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17/4/2024

Ishmael Ackah (PhD)
Executive Secretary
Public Utilities and Regulatory Commission
53 Liberation Road
Africa Liberation Circle
Accra

Dear Sir,

RE: - PURC REGULATORY ORDER (ORDER NO. PURCECG022024)

We act on behalf of Members of the Board of Directors of the Electricity Company of Ghana who were in office from 1ST August 2023 to 18th March 2024.

Pursuant to their instructions we write to the PURC as follows: -

1. The Public Utility Regulatory Commission in its Order, ORDER NO. PURCECG022024, dated made various adverse findings against ECG and proceeded to impose regulatory charges in relation to individual Board members as follows: -

- **4.3.1 Allocation of Tariff Revenue Collected**

In addition to honouring its ongoing obligations under the CWM, ECG shall pay the amount of GHS446,283,706.29 to the Category B beneficiaries under the CWM. The amount represents actual revenue collected by ECG, declared by ECG CWM, and approved by the CWM Standing Committee for payment from August 2023 to February 2024 but which remains unpaid

Timeframe for Compliance: ECG shall pay the amount of GHS446,283,706.29 before or by 30th April 2024. **In the event of failure to pay by the said date, the Board members or management of ECG shall be held liable.**

- **4.3.3 Notification and publication of planned outages:**

- i. For failure to comply with the 3-day statutory notice required under Regulation 39 of L.I. 2413, the Commission in accordance with Regulation 45 of L.I. 2413, hereby imposes a regulatory charge of 3000 penalty units on ECG for each of the 163 breaches, amounting to Five Million, Eight Hundred Sixty-Eight Thousand Ghana Cedis (GHS 5,868,000.00).

ii. The Commission has determined that having regard to the nature of ECGs ownership and business, the imposition of the penalty of Five Million, Eight Hundred

Sixty-Eight Thousand Ghana Cedis (GHS 5,868,000.00) on ECG would be counter-productive, as payment from ECGs revenue will have a rebounding adverse effect on quality of service and consumers who pay tariffs to the Company.

iii. For that reason, in the interests of justice and to protect the interests of consumers, the Commission shall hold Board Members of ECG who were in office between 1 January to 18 March 2024 liable for the payment Five Million, Eight Hundred Sixty-Eight Thousand Ghana Cedis (GHS 5,868,000.00). These Board Members were at all material times responsible for strategic direction to ensure the provision of safe, adequate, efficient, reasonable and non-discriminatory service to consumers.

iv. Timeframe For Compliance: The Board Members in office between 1 January to 18 March 2024 shall pay the regulatory charge of Five Million, Eight Hundred Sixty-Eight Thousand Ghana Cedis (GHS 5,868,000.00) into a dedicated fuel account under the joint control of the Ministry of energy and the Ministry of Finance on or before 30th May, 2024. The Commission will validate compliance in tandem with its Cash Waterfall validation reports and periodic regulatory monitoring.

2. POWER/AUTHORITY OF THE COMMISSION TO IMPOSE REGULATORY CHARGES

The Commission is a creature of statute which can only act within the remit of the law. As a creature of statute, the Commission must confine itself strictly within the powers, rights and jurisdiction granted to it by the statute or its enabling instruments. In assuming jurisdiction or exercising power/authority thereof, the Commission cannot go beyond what is conferred on it by law or try to read into it something which is not there.

The Commission's power/ authority to impose regulatory charges on public utility companies is provided for under **Regulation 45 of the Public Utilities Regulatory Commission (Consumer Service) Regulations 2020. (L.I. 2413).**

**Reg. 45 of L.I 2413 provides as follows: -
SANCTIONS AGAINST PUBLIC UTILITY**

45 (1) Where a public utility contravenes a provision of these Regulations or a directive or order of the Commission, the Commission may impose a regulatory charge on that public utility as specified in the Schedule.

(2) Without limiting subregulation (1) the Commission may order a public utility to pay a reasonable compensation to a consumer for the contravention.

(3) the compensation under subregulation (2) shall be commensurate with the inconvenience, loss or damage suffered by the consumer.

(4) The Commission may in addition, issue further orders to secure compliance.

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(5) A public utility is not in breach of these Regulations, if the provisions do not apply to the core business and activities of the public utility.

(6) For the purpose of this regulations, "regulatory charge" means an administrative penalty to be imposed by the Commission for the breach of a provision of these Regulations.

It is patently clear that under the said provision, the Commission can only impose a regulatory charge on a public utility. The Commission does not have the power/authority to purport to impose any regulatory charge on officers of the public utility. The Commission in purporting to impose the said regulatory charges on the Board Members of ECG clearly exceeded their jurisdiction as it is not within their powers/authority to do so.

It must also be stated that, the Electricity Company of Ghana Limited as a corporate body has a legal personality that is distinct from its Board Members. This is the very foundation of Company Law. The officers of the company cannot be held liable for the acts of the company.

Lifting/piecing the veil of incorporation to go after the officers of the company can only be done in exceptional cases and can only done by a court of competent jurisdiction.

The Commission's lack of jurisdiction, power and/or authority to lift the veil of incorporation in the instant matter to purport to impose regulatory charges personally on the Board Members of ECG is strengthened by the provisions of Sections 38 & 42 of **The Public Utilities Regulatory Commission Act, Act 538,1997.**

Sections 38 & 42 of **The Public Utilities Regulatory Commission Act, Act 538,1997** provides as follows: -

38. Offences and penalties

A public utility which

(a) fails to comply with the required standards of performance in the provision of utility services,

(b) refuses to provide its utility service contrary to section 15 (1),

(c) charges or demands for its services rates not approved by the Board contrary to section 18(1),

(d) charges or demands a higher rate than the rate approved by the Board contrary to section 18(2),

(e) fails to submit within a specified period the tariffs of its rates contrary to section 21,

(f) fails to submit new or revision of any existing rates for approval by the Commission contrary to section 22,

(g) fails or refuses to provide a bill to its consumers contrary to section 26,

(h) fails or refuses to make the requisite adjustment arising out of a variation in rates contrary to section 27,

(i) fails or refuses to prepare and submit to the Commission within a specified time provided by or under this Act a return or an information

(i) required to be furnished by or under this Act, or

(ii) directed to be furnished by the Board for the purpose of the performance of its functions, or

(j) fails or refuses to answer a question relevant to a matter which is the subject of an investigation before the Commission,

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commits an offence and is liable on summary conviction to a fine not exceeding five hundred penalty units **and in default of payment the principal officer or the secretary of the public utility is liable to a term of imprisonment not exceeding two years.**

42. Offences by body of persons

(1) Where an offence under this Act or the Regulations is committed by a body corporate or by a member of a partnership or other firm, every director or officer of that body corporate or a member of the partnership or other person concerned with the management of the public utility commits that offence and

(a) is liable on conviction, to a fine not exceeding five hundred penalty units for the offence, and
(b) is liable in addition to the payment of compensation for a damage resulting from the breach.

(2) A person shall not be convicted under subsection (1) where it is proved to the satisfaction of the High Court

(a) that due diligence was exercised to secure compliance with the provisions of the Act, and
(b) that the offence was committed without the knowledge, consent or connivance of that person.

As provided for by the said provisions, officers of the public utility can only be held liable upon the conviction of the said public utility and the default and/or failure of the said public utility to pay the imposed fine and this can only be done by the High Court as clearly stated in the said sections.

The Commission's basis for holding the Board Members personally liable is because **"These Board Members were at all material times responsible for providing strategic direction to ensure the provision of safe, adequate, efficient, reasonable and non-discriminatory service to consumers"**

As stated above, under Section 38 of Act 538 a default on the part of a public utility in the payment of a penalty may lead to the personal liability of a principal officer of the public utility. Under Section 49 of Act 538 a principal officer means the **person responsible for the day-to-day administration of the affairs of the public utility.**

Board members of ECG are not responsible for the day-to-day administration of ECG and, therefore, are not principal officers within the intendment of Act 538 to be able to be held liable for a default on the part of the public utility ECG.

The Commission's Order imposing regulatory charges on the members of the Boards is unlawful, null and void as same is without jurisdiction. By this Order, the Commission has unlawfully clothed itself with the powers of the High Court, and imposed a sentence on the Board Members, without having been given the opportunity to be heard which amounts to a breach of the rules of natural justice.

Our clients, therefore, reject the contents of the regulatory order relative to any personal liability on their part.

We pray that the Commission take notice of the contents of this letter and act accordingly

Yours faithfully,

YAW ACHEAMPONG BOAFO
SOLICITOR FOR MEMBERS OF THE BOARD OF DIRECTOR OF ECG FROM 1ST AUGUST 2023 TO 18 MARCH 2024.

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