

Electricity Reform - round 2

The Government has just narrowly passed its second electricity law in eight months, in the form of the Electricity Reform Act.

It was preceded last March by the Energy Supply (Temporary Provisions) Act No. 2 of 2002, expressed to be of two year duration, which remains in force notwithstanding the new Act.

The power crisis faced by this country was both a crisis of supply and a crisis of alleged corruption and mismanagement. The details of both are too well documented to bear repetition. The result was periods of acute power shortage and a steep rise in the cost of electricity. There was also a breakdown in the decision-making process, as evidenced by the official vacillation that surrounded the implementation of large-scale power projects.

The Energy Supply (Temporary Provisions) Act passed in March established an "Energy Supply Committee" chaired by the Secretary to the Treasury, and comprising mostly officials from finance and investment-oriented government institutions.

Consumers

The object of this Committee was said to be to ensure an adequate supply of energy. To that end it took over many functions of the Ceylon Electricity Board and the Ceylon Petroleum Corporation.

In the exercise of its powers under the Act, the Committee is permitted to override the provisions of the National Environmental Act and the public nuisance laws. However it is required to protect the interests of consumers and also obtain a report from the Central Environmental Authority prior to granting approval to any power project.

Apart from the fact that the Supreme Court found it necessary to recommend over twenty amendments to the Energy Supply Act when it was referred to that Court in Bill form, many persons (including the Sri Lanka Association for the Advancement of Science) queried the wisdom of this particular remedy.

It was noted that the Energy Supply Committee lacked input from recognized scientific and engineering institutions and some also doubted the capacity this investor oriented Committee to make economically sound decisions that would balance the interests of the power investor with those of the local consumer, both industrial and domestic.

Many also doubted the effectiveness of the Central Environmental Authority (a

government body) to enforce environmental standards in the face of heavy pressure from power investors who often enjoyed BoI or other official blessing. This relates in particular to the maintenance of prescribed noise levels when diesel power plants are allowed to operate in residential areas.

Electricity tariffs were immediately raised. Thereafter, the metropolitan area was fumed into a blaze of light and night carnivals encouraged, after the purchasers of power apparently found they had contracted for more power than the price-hit public was consuming.

On the other hand, residents living near private-sector installed diesel power plants in places such as Kosgama were enduring noise levels much in excess of what is permitted by regulations under the National Environmental Act. Meanwhile, the continued bickering over the Upper Kotmale Hydropower Project demonstrated the unsatisfactory nature of the decision-making process.

LEGAL WATCH

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ing process.

Finally, the Energy Supply Act did not address the many shortcomings in the administration of the CEB and CPC that led to the crisis in the power sector. The public has yet to see the perpetrators of any of the large-scale and well-documented acts of mismanagement, negligence and suspected corruption at those institutions being brought to book.

The Electricity Reform Act passed earlier this month neither replaces nor supplements the Energy Supply Act, but deals with the proposed re-structuring of the Ceylon Electricity Board. It must be read together with the Public Utilities Commission of Sri Lanka Act, passed at the same time, which sets up a 5-member regulatory authority for the "electricity" and "water service" industries.

In terms of the reorganization of the electricity industry as set out in the Electricity Reform Act, there will be a separation of the functions of power generation, transmission and distribution presently carried out by the Ceylon Electricity Board and the Lanka Electricity Company (a subsidiary of the CEB).

Each of these functions will be handled by one or more public companies to be established under the "Conversion of Government Owned Business Undertakings into Public Corporations"

Act No. 22 of 1987. Separate companies may also be set up to take over other functions of the CEB and LECO.

However it is clearly envisaged, though not expressly stated, that the generation, transmission and distribution of power are eventually to be handled on a competitive basis by non-state entities. Any person will be allowed to apply for a license in this regard and the authority for the granting of licenses will be the Public Utilities Commission (PUC). Furthermore, the PUC Act expressly requires the PUC to administer the industry in such a manner as to avoid monopolies and anti-competitive practices.

In an Act that seems designed to confuse rather than enlighten, the Preamble talks of the carrying on of CEB and LECO functions by "public companies". Part I abruptly talks of the granting of licenses to persons by the PUC; and Part II reverts to the restructuring of the CEB and conversion into public companies.

Section 66 almost at the end of the Act refers to the repeal of the CEB Act and the Electricity Act once these other provisions become operational. This means that the CEB has to disappear eventually, notwithstanding the assurance reportedly given to Parliament by the Power and Energy Minister that the CEB was a national asset that would be safeguarded.

Three clauses of the Electricity Reform Bill as gazetted were found to be unconstitutional by the Supreme Court.

Clause 38(2) of the Bill gave the PUC the power to "determine" disputes arising, between licensees and customers, or between licensees inter se, "unless it decides that it is more appropriate for the dispute to be determined by the courts or arbitration."

This was held to be inconsistent with Articles 3, 4 and 105 of the Constitution which mandates that the "judicial power of the people" shall be exercised by Parliament through courts, tribunals and other institutions created and established or recognized by the Constitution or created and established by law.

As such, this clause would require to be passed by a two-thirds majority in Parliament and approved by the people at a referendum.

Two clauses dealing with the fate of CEB and LECO employees and their pension/provident funds were also held to require a two-thirds majority in Parliament. Clause 47 allowed for some employees of these institutions to be re-

employed in "successor companies" without providing any guidelines or scheme for the selection of such persons. This was held to be arbitrary and discriminatory and therefore inconsistent with Article 12(1) of the Constitution.

Clause 48, which allowed "successor companies" to establish their own provident funds or contributory pension schemes for employees contrary to the terms of the Employees Provident Fund (Special Provisions) Act was likewise held to be discriminatory as this privilege was not given to other companies.

It is important to note that the Supreme Court determination refers to Clauses 47 and 48 as a whole as being unconstitutional. Clause 48(3) even provided that where employees joined the successor companies, the money lying to their credit in their EPF accounts could be transferred to the private pension and provident funds that were to be created by the successor companies.

Apart from questions of constitutionality, a number of other issues remain to be addressed. Firstly, is the huge debt burden of the CEB to be written off, paid by the Government and/or passed on to the consumer in the form of higher tariffs?

Conflict of authority

Secondly, the Electricity Reform Act only deals with the generation of "thermal" and "hydro" power. It makes no provision for the development of alternative energy sources nor for the economic rights of those who are willing to develop and supply such power. There will also be a conflict of authority if the Electricity Reform Act is sought to be implemented while the Energy Supply Act remains in force.

Thirdly, one could question the economic wisdom of having separate companies to generate, transmit and distribute power. Critics say that the price paid by the consumer will then have to accommodate the profit margins of three companies instead of one.

While the Act allows the PUC to set consumer tariffs at subsidized rates, it may do so only if the Government is willing to compensate the licensee for the cost of the subsidy. Such provisions have caused critics to argue that the electricity "reforms" are really not for the benefit of government or the consumer, but rather for the private and possibly foreign owned electricity companies to whom the door will be opened under this Act.