites, including luxury accommodation at the JAIC Hilton, thereby giving a cost of around Rs. 1,000,000 per month per person. Is this a decision that had been made by the Board of Directors of AirLanka or by the Cabinet of Ministers and who would take the responsibility therefor? Could a shareholder, a government or otherwise, dictate to the Board of Directors of a Company, on such decision making? Had the Cabinet of Ministers been apprised of and/or deliberated upon such details and approved same? If not, who takes the responsibility therefor?

It is left it to the public of this country to decide, as to whether the Director General, PERC, Mano Tittawella had in fact been able to satisfactorily deal with and answer all the cardinal issues that had been raised by *The Sunday Leader* in the public interest, on the privatisation of AirLanka by PERC.

INFLUENCE PEDDLING & CORRUPT PRACTICES

Recently, on a Cabinet Memorandum by President Chandrika Bandaranaike Kumaratunge, as the Minister of Finance & Planning, dated June 10, '98 titled – "New procedures applicable to international companies bidding for large scale government tenders and BOO/BOT projects", the Cabinet made decision, that such foreign investors or contractors should enter into a valid agency agreement with a local company, listed on the Colombo Stock Exchange, whose market capitalisation is not less than Rs. 500 million, applicable to all projects and tenders in excess of a value of Rs. 250 million.

The rationale for such policy decision is quite evident from the dictum of the Cabinet Memorandum, itself, – "...it is important that the local agents of companies bidding for such projects do not unduly influence public officials or resort to corrupt practices in concluding deals which at times are unfavourable to the Government.... The justification for public listed companies representing reputed international suppliers, contractors and investors is that they are compelled to operate more transparently than an unlisted private or public company and with a greater degree of accountability towards shareholders. Furthermore, public listed companies are required to comply with the continuing listing requirements of the Securities & Exchange Commission...".

Ironically however, such regulations to prevent undue influence peddling and corrupt practices, did not apply to privatisation transactions pertaining to Thawakkal, Orient Lanka, Colombo Gas, Steel Corporation, Sri Lanka Telecom, Airlanka that had been carried out by PERC, - to name some of the transactions that had not been caught up in such policy regulations. However, the exposures have revealed several questionable issues pertaining to such privatisation transactions.

The objective of eliminating undue influence peddling and corrupt practices, no doubt, is laudable. Nevertheless, would it not be a great fallacy to presume, that listed public companies are devoid of such undesirable practices? Would not the very captains of business, hovering around the hierarchy of the People's Alliance government today, would also, without any inhibition, whatsoever, be hovering around the hierarchy of a future United National Party government? If it is not, for influence peddling, what then would it be for?

The People's Alliance politicians, whilst in the opposition decried vehemently, from an environmental standpoint, the construction of the picturesque Kandalama Hotel, by the Aitken Spence Group of Companies; and whilst in government today the very People's Alliance government hierarchy is reported to be wining, dining and merry making at this very Hotel.

Listed public companies with such levels of market capitalisation, no doubt, would have a larger outlay of financial resources. Nevertheless, do not captains of business invariably also appropriate shareholder funds to seek personal political rewards, appointments and provide for their retirement plans?

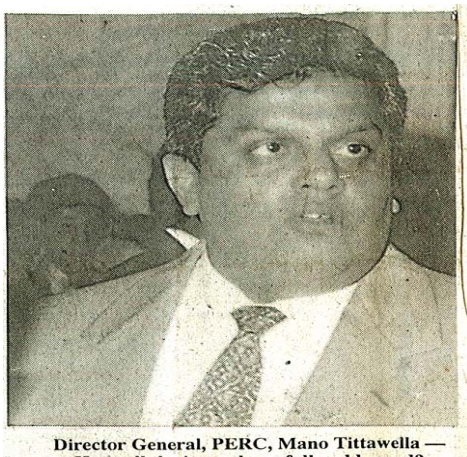
Would not the new policy regulations only help to enrich the privileged few and deny the equality of opportunity to those, not in the league of listed public companies, with a market capitalisation of not less than Rs. 500 million.? Could it realistically be postulated that influence peddling and corrupt practices do not permeate in listed public companies? Have not several scandalous exposures pertained to listed public companies as well?

FOREIGN MEDIA EXPOSURES

Newsweek of June 1, '98 carried a report by Peter Hudson on corruption in Argentina. Extracts are quite revealing – "Four years of detective work recently worked for Argentine Judge Adolfo Bagnasco, when a former Director of the country's largest bank came before him on May 15. Yes, admitted Alfredo Aldaco, he did accept a $ 3 million 'gift' before helping choose a vendor for a $ 249 million computer system at Banco de la Nacion back in 1994. The confession was a major break in a case that has embarrassed giant IBM Corp.... IBM has long since cleaned house in Argentina. It removed three key local executives in September '95 and subsequently replaced all 13 members of its board there.... 'We believe that the people responsible for noncompliance are no longer with the company'.... Bagnasco's crusade is a popular one in Argentina, where polls show corruption is one of the public's biggest worries.... IBM says that internal investigations have not turned up any wrongdoing by the company and that, anyway, all the cases relate to events that took place before it installed new management in the country. In the United States, meanwhile, the Justice Department is investigating the company under the Foreign Corrupt Practices Act".

Financial Times of May 27, '98 published a report by Richard Wolffe in Washington, under the caption – " 'Illusory Profits' Accountants deny claims over Spectrum -- Anderson partners face SEC action". The report, inter-alia, stated – "The US Securities & Exchange Commission yesterday launched legal action against two partners of the accountancy Arthur Andersen, alleging they approved of 'illusory profit' statements by an information technology company.... Arthur Andersen strongly rejected the SEC's claims yesterday and pledged to support its partners in their defence. The firm said the partners had been given mis-leading information by other staff and by Spectrum over unaudited interim financial statements.... The SEC alleges Arthur Anderson approved of a Spectrum plan to account for the deals by treating the licensing fees as current revenue, while deferring the advertising payments.... Their actions allowed Spectrum to report profits in two quarters in 1993, eventhough the company actually lost $ 2 m."

WHY INACTION BY SEC ?



Director General, PERC, Mano Tittawella — Have all the issues been fully addressed?

Director General, SEC/Member, PERC Kumar Paul — Are companies of the government above the law?

The above illustrates just two recent cases exposed in the international media pertaining to listed public companies. There have been several more reported cases..

A parallel case of "illusory profits", as so exposed by would be the case of the Merchant Bank of Sri Lanka Ltd., which as a subsidiary of Bank of Ceylon, comes under the purview of the Ministry of Finance & Planning. The Merchant Bank of Sri Lanka declared "profits" by transferring, above the market price, its portfolio of shareholding in Veytex Ltd. to a newly incorporated company Alexandria International (Pvt) Ltd., funded by the Merchant Bank of Sri Lanka Ltd. and the Bank of Ceylon. Why did not the SEC in Sri Lanka prosecute, whereas professional business partners of the Chairman of both banks were Members of the SEC, itself?

In another scandalous case, Hotel Developers (Lanka) Ltd., a company owned by the government and controlled by the Ministry of Finance & Planning, a Special Presidential Commission has charged its Directors, inter-alia, specifically for endeavouring to adopt audited accounts with the object of suppressing fraudulent acts. Why had the SEC failed to prosecute in such circumstances, whereas, partners of the audit firm concerned had continued regardlessly to be Members of the SEC, itself?

Ironically, the SEC also functions under the purview of the Ministry of Finance & Planning, which Ministry had forwarded the above Cabinet Memorandum, on the rationale that listed public companies being required to comply with the continuing listing requirements of the SEC are compelled to operate more transparently and hence by implication would be devoid of undue influence peddling and corrupt practices. Is this a truism?

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