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Alternative Energy & Power 2022

Ghana: Trends & Developments
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Trends and Developments

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Introduction

Due in part to recent rising costs in electricity tariffs and lack of uninterrupted supply of power from the primary electricity distribution company in Ghana (the Electricity Company of Ghana), some residential customers and industrial firms in Ghana have begun to explore the possibility of using alternative forms of energy for domestic and industrial use.

Most of these consumers of electricity have especially resorted to the use of solar energy. Unfortunately, most solar equipment companies, unless licensed by the Energy Commission of Ghana to sell power, are only able to structure their business model as a sale of solar equipment upon obtaining importation and installation licences from the Energy Commission to do so. This implies that companies offering solar energy as alternative source of power are prohibited from structuring their transactions as a sale of power and therefore cannot peg the purchase price of their equipment to the amount of energy consumed by the customer.

Apart from this restriction, the Energy Commission has also recently engineered the passage of local content regulations in the electricity supply industry, which has significant implications for suppliers of alternative or renewable energy in Ghana.

The purpose of this paper is to discuss the above developments and their implications.

The Energy Commission and the Renewable Energy Sector

Under the Renewable Energy Act, 2011 (Act 832), any person engaged in a commercial

activity in the renewable energy sector must do so under a licence and any person operating without the stated licence commits an offence punishable on summary conviction to a fine not exceeding 2,000 penalty units (one penalty unit amounts to GHC12) or to a term of imprisonment not exceeding five years, or to both and where the offence is by a body corporate, the body corporate is liable on summary conviction to a fine not exceeding 5,000 penalty units. “Commercial activity” here is defined as the production, transportation, storage, distribution, sale and marketing, importation, exportation, re-exportation and installation and maintenance.

A licence may only be granted to a citizen, a corporate body duly registered under the Companies Act 2019 (Act 992) or under any other law in Ghana or a partnership registered under the Incorporated Private Partnerships Act 1962 (Act 152) upon application to the Energy Commission. The Energy Commission is required to make a decision regarding any application within a maximum period of 16 days. Applications will be granted as a matter of course unless there is compelling reason not to do so. Such reasons must be founded on technical data, national security concerns, public safety or any other reasonable justification. The licence is non-transferrable, renewable and subject to conditions specified in it.

There are several licences that can be issued by the Energy Commission within the renewable energy space.

- A licence may be granted for the production and supply of renewable energy product. This licence allows a licensee to either manufacture and assemble a renewable energy

product, install, generate and supply electrical energy or produce biofuel or wood fuel in accordance with the directives of the Commission.

- Where a bulk storage licence is obtained, the licensee is allowed to install a facility for the storage of the renewable energy product. The suitability of the facility is to be determined by the Commission.
- Where a marketing licence is obtained, the approval of the Commission is to be obtained for the export of each consignment.
- An importation licence allows the holder of the licence to import for sale of renewable energy products.
- In the instance of an installation and maintenance licence, the licensee is only allowed to engage in a commercial activity that correlates to the specific renewable energy technology, that is, solar, wind, mini hydro, biogas digester, charcoal kiln or biofuel processing plant.
- For a bulk transportation licence, the licensee shall only use a vehicle registered with the Commission in the transport of biofuel and wood fuel products.

Energy Commission's Regulatory Approach on Models for Sale of Renewable Energy Equipment

The last few years have witnessed heightened interest in Ghana for use by residential and commercial customers in the electricity regulated market for renewable energy equipment such as solar panel infrastructure. The interest has been the result of increase in electricity tariffs and the unreliable supply of power. Although the Renewable Energy Act encourages the use of renewable energy in Ghana, the influx of renewable energy equipment has the potential of undermining the continuous viability of the main state-owned distribution utility company, the Electricity Company of Ghana. The concern of regulators of the sector therefore has been to

ensure that the sale and purchase of renewable equipment is not used as a pretence to sell power (which has been the preserve of licensed distribution companies like the ECG). The approach therefore of the Energy Commission is to ensure that a contractual structure for the sale of renewable equipment does not involve payment for the equipment on the basis of the power usage by the customer. In other words, any instalment purchase price payments (in the form of leasing, rental, hire purchase or conditional sale) should not be calculated based on kilowatt/hr. Any such arrangement would be considered as a sale of power (a power purchase agreement) by the Energy Commission, which can only be allowed when a power generation licence is applied for and obtained from the Energy Commission.

Unfortunately, there has been an indefinite suspension by the Energy Commission on the issuance of the Power Generation Licence. This has led most companies engaged in the sale of renewable equipment to only obtain an Importation Licence and an Installation and Maintenance Licence. The ban on the issuance of power generation licence has made it impossible for non-holders of the licence to calculate their purchase price of any renewable equipment based on kilowatt/hr as it stands the risk of being interpreted as a power purchase agreement (which will be in violation of the law).

The inability of renewable energy equipment-supply companies to structure their sale transactions with electricity consumption as a basis for the purchase price has become quite a challenge for these companies to meet the demand for such equipment in the market. The incentive for customers to go in for this alternative source of power tend to be minimised when the customer is unable to appreciate the cost saving value as compared to their continuous use of the conventional source of power from the Electricity Company of Ghana. Equipment sup-

ply companies would therefore have to come up with innovative models to sell their products to the Ghanaian electricity market.

The Energy Commission (Local Content and Local Participation) Electricity Supply Industry Regulations, 2017 (LI 2354)

Another development in the alternative energy space in Ghana is the introduction of the above-referenced local content regulations, which came into force upon its publication in March 2018.

One purpose of the Regulations is to ensure that persons engaged in activities in the Electricity Supply Industry (“ESI”) make maximum use of indigenous financial capital, expertise, goods and services to enhance Ghana’s economy. The Regulations obliges a regulatory authority, service-providers or any other entity engaged in an activity in the ESI to ensure local participation and local content forms part of those activities. Another aim of the Regulations is to develop and promote local content and local participation in the ESI by providing an enabling environment to ensure the maximum use of financial capital, expertise, goods and services locally to create employment for Ghanaians, promote businesses in the electricity supply industry and retain the benefits in Ghana; and achieve a minimum of 60% local content and 51% local participation. Pursuant to section 77 of the Regulations, a Local Content and Local Participation Committee (the “Committee”) has been established by the Energy Commission. This Committee in 2019 issued guidelines for the effective implementation of the Regulations.

In the renewable energy sector, the Regulation sets an initial local equity participation of at least 15%, increasing to 51% in ten years. It must also be noted that violation of the Local Content Regulations attracts penalties. It provides, among others, that “a citizen who fronts or connives with a foreign citizen or company to deceive the Com-

mission as representing an indigenous Ghanaian company to achieve the local content and local participation requirement under these Regulations commits an offence and is liable on summary conviction to a fine of not less than 500 penalty units and not more than 1,000 penalty units or to a term of imprisonment of not less than six months and not more than 12 months or to both”.

Under the Regulations, a Service Provider is a person licensed to provide a service under the Energy Commission Act, the Renewable Energy Act; an operator, contractor, subcontractor or any other person performing paid services for a person operating under a licence; or a person who is registered under the Regulations to manufacture electrical equipment, electrical appliances or renewable energy equipment under the Regulations.

The Regulations state that before carrying out any activity in the ESI, a Service Provider must submit to the Committee for approval a plan demonstrating compliance with the local content requirements stated in the Regulations. The local content and local participation plan must consist of the following:

- (a) An Employment and Training Sub-Plan.
- (b) A Research and Development Sub-Plan.
- (c) A Technology Transfer Sub-Plan.
- (d) A Legal Service Sub-Plan.
- (e) A Financial Services Sub-Plan.
- (f) An Allied Services Sub-Plan.
- (g) An Ancillary Services Sub-Plan.
- (h) A Fuel, Lubricant and Water Supply Services Sub-Plan.

Generally, the Sub-Plans are a summary of a Service Provider’s practical steps to achieving local content and local participation within each of the headings listed above.

According to the Second Schedule of the Regulations, a Service Provider engaged in the development and utilisation of renewable energy resources must adhere to the Second Schedule of the Regulations. Please refer to the relevant schedule by using the following link to the Regulations: Local Content and Local Participation Regulations, 2017 (L.I. 2354).

Also, in compliance with Part B of the Seventh Schedule of the Regulations, a person who engages in an activity in the renewable energy sector and requires equipment as set out below shall purchase the desired equipment from an entity that manufactures it in Ghana. A person who defaults is liable to forfeiture of the equipment imported in addition to the full import duty and levies on the equipment. Please refer to the relevant schedule by using the link above.

According to the Regulations, a Service Provider must be certified 60 days after complete submission of all the required plans stated under paragraph (a) to (h) above once the Committee is satisfied that the local content and participation plan complies with the provisions of the Regulations. It shall then issue a Certificate of Authorisation to the Service Provider.

It is interesting to note that the Regulations do not only apply to existing and future Service Providers within the ESI but to financiers of such service providers, their advisers (including legal, technical and financial), insurance services procured by the service providers, engineering procurement and construction (“EPC”) contractors, Operation and Maintenance (“O&M”) providers and suppliers of fuel to these service providers.

As provided in paragraph 2 under the caption “Local Content and Local Participation in the Renewable Energy Sector” above, a Service Provider must ensure that at least 70% of the EPC contract value must go to a Ghanaian company. Also, Service Providers must ensure that at

least 51% of their source of funding are from an indigenous Ghanaian finance institution, which may then partner with a foreign service provider. A service provider is also required to maintain a bank account with an indigenous Ghanaian bank and to transact business of at least 10% of its total financial transactions through the bank account. An indigenous Ghanaian bank means a bank that has majority Ghanaian shareholding.

Concluding Remarks

From the above summary, in as much as the objectives of the Regulations are laudable and ultimately for the benefit of Ghanaians, it would appear the manner in which the Regulations seek to achieve the objectives of promoting local content has the potential of adversely impacting foreign investment and interest in the ESI in Ghana. There has been recent backlash from existing Service Providers against the Regulations as its practicability has been extensively questioned. Their concern is that many parts of the Regulations cannot work under current circumstances and if implemented in its current form, the Regulations will effectively end the independent power project and renewable energy market in Ghana. It has been strongly argued that the Regulations in its current form would make many aspects of renewable energy projects unworkable and need to be urgently reviewed. After stakeholder consultations, the Energy Commission is said to be taking steps to review the Regulations but there is no indication when this revision will be done to address the concerns of the industry.

The Energy Commission may also have to review its policy regarding the new models being introduced by renewable energy equipment suppliers to enhance the use of renewable energy such as solar in the country. It is quite a paradox that although the Energy Commission appreciates the need to encourage the use of alternative sources of energy in Ghana, it appears also to be somehow protective of the status quo.

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Senet Corporate Solicitors is a corporate law firm in Ghana offering proactive, practical and competent legal advisory services to individuals and corporate clients. Senet's area of expertise includes energy, banking and project finance, general corporate and commercial transactions, mergers and acquisitions, investments and joint ventures, mining, oil & gas, construction, regulatory and compliance matters, employment, real estate and dispute resolution. Senet is a go-to law firm in Ghana for transactional legal

work. Although a relatively young firm, Senet is punching above its weight and competing favourably with other law firms. International law firms have also found value in partnering with Senet to deliver legal services. The Senet team is made up of dedicated, competent and smart individuals who are committed to the philosophy, values and clients of the firm. The team has the capacity to handle both complex transactional work involving difficult legal concepts and regular legal tasks.

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