



FREE MARKET FOUNDATION

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Free Market Foundation submission on ELECTRICITY – OVERVIEW

To: Committee 1 (Triple Challenges of Inequality, Poverty and Unemployment)
High Level Panel on the Assessment of Key Legislation

By: Free Market Foundation

1. The Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

2. General comments

- South Africa faces an electricity crisis which if left unresolved will cost the economy further unrecoverable billions.
- Proposed energy-related legislation is more restrictive than existing legislation.
- The new power stations, Medupi and Kusile, will not be completed on schedule or within budget.
- Already mines, manufacturers and other businesses, shopping malls, property developers and others have to rein in potential expansion.
- It is essential that government change the energy environment immediately to forestall stagnation of the economy and further job losses.
- The world's experience shows that private investment and management of electricity generation, transmission and distribution are essential because of the critical role played by competition in ensuring the lowest prices, timely investment, availability of capital, and continuity of supply.
- A well-functioning electricity supply system has certain essential features:
 - **Independently owned and operated transmission grid:** The grid need not have one owner and parts of it can be independently operated. Independent supervision of the grid and its operation, and objective rules, are essential to protect the grid's integrity. Generators of electricity who abide by the rules should not be prevented from utilising the grid to sell electricity to customers. Similarly, purchasers of electricity who follow the rules should not be prevented from drawing electricity off the grid.
 - There is a strong case for Eskom to divest itself of ownership and control of the transmission grid.

- Sale of the grid to private purchasers would supply much-needed capital to finance the building of new power stations or to pay off debt and reduce the burden on the government, taxpayers, and electricity customers.
- **Independent Power Producers:** Entry of power producers should be entirely dependent on their meeting objective standards and not on a licensing process based on the subjective judgements of officials. No restriction would be necessary in an effort to prevent “excessive” investment in generation capacity. If there is inadequate business to sustain additional entrants, the cost will be borne by such entrants and not by taxpayers.
- **Distribution of electricity:** The market for distribution of electricity to end users should be opened up in the same way as the opening of the transmission grid, except that consumers should have access to a choice of competitive suppliers as they do in other countries.
- **Trading in electricity:** With an independent grid or grids, competing power producers, and competing distributors, trading in electricity will become commonplace. A market for electricity will help to smooth supply and demand and reduce peaks and troughs in demand as price adjustments change the behaviour of users and consumers.

3. **Specific proposal**

The High Level Panel is tasked with **identifying gaps in legislation.**

An important element to ensure sufficient and stable energy, is an **Independent System and Market Operator (ISMO)**. FMF proposes that government revisit the **original** (not subsequent) **ISMO Bill**, which has been stalled.

Attachment

1. Two-page submission on original ISMO Bill



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**Free Market Foundation Submission on ELECTRICITY
– the Independent System and Market Operator (ISMO)**

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2. Introduction

The sustainable and effective supply of electricity in South Africa is key to fulfilling the State's duty to combat poverty. Electricity disruptions brought about by Eskom's incapacity to generate enough electricity to provide for the whole country has cost South African industry billions of rands, which cost has undoubtedly been shifted to the consumer as prices steadily rise. Inequality is thus also exacerbated ineffective energy policy as disruptions have had the indirect effect of making cost of living higher for the poor. Electricity itself has become more expensive, shifting the burden of paying for access from the poor's ability to fund it themselves, to the State's willingness and ability to provide assistance.

In April 2012 the Free Market Foundation submitted comments to Parliament on the Independent System and Market Operator Bill (B9B-2012) (the ISMO Bill). The comments are attached as an annexure. The bill has not been brought up in Parliament since March 2015, when the Minister of Energy responded to a question about the status of the bill, saying that "the ISMO Bill will be reviewed and re-submitted to Parliament." The African National Congress, however, at a National Executive Committee lekgotla in early 2015, decided that it would no longer support the bill. Acting director general of the Department of Energy, Dr. Wolsey Barnard, said in February 2015 that another bill will be developed.

Furthermore, the FMF believes strongly that a prior version of the bill (B-2011 in General Notice 290 of 2011), also attached, is preferable to the most recent version. The FMF thus recommends that that bill be once again considered for enactment. This submission will be based on that version. Taking into account that the High Level Panel is tasked with identifying gaps in the national legislative scheme, it is appropriate to comment on the bill, even though it was never enacted into law.

3. The need for an independent electricity grid

Ideally, the generation, transmission, distribution, and control of electricity in South Africa must take place separately and independently. As matters currently stand, these functions are currently centralized with Eskom, establishing a monopoly which is unable to meet the demands of consumers.

The ISMO Bill avoids stating whether or not the national electricity grid will become an asset of the new independent state agency which the bill creates. Later versions of the bill completely ignore the question of asset transfer. As the FMF pointed out in its prior submissions, there are a host of issues associated with this, such as whether Eskom would cooperate with the new agency, and who would set electricity prices. This would make the second proposal by the FMF – for government to adopt its 1998 policy – more difficult, as that policy demanded that the energy sector be opened to market forces. Eskom has kept potential private electricity providers from accessing the national grid, and there is no reason to believe that this behaviour would change if the independent state agency does not acquire control and ownership of the grid.

The bill, however, was a step in the right direction insofar as it would have brought reform. The FMF has attached various amendments, as an annexure, it would like to see made to the bill or a similar bill.

International best practice from New Zealand, the United Kingdom, and the United States of America, show that competition and consumer choice in the energy sector leads to more efficiency. In the UK, for example, the National Grid welcomes private electricity generators to connect to its grid, leading to more electricity output for people of the United Kingdom and a higher income for the grid. An independent grid will incentivize the private sector to assist the government in generating electricity.

4. Government must implement its stated policy from 1998

In 1998 the government clarified its energy policy in the 1998 Energy White Paper. It provided that “the role of policy is thus to facilitate the optimal consumption of energy resources to meet social needs. This obviously requires a recognition of consumer choice and the need to open up the energy sector to market forces where appropriate.” Among other things, it stated that the objectives of state energy policy should be to increase access to affordable energy services and for the government to encourage competition within energy markets.

In line with the white paper, consumers must be given the right to choose their electricity supplier, competition must be introduced into the sector, especially with regard to the generation of electricity, and there must be open, non-discriminatory access to the grid.

The FMF believes that the government must adhere to the white paper’s guidelines and imperatives, as it provided the clearest and, in our opinion, the best solutions to the electricity crisis which followed a decade later.

5. Conclusion

The main points of this submission are thus:

1. The ISMO Bill must be reconsidered and an independent agency must take over from Eskom in managing the national electricity grid.
2. The government must base its electricity policy on the 1998 White Paper on Energy Policy, thereby:
 - a. Giving consumers the choice in who to supply them electricity;
 - b. Allowing private sector competition to compete with Eskom in generating electricity; and
 - c. Permitting open, non-discriminatory access to the national power grid.

Attachments

1. Article: What is the electricity transmission grid
2. FMF 2011 comment on original ISMO Bill
3. Proposed amendment to original ISMO Bill
4. Original ISMO Bill

What is the Electricity Transmission Grid and why is it important to you?

by Eustace Davie

Most people do not know that the electricity transmission grid plays a significant role in their lives. The grid consists of high voltage wires strung between huge pylons and stretching across thousands of kilometres from generating plants to electricity users. In SA, this grid is currently owned and maintained by Eskom.

But this is about to change. The Department of Energy recently released the 'Independent System and Market Operator Bill', which proposes to transfer responsibility for operating the grid to an independent operator, ISMO. The Bill provides for a process that will allow for the transfer of 'fixed property and other real rights in fixed property' as well as other assets, liabilities and obligations 'that can legally be transferred' from Eskom to ISMO but it does not specifically mention the electricity grid.

Should the 27,770 kilometres of high voltage transmission lines currently owned by Eskom and all the other components of the grid become owned and operated by ISMO, leaving Eskom to focus purely on power generation, the grid would function in the same way as electricity transmission is handled in the UK, except that it would be publicly and not privately owned.

National Grid is an investor-owned company that owns and operates electricity transmission grids in the UK and parts of the US. In England and Wales it owns the electricity transmission system, including approximately 7,200 kilometres of overhead line, about 690 kilometres of underground cable and 337 substations. The company is the Great Britain system operator. Besides the operation of the England and Wales transmission system, it also manages the two high voltage electricity transmission networks in Scotland. According to the company, day-to-day operation of the Great Britain electricity transmission system involves the continuous real-time matching of demand and generation output, ensuring the stability and security of the power system and the maintenance of satisfactory voltage and frequency.

Inherent in having a single grid owner and operator is the lack of competition. This lack creates the problem of potential excessive charges and difficulties with obtaining access to the grid. A problem governments generally attempt to solve by regulation and, especially, price control, which are not as effective as competition and consumer choice. Competing regional owners and operators of high voltage grids, who are linked for purposes of balancing loads, buying and selling electricity from each other when necessary, allow trading across their grids and some consumer choice. This is essentially what occurs in the EU and US. A single monopoly government-owned electricity generation, transmission and distribution organisation, such as Eskom, creates the most problems for consumers and for itself.

Consumers, be they individuals or large organisations, have the obvious problem of lack of choice, a problem that regulators in countries such as the UK and New Zealand have been at great pains to address. It is important to at least have final distributors who purchase electricity from competing generating companies, transmit it across transmission lines, transform it, and compete with each other for the business of the final consumers.

Public enterprises experience a great many difficulties that retard the efficiency of their operations. Inevitably, there is political interference in the functioning of the enterprise, the requirements changing every time there is a change in the political leadership. Industrial relations are politicised with demands being particularly difficult to resist when the employer is the only supplier of an essential service. Delays in political decision-making, such as the delay in facilitating the entry of private electricity generators to provide the power so desperately needed in SA, hamper the activities of the responsible public enterprises. Long term plans which can be set aside with the wave of a political hand deprive public enterprises of the kind of certainty that is essential for proper planning and efficient management.

World experience has shown that a vertically integrated electrical generation, transmission and distribution structure is not the best way to organise the supply of electricity. Even if most of the parts of

the whole structure remain government-owned, which is not desirable, the entities will function better if they are separated and can concentrate on their core functions. The creation of ISMO to channel electricity to the end users will relieve Eskom, as an electricity generator, and its employees of responsibility and blame for electricity shortages that are none of their making.

ISMO and the electricity regulators will hopefully encourage private generating companies who believe there is business to be had, to enter the market. ISMO does not have to weigh the risks on behalf of potential investors; all they need do is to allow access to the grid for their generating plants. SA needs more generating capacity rather than less. An independent ISMO will provide electricity generators, distributors and purchasers with information regarding supply and demand for electricity, including peaks and lows, on which to make their production and investment decisions. An independent grid operator, as long as it is instituted quickly and efficiently, will go a long way towards solving SA's electricity supply problems.

ISMO is set to buy electricity from Eskom and new independent suppliers to ensure that the demand for electricity is properly met. We will know that this has been achieved when ISMO, Eskom, new independent power producers and distributors start advertising to encourage consumers to buy more electricity, instead of appealing to them to buy less.

An independent electricity transmission grid is important to each and every one of us. Give the establishment of ISMO your support. And if government decides to make shares in the various entities available to employees and the general public be even more enthusiastic in your support.

AUTHOR: Eustace Davie is a director of the Free Market Foundation. This article may be republished without prior consent but with acknowledgement to the author. The views expressed in the article are the author's and are not necessarily shared by the members of the Foundation.



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Comment on the Independent System and Market Operator Bill

ISMO BILL

1. The Free Market Foundation

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This comment is submitted as a contribution to government's attempt to find a solution to the precarious position in which the country finds itself as a result of an inadequate supply of electricity to meet the needs of the nation.

2. Introduction

Comment on legislation and regulations relating to the supply of energy in South Africa must necessarily be made against the background of the environment that currently exists. However, to be useful, the comment must also encompass the potential for government to create an alternative environment which will eliminate the ever present threats of disruption that hang over the country's energy consumers.

Comment on the Independent System and Market Operator Bill will therefore focus on the potential for the Bill to improve conditions for the supply of electricity in the country; not merely to improve conditions marginally but to bring about an optimal improvement in the supply of electricity in the shortest possible time.

The name "Independent System and Market Operator Bill" does not correctly describe the content of the proposed legislation. Or does it? The Bill does not create either a truly independent system or a market operator if ownership and control of the transmission grid is not transferred to ISMO. If the transmission grid is transferred to a truly independent system or a market operator, it will.

3. Independence of the System Operator

3.1 Ownership/control of the transmission system

The reason why there is a shortage of electricity generation capacity in South Africa today is that independent power producers (IPPs) have been denied access to the high voltage electricity transmission grid.

Eskom is a vertically integrated monopoly that owns a large number of generation plants, the high voltage transmission lines that carry electricity across the country, and the distribution systems that deliver lower voltage electricity directly to customers. Local authorities also distribute electricity by purchasing high voltage electricity from Eskom, transforming it to lower voltage, and then selling it to customers.

Several years ago, IPPs were lining up to build generation plants and supply the additional electricity that South Africa obviously needed. They were told that they would have to sell any electricity they produced to Eskom. They would not have access to the grid and thus not able to sell directly to large potential customers. Customers who were unable to secure supply contracts with Eskom because of Eskom's shortage of generating capacity. The IPPs could also not secure purchase agreements with Eskom for the electricity they produced to be purchased at a price that would justify their investments.

Eskom should not be blamed for this situation; it was acting as any firm would do that owns a government-granted monopoly, which is to attempt to keep out competitors. The blame for the resultant blackouts, continuing electricity deficit, and lost investment falls squarely on the shoulders of government and Parliament for allowing this harmful situation to continue.

The country's citizens have already suffered considerable inconvenience when their power has been switched off, production has been damaged, and investments have been lost, all because the laws have not been changed in order to facilitate the entry of private investment in the generation of the required quantity of electricity to make the economy function efficiently.

Does the ISMO Bill hold out hope of a swift solution to the problem? It is impossible to tell from reading the Bill.

According to Section 1(1)(a) Eskom Holdings must, on the effective date and within the time period determined by the minister by notice in the *Gazette* –

- (i) Compile a list of all the fixed property and other real rights in fixed property, movable assets, intellectual property and all liabilities, rights and obligations, including the values applicable to each asset, right liability and obligation, arising from or relating to or attributable to the functions performed by Eskom Holdings immediately prior to the commencement of this Act, which can be legally transferred, ceded or assumed to ISMO in order that it can perform its functions as set out terms of this Act; and
- (ii) Submit such list to the Board for its consideration.

The meaning of the words, "*which can be legally transferred to ISMO in order that it can perform its functions as set out terms of this Act*" is critical to an understanding of what the ISMO Bill is attempting to accomplish. It is impossible for the reader to know what assets and liabilities are to be transferred.

Clause 2.3 of the Memorandum on the objects of the ISMO Bill does say "for an efficient electricity sector, it is imperative to have an independent entity to deal with both system operation and market operation." The questions are, "How independent is the entity to be and is a real market in electricity envisaged?"

There is no mention of the transmission grid in section 1(1)(a)(i). Is this, or is it not an asset that can be legally transferred to ISMO “in order that it can perform its functions”? If the grid is not to be taken over by ISMO, how is the working relationship with Eskom intended to function? Does Eskom remain responsible for the maintenance of the grid, and crucially, its expansion? If ISMO intends to allow wheeling across the grid from an independent power producer (IPP) to a large electricity customer, or to purchase electricity from an IPP to meet demand, will Eskom be compelled to facilitate the process and make the necessary connections, and if so, will the process be fully described in the contract with Eskom as contemplated in section 1(2) of the Bill? Will Eskom charge ISMO separately for electricity supplied by Eskom’s generating plants and for the transmission of electricity over Eskom’s electricity transmission system? Can ISMO be independent while utilising assets belonging to another state-owned enterprise under the control of a different government department?

If ownership of the transmission grid is to be transferred to ISMO, the difficulties mentioned in the previous paragraph will be resolved. ISMO will be in control of all the activities on the transmission system and will have the incentive to not only maintain the grid but to expand it and increase its capacity. This will be of particular importance if it is to encourage the building of generating plants by IPPs to meet its obligations under the Act.

3.2 Will ISMO be able to comply with its objects?

Some of the objects for which the ISMO is to be established as described in section 2 of the Bill are that ISMO:

- (d) is responsible for the establishment, practice and maintenance of up-to-date contingency plans that will ensure continuity of control over, and integrity of, the integrated power system at all times;
- (e) is empowered to order the interruption of supply to preserve system integrity in times of power shortages;
- (f) is responsible for the maintenance and coordination of outage schedules in line with international best practice and the Grid Code to ensure the safety, security and integrity of the integrated power system.

Section 4 of the Bill describes the functions of ISMO in great detail. Section 4(3) sets out the duties of ISMO as a market operator, and among these duties are to:

- procure sufficient energy and capacity to be able to meet the projected load on the transmission power system and to serve its contractual commitments in accordance with the Electricity Regulation Act;
- procure sufficient flexible resources to support ISMO’s real time function of balancing load to generation, including sufficient ramping capability (MW range and ramp rate) and automatic generation control capability (AGC) to meet the projected hour to hour and minute to minute system balancing requirements;
- maintain sufficient black start capability (number of units, and location on the transmission power system) under contract in order to restart the system after a partial or total blackout, and ensure that this capability is functional through periodic performance testing.

In order to function as required by its objects and functions as set out in the Bill (examples of which are shown above), ISMO will be totally dependent on an adequate supply of electricity from generation plants. ISMO will have control of electricity emanating from generating plants that are already connected to the grid at the time it takes over. What remains in question, if the transmission grid is to remain totally under Eskom’s control, is how these two entities are going to work together to achieve a better outcome than has been achieved while the whole process of generation and transmission has been under the control

of Eskom. Will ISMO have a contract with Eskom that will ensure the smooth functioning of the process for which ISMO is being made responsible, including the timely connection to the transmission grid of new suppliers of electricity with which ISMO has concluded contracts and the swift resolution of any transmission problems that occur on the grid?

Eskom has shown a disinclination to purchase electricity from alternative electricity suppliers. These include IPPs that have been prepared to erect new power plants, potential suppliers such as the sugar industry that already generate electricity for their own processing plants and could increase their capacity to sell to customers, if provided with access to the transmission grid at a reasonable price, or so-called co-generation in which companies with generation plants sell electricity that is surplus to their own requirements to a single purchaser (such as Eskom now or ISMO later) or sell it to different customers at different times. Many of these arrangements become feasible when there is an active market for electricity and unconflicted access to the transmission grid for suppliers that meet all the requirements that are necessary to ensure that the integrity of the grid is not jeopardised.

Real trading in electricity can considerably improve the efficiency of an entire inter-connected electricity system if prices are allowed to dictate the supply and demand for electricity at different times of the day or night. Some electricity users are able to shift their utilisation times so that they draw electricity off the grid in off-peak times, which they will do if a lower price makes it profitable to do so. However, they do not necessarily want to be locked into a long term contract and may prefer to carry out scheduling of their activities as and when low-cost future electricity becomes available on the electricity market. Once having purchased future electricity they may wish to sell it again if their production plans change. A market in electricity increases efficiency considerably. Most importantly, it assists in reducing peak demand levels and increasing demand in off-peak times, reducing the level of spare capacity that has to be maintained.

If the ISMO is not to be the owner and maintainer of the transmission grid, this should be clearly stated. If shifting the operation of the grid to ISMO without the transfer of ownership and control is intended to resolve the 'conflicted grid problem' as it is described in the trade, it will be much more difficult to achieve. In attempts to find ways to eliminate the electricity shortage, the main obstacle has been that independent private electricity producers have not been able to gain access to the grid.

3.3 A sound plan that was shelved and potential alternatives

In 1998/9 Eskom was preparing for the institution of a trading system in order to accommodate IPPs on the grid, including power stations sold by government to international power producers, which would have gone a long way towards resolving the inadequate power supply problem in the country. The necessary system was developed at the National Control Centre at Simmerpan and the pricing process tested through simulations carried out at the Eskom College.

For some inexplicable reason this excellent solution to South Africa's power supply problems was shelved and the country went on to experience load shedding (blackouts), industry power cuts, no sales of power stations to international power companies, and no access to the grid for IPPs. An appalling economic loss has consequently been suffered by the country.

What this experience has clearly demonstrated is that the grid must be 'unconflicted', which means that the grid must be neutrally managed in a way that does not impede the access or operations of power producers and purchasers.

IPPs seek 'bankable' power purchase agreements which they can use to persuade bankers to lend them the money they need to build power stations. If the grid is merely operated and not owned by the ISMO, a

power purchase agreement (PPA) between the operator with no assets and the IPP will not be 'bankable'. A government guarantee of the PPA would be required to support the agreement and make it bankable.

Various options are available for the solution to the problem of bankable purchase agreements:

1. Ownership of the grid could be transferred to the ISMO, which would mean the transfer of assets from one state-owned enterprise to another, a change that would not impair the assets of the state but would significantly reduce the assets of Eskom.
2. An interest in the grid could be sold to private shareholders (say 40%), the proceeds of which could go towards funding Eskom's Medupi and Kusile power stations and other projects, and the balance of the interest transferred to ISMO.
3. The entire grid could be sold to private owners, a single company in the same way as the National Grid Company owns the England and Wales electricity grids and operates other grids across Great Britain and the north eastern United States, or a company specially created to own the SA grid.

The problem of a single monopoly grid owner is generally resolved by strict regulation that prevents the grid owner from denying power producers and purchasers access to the grid for any reason other than the integrity of the grid, and ensuring that charges for access to the grid are equitable and uniformly applied. NERSA has published a consultation paper with the title 'Regulatory rules on network charges for third-party transportation of energy', which addresses the issue of access to the grid.

3.4 Benefits of selling the electricity transmission grid

Option 3 (above), the outright sale of the grid to an experienced grid operating company, has certain attractive aspects that deserve closer scrutiny. In the thrust to resolve the problem of the current dangerous power deficiencies as rapidly as possible, the necessity of having an independent and unconflicted grid is a feature that stands out as being widely recognised and accepted, including by government. What has not received attention is the potential advantages of selling the grid to a grid owner and operator. The immediate advantages are:

- Clean separation of the grid from generation and distribution.
- A dedicated grid operator with the sole responsibility of efficiently operating the grid, subject to strict regulatory requirements.
- A cash injection into the coffers of Eskom to help pay for its new generation capacity (while the carrying value of the grid in the financial statements of Eskom is R12.8bn it is probable that the selling price could be substantially greater).
- Immediate access for any power generating company that meets the technical and other requirements for connection to the grid.

There is a view that ideology could influence decision-makers against adopting this course but this view cannot summarily be assumed to be correct. Ideology must eventually make way for tried and tested policies that have proved to be successful wherever they have been properly applied.

3.5 Access to the grid

From world experience, it has become abundantly clear that the ownership and control of electricity generation plants must be completely separated from the ownership and control of the electricity transmission grid to allow for a range of solutions to be found to the current supply problems, including the absence of barriers to entry (other than uniform technical standards) for new suppliers and purchasers of electricity.

The Department of Energy (DOE) currently considers the prices that IPPs will need to charge to be profitable or break even as a major stumbling block for granting access to the grid. The reason for this

concern is the view that the single buyer of electricity will not be prepared to pay a price that will be acceptable to an IPP. This assumption might be correct so far as electricity purchased by ISMO for resale to its customers is concerned. The assumption is not correct in respect of wheeling across the grid from IPPs to power purchasers in the carrying out of bilateral agreements.

DOE is further concerned about who will supply the additional capacity required for balancing the grid if an IPP should 'go down' and what contribution IPPs will make towards the safety margin between maximum potential supply and demand for electricity. None of these considerations provide reasons for denying IPPs access to the grid:

3.5.1 Pricing of access to the grid (wheeling charges)

There is no need to delay access to the grid to IPPs over assumed limits as to what they can charge their customers for electricity. While it is true that the current cost of electricity to Eskom, based on the historical cost of its plant, might be lower than the cost that will face new IPP plants, there is no way of knowing what electricity costs or charges are likely to be in a fully competitive market for electricity. Government need only concentrate its attention on the wheeling charges, except when ISMO is to be the purchaser of electricity.

When an IPP wishes to obtain access to the grid from ISMO for purposes of supplying electricity across the grid to a power purchaser in terms of a bilateral contract, the appropriate arm of government (probably NERSA) needs to act as referee to ensure that access to the grid is not unreasonably denied and that the wheeling charge is not unreasonably high, for instance, if IPPs were to supply the 10 per cent of electricity by which large users have been asked to reduce their off-take. Another example would be cases where IPPs are able to supply electricity to those property developers that have been denied the right to proceed with developments because of Eskom's inability to do so.

Such potential electricity customers, at the top end of the market-demand for electricity, are likely to be prepared to pay premium rates to ensure supply. ISMO might object to such contracts on the grounds that as the supplier of first instance any such higher price paid should be paid to them, that the supply by an IPP of all or part of the requirements of its own existing best customers amounts to cherry-picking. Such an argument is unfounded. If ISMO has the electricity to supply such customers, they should do so, if not they should step aside gracefully and facilitate the wheeling of the electricity that is in such high demand from IPPs to the short-supplied or power-starved customers. The health of the economy and availability of jobs is at stake.

3.5.2 Balancing the grid and providing reserve capacity

IPPs will be subject to the same disciplines as Eskom regarding the balancing of the grid. A group of IPPs could be formed to ensure that in the event of a problem with one of them, the others will have sufficient reserve capacity to fill the void. Another solution would be to have an agreement with their customers to immediately stop drawing power off the grid in the event that the IPP has a supply failure. Also, the IPP could have an agreement with ISMO that in the event of a power failure, the major supplier would cover the shortfall at a punitive rate, if not, the customer would be compelled to cease drawing power.

All these arrangements could be dealt with using smart technology. Both the balancing and the making up of shortfalls could be dealt with in co-operation with ISMO or other transmission system operator but on a self-correcting basis that is, first and foremost, designed to avoid disrupting the operation of the grid.

3.5.3 ISMO as System Operator

ISMO will be able to function if it has watertight agreements, which it is able to enforce, with Eskom as grid owner, but it will be in an invidious position given that Eskom is also the generator of almost all the electricity. If ISMO is not the owner and maintainer of the grid, ISMO can be truly independent only if the grid ownership and maintenance is in the hands of an organisation or body that is itself independent of electricity generation companies.

Carrying out the December 1998 objectives as outlined in government's White Paper would resolve the issue of independence. The White paper provided that:

To ensure non-discriminatory and open access to transmission lines, and taking into consideration the financial stability of Eskom, government, in the medium term, is to establish a separate state-owned transmission company.

4. Board of Directors

The Board of Directors must be independent and seen to be independent of political interference, as far as possible, to ensure that the system operations are carried out strictly in accordance with prudent business principles. The fact that the ISMO Bill requires nominees to the Board to have technical skills that 'would add value to ISMO in performing its functions' will assist in ensuring the efficient functioning of the Board and the ISMO.

5. Comment on specific problematic sections of the Bill

Section 4 – Functions of ISMO – setting out the functions that ISMO is required to perform in great detail as in 4.2 appears to be unwise. Would this not require new legislation to rectify the description of the functions every time circumstances or the requirements change? A general description of the functions and the expected outcomes would appear to be preferable, especially as the company incorporation documents will spell out the purpose for which the company is to be formed.

Section 4(3)(e)(ii) – requires ISMO to “conclude electricity export agreements, **having regard to the interests of the Republic over the long term.**” The bold section of the quote from the Bill appears to indicate that the ISMO will be expected to perform some form of political role, which should not be its function. ISMO should function as a business and should not be treated as an arm of government. If there is to be a government-to-government agreement regarding electricity, it should be entered into by the appropriate government department, with a back-to-back agreement between the department and ISMO, even to the extent of the department purchasing the electricity from ISMO and selling it with the other government.

Section 16 – Personnel of ISMO and not treating ISMO as a branch of the public service – Section 16 provides that the Energy Minister and the Minister of Finance play a decisive role in ensuring the success of the ISMO. The second confirms the impression that the ISMO is to be treated as an arm of the public service. If these impressions are correct it would be most disappointing. It is essential that ISMO must function as a business with the directors taking ultimate responsibility for its proper functioning. An enterprise of this nature cannot be run from the office of the Minister. Constant political interference will destroy it. People who know what they are doing must be employed to run the ISMO and the Minister, acting as the representative of the shareholder, should only become involved in the manner that shareholders would get involved in the affairs of a public company.

Section 10 – Powers of entry and inspection – It is not clear why ISMO should have powers of entry and inspection, except if ownership and control of the transmission grid is to be transferred to it. The section intends to provide ISMO with draconian powers similar to those that Eskom inherited from the apartheid government that was not restrained by the rule of law as the central guiding principle of the constitution we have now. If the transmission grid is not to be owned or maintained by ISMO, this section should be deleted. If ISMO is to own or maintain the transmission, the provisions in the section need to be toned down. Right of access to check and maintain existing plant can be understood but to summarily cut off the electricity supply to someone who might have a legitimate reason for denying access to property, especially in the face of South Africa's high crime rate is intolerable.

What is even more intolerable is to treat customers in the manner contemplated in the Bill. If you are a customer, whether or not you have promptly paid your electricity bill for many years, you have your electricity cut off until you allow access (Subsection 10(3)(a)). If you are not a customer, ISMO is required to apply to the High Court for an order authorising entry to the premises. No private owner of transmission or distribution lines would dream of acting in such a fashion.

Section 11 – Offences and penalties – This section provides for even more appalling treatment of customers and citizens of the country. Subsection (1)(f) provides that anyone who "refuses to grant ISMO access to land or property for electric-related inspection; or (1)(g) "impedes, interferes with or attempts to frustrate ISMO in its attempts to gain access to land or property" is "guilty of an offence and liable on conviction of a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment (Subsection (2)). If the person has previously been convicted of chasing away ISMO staff members, the imprisonment is doubled to ten years (Subsection (3)). The records are likely to show that criminals who have committed heinous crimes receive sentences such as those described in this Bill. It would be informative to discover what level of criminality in the form of theft, burglary, assault and murder routinely receives penalties of such proportions. These Subsections should be removed.

6. Governments and delivery of electricity and other services

6.1 Projects that are too big for governments to handle

In the mid-20th Century there was a widespread belief that some projects and industries were the 'natural preserve' of government because they were 'too big' for the private sector to handle. This belief has been proved by experience in many countries to be not only wrong in principle but that government attempts to finance and manage very large projects are strategically imprudent. Now, in the most economically free countries, and in the less free countries with astute governments, the largest projects are privately financed, owned and managed, because they are either too large for governments to handle or governments correctly consider the field of competitive enterprise, profit and loss, to be an area of activity best left to private enterprise.

6.2 Government monopolies

Also in the middle of the last century, the notion of natural government monopolies was widely accepted. Governments decided to embark on projects that were considered to be in the public interest but which the private sector 'was incapable of doing or was not prepared to do'. As events have unfolded since then, resources in private hands internationally have increased considerably, and it has become clear that:

No project is too big for the private sector

There are no projects that can be carried out by government that are beyond the capability of the private sector. The 'private sector' encompasses all private firms worldwide.

Governments should generally not do what the private sector considers to be economically unjustifiable

If the private sector is not prepared to carry out a project it is probable that it is not economically viable.

The National Party government adopted 'siege economy' and collectivist/socialist policies

The 'commanding heights' of the economy (including electricity production and distribution) in South Africa, were monopolised by the National Party government not only as part of its 'siege economy' attempts to become independent from the rest of the world but also as a result of its collectivist/socialist philosophy.

Significant government economic errors are imposed on private taxpayers

Governments tend at times to make more serious and larger errors than private sector decision-makers on matters relating to enterprise management because politics unfortunately often takes precedence over economics in their decision-making processes. Another typical phenomenon is that political decision-makers are seldom held personally responsible for seriously negative financial and economic errors. One of the reasons for large errors is that politicians invariably do not have the information required to make crucial decisions relating to large enterprises. In such cases taxpayers foot the bill whereas private company shareholders pay for losses, and directors and managers lose their jobs, a recent international example being the forced resignation of BP Chief Executive Tony Howard over the major oil spill in the Gulf of Mexico.

Political pressures cause governments to remain 'locked in' to methods of providing services that are politically problematic

Even when services provided by public enterprises deteriorate badly, or they show large losses and it becomes patently obvious that their monopoly status is harming the economy; some governments remain 'locked in' and find it difficult or politically impossible to remedy the situation. Such governments generally face criticisms from their citizens for squandering taxpayers' money on bailouts of loss-making public enterprises, or for deteriorating service delivery. Notwithstanding such criticisms, their ability to institute reforms is typically hampered by strong ideological opposition from their political supporters to allowing the private sector to compete with, or take over, struggling public enterprises.

Government gains from the existence of competing providers of essential services such as electricity

Government, instead of attempting to be the generator, transmitter and distributor of electricity (vertically integrated), should pave the way for the entry of competing suppliers of every possible service involved in the process, from generation to transmission and distribution to end users of electricity.

Even while the large power stations within Eskom continue to be owned by the utility, they should, in order to increase efficiency, be operated and managed independently. All these stations, together with independent power producers should compete with each other in a trading system for the business of consumers. The trading system should be operated by ISMO, which should function on a strictly business basis in the interests of electricity consumers, which means ensuring stability of supply and competitive delivery.

The generation, transmission and distribution systems incorporated in Eskom constitute substantial state-owned assets that have been largely paid for by past taxpayers. This is also the case with all state-owned enterprises. Instead of looking to current taxpayers to pay for new plant for electricity generation, transmission and distribution, government should consider halting its investment in public enterprises and turning to competing private investors to take over the role of providing capital for expansion.

6.3 European experience

The best structure is not a single government monopoly such as Eskom, with centrally controlled oversight and direction. Much better structures are those that have evolved and continue to evolve in the European Union countries, based on the UK example, and the structure that has developed in North America.

An economics or business-driven structure for the delivery of electric power consists of an electricity grid made up of inter-connected high voltage transmission lines supplied by a multiplicity of electricity generating entities that feed electricity into the grid. An even greater multiplicity of distributors purchase electricity from the generating companies or from wholesale intermediaries, draw it from the grid, transform it from high to a lower voltage, and distribute and sell it to end users. For all or most of these functions to be carried out by a single organisation such as Eskom is not a good idea, especially when that organisation's very existence depends on a legislated monopoly that prohibits competitors from entering the business of generation, transmission and supply of electricity.

There is ample evidence that SA's electricity generation and supply structure needs to change. For instance, the Ignalina Nuclear Power Plant in Lithuania observes on its website that: 'Until the late 1980s, the structure of the electric sector in most countries was based on the idea that the most efficient way to provide electricity was to have a national electricity company which was a natural monopoly and so needed to be state owned to protect consumers. However, now experience shows it is possible to divide electricity companies into those parts which are still natural monopolies (for example, high voltage and low voltage networks) and those parts where it is possible to have competition (for example, power stations) and to create a market for electricity. This experience is now being used all over the world to create cheaper electricity by means of competition among power stations and among companies that are in the business of purchasing and reselling electricity. Western Europe has shown that prices to consumers can fall by up to 20% when the market is fully operational.'

According to the website, a May 2000 European Commission report revealed marked decreases in the price of electricity from 1996 to 1999 in Finland -19.6%, Sweden - 17.6%, and Germany - 9.6%, all countries with 100% market opening. Spain - 16.2%, Portugal - 14.0% and France - 12.7% also experienced significant price reductions with a reduced level of market opening (between 30% and 45%). At the time of the report Lithuania was in the process of meeting the conditions for its 1 May 2004 entry into the EU, one of the conditions being the opening of its electricity market to alternative suppliers, a condition that applies to all EU members.

7. Conclusion

Changing a large structure that has been in existence for many years is extremely difficult. It is understandable that government has approached the task with considerable trepidation and that there have been several changes of direction. However, while it is prudent to take care in making changes, a time arrives when to delay further becomes imprudent. Such a time has arrived in dealing with electricity generation, transmission and distribution. Making transmission independent and as neutral as possible has now become essential to save the South African economy from serious harm and the country's people from unnecessary deprivation. The time has come for government to take determined and fundamental action to solve the problem of electricity shortages and potential regular blackouts.

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Attachment to Free Market Foundation submission on the ISMO Bill

These amendments are proposed to the Independent System and Market Operator Bill in the form of B-2011 in General Notice 290 of 2011.

Section 13 must be amended as follows:

- The portion in subsection (1) that reads:
“subject to the prior approval of the Minister,”
must be removed.

Section 23(1) must be amended as follows:

- Subsection (1)(a) must read *in toto*:
“the assets and rights transferred to ISMO, which includes the national transmission power system which is to be transferred from Eskom Holdings;”

Section 25 must be amended as follows:

- The following must be inserted in subsection (1)(a) after the words “new generation”:
“, with the permission of the owner;”
- The following must be inserted in subsection (1)(b) after the words “supplied by ISMO,”:
“with the permission of the owner,”
- Subsection (2) must be removed and replaced by the following:
“If any owner refuses unreasonably the entry of the person so contemplated in subsection (1), ISMO may apply to the High Court for an order authorising entry to the premises.”

Section 27(1) must be amended as follows:

- Subsection (1)(a) must provide that the national transmission power system *must* be included in the list of assets that Eskom Holdings will transfer to ISMO.

REPUBLIC OF SOUTH AFRICA

INDEPENDENT SYSTEM AND MARKET OPERATOR BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 34289 of 13 May 2011)
(The English text is the official text of the Bill)*

(MINISTER OF ENERGY)

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BILL

To provide for the establishment of an Independent System and Market Operator as a state-owned entity which will provide an independent system operation to ensure safe, secure and efficient operation of the integrated power system, trading of electricity at wholesale level; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

DEFINITIONS AND OBJECTS OF ACT

Definitions 35

1. In this Act, unless the context otherwise indicates—
 - “**ancillary services**” means services supplied to ISMO by generators, distributors or end-use customers, necessary for the reliable and secure transport of power from generators to distributors and other customers;
 - “**Board**” means the Board of ISMO contemplated in section 9; 40
 - “**chief executive officer**” means the person appointed by the Board in terms of section 19;
 - “**chief financial officer**” means the person appointed by the Board in terms of section 19;
 - “**Commission**” means the Companies and Intellectual Property Commission 45 established by section 185 of the Companies Act;
 - “**Companies Act**” means the Companies Act, 2008 (Act No. 71 of 2008);
 - “**Department**” means the department responsible for energy;

“Director-General” means the Director-General of the Department;
“dispatch” means the scheduling, coordination and management of the flow of electricity produced by generation facilities or consumed by the demand-side resource into and out of the transmission power system, including the start-up and shut-down of those facilities; 5
“distribution” means ‘distribution’ as defined in section 1 of the Electricity Regulation Act;
“distribution power system” means an interconnected network for the conveyance of electricity which operates at or below a nominal voltage of 132kV;
“effective date” means the date on which ISMO is established as a state-owned entity; 10
“Electricity Regulation Act” means the Electricity Regulation Act, 2006 (Act No. 4 of 2006);
“Eskom Holdings” means the company envisaged in section 3 of the Eskom Conversion Act, 2001 (Act No. 13 of 2001); 15
“expansion plan” means a plan for development of the transmission network;
“generation” means ‘generation’ as defined in section 1 of the Electricity Regulation Act;
“generation licensee” means the holder of a licence to construct or operate a generation facility in terms of the Electricity Regulation Act; 20
“Grid Code” means the transmission or distribution Grid Code applicable in terms of the Electricity Regulation Act;
“integrated power system” means a power system that is interconnected to a generation facility, transmission power system and distribution power system;
“integrated resource plan” means an integrated resource plan as contemplated in the Electricity Regulation Act; 25
“ISMO” means the Independent System and Market Operation SOC Ltd established in accordance with section 3;
“ISMO Customers” means the customers— 30
 (a) to whom ISMO may sell electricity;
 (b) from whom ISMO may buy electricity; and
 (c) who provide ancillary services, as identified by the Minister through regulations or by notice in the *Gazette*;
“licence” means a licence issued under the Electricity Regulation Act;
“licensee” means the holder of a licence issued under the Electricity Regulation Act; 35
“market operation” means the purchase of power from generation and sale to ISMO customers at a wholesale price;
“member” means an executive or non-executive member of the Board;
“Memorandum of Incorporation” means the Memorandum of Incorporation of ISMO referred to in section 5; 40
“Minister” means the Minister of Energy;
“national control centre” means the control centre operated for the control and management of the dispatch and supply of electricity by the generation licensees into the transmission power system; 45
“NERSA” means the National Energy Regulator of South Africa established in terms of section 3 of the National Energy Regulator Act, 2004 (Act No. 40 of 2004);
“Public Finance Management Act” means the Public Finance Management Act, 1999 (Act No. 1 of 1999); 50
“system operation” means the operation of the integrated power system in real time which includes electricity dispatch.
“trading” means ‘trading’ as defined in section 1 of the Electricity Regulation Act;
“transmission” means ‘transmission’ as defined in section 1 of the Electricity Regulation Act; 55
“transmission power system” means an interconnected network for the conveyance of electricity which operates above a nominal voltage of 132kV;
“transmitter” means the owner of a transmission power system; and
“this Act” includes the regulations made in terms of this Act.

Objects of Act

2. The objects of this Act are to provide for the incorporation of ISMO as a state-owned company that—
- (a) is financially viable and that will manage the system in an efficient manner;
 - (b) will act as a trader of electricity to ISMO Customers in line with Government policy; 5
 - (c) will prepare appropriate input into the planning of electricity supply and the transmission planning;
 - (d) is responsible for the establishment, practice and maintenance of up-to-date contingency plans that will ensure continuity of control over, and integrity of, the integrated power system at all times; 10
 - (e) is empowered to order the interruption of supply to preserve system integrity in times of power shortages;
 - (f) is responsible for coordination of outage schedules in line with international best practice and the Grid Code to ensure the safety, security and integrity of the integrated power system; 15
 - (g) ensures efficient dispatch within the integrated power system; and
 - (h) manages tariff aggregation in respect of electricity sale by generators, and provide for matters related thereto.

CHAPTER 2

20

ESTABLISHMENT OF ISMO

Establishment of ISMO

3. (1) (a) There is hereby established a juristic person to be known as the Independent System and Market Operator SOC Ltd.
- (b) The Minister must effect the incorporation of ISMO in terms of the Companies Act. 25
- (c) The State is the sole shareholder of ISMO.
- (2) Notwithstanding the Companies Act, the Minister or a person designated by him or her must, on behalf of the State, sign the Memorandum of Incorporation and all other documents necessary for the incorporation of the company. 30
- (3) The Commission must—
- (a) register the Memorandum of Incorporation as signed in terms of subsection (2);
 - (b) incorporate the company as a state-owned company under the name “Independent System and Market Operator of South Africa Holdings”, with “ISMO Holdings” as its shortened form; and 35
 - (c) issue to the company the necessary documentation to enable it to conduct its business as a corporate entity.
- (4) No fee is payable in respect of the incorporation of ISMO.

Functions of ISMO

40

4. (1) In relation to planning, ISMO must—
- (a) model scenarios at regular intervals for the purpose of developing the integrated resource plan and provide the results of the modelling to the Minister for the purpose of developing the integrated resource plan and any other activity incidental thereto; and 45
 - (b) provide the necessary input for the development of the expansion plan by the transmitter in accordance with anticipated electricity demand as per the integrated resource plan whose input must be duly considered by the transmitter.
- (2) In relation to system operation ISMO must— 50
- (a) operate the integrated power system in a safe, secure, efficient and sustainable way;
 - (b) control the system voltages and system frequency within safe and sustainable limits;
 - (c) optimise real and reactive power flows to reduce losses whilst maintaining system security; 55

- (d) coordinate transmission and generation outage and maintenance plans in accordance with the Grid Code requirements;
- (e) prepare short-term load forecasts and dispatch schedules in accordance with Grid Code requirements;
- (f) dispatch available generation in accordance with the dispatch rules in the Grid Code as far as practically possible; 5
- (g) maintain and operate a national control centre to control the integrated power system and related systems;
- (h) direct the functioning of transmission operating centres located throughout the Republic and ensure that their operation is coordinated with the overall operation of the integrated power system; 10
- (i) serve as the operating interface to the operators of other transmission power systems and distribution power systems for planning and the real time operation of combined electrical systems;
- (j) maintain the real time balance of generation and electricity demand within the Republic and coordinate operation with adjacent control areas; 15
- (k) develop the short-term operation plans and dispatch schedules using the resources that are procured or otherwise arranged for by the market operator;
- (l) coordinate with generation licensees with regard to the planning of maintenance in accordance with the Grid Code and international best practice to ensure that there is always sufficient capacity available to meet the demand; 20
- (m) coordinate with transmission operators and distribution operators with regard to the planning of maintenance in accordance with the Grid Code to ensure that there is always sufficient capacity available to deliver the required power safely and securely as far as is reasonably possible; 25
- (n) coordinate the start-up, shut-down and dispatch generation under its jurisdiction;
- (o) manage adequate operating reserves in accordance with the Grid Code as part of the dispatch activities;
- (p) implement system emergency plans and procedures as required to maintain an acceptable level of reliability; 30
- (q) perform contingency studies in real time using live data from the control system state estimator or as required and react in due time to mitigate any possible risk for the integrated power system;
- (r) perform a short-term, day to day, week to week, load forecast as an input into a short-term energy and capacity planning function; 35
- (s) verify and record the generators' actual dispatch loading and the corresponding transmission load losses and conduct an assessment of the actual generation loading against the dispatch schedule;
- (t) keep a complete and accurate record of all the transmission systems loadings and associated dispatch on a half-hourly basis together with the dispatch rules and costing; and 40
- (u) order the interruption of supply to preserve the system integrity in times of power shortage.
- (3) In relation to market operation, ISMO must— 45
 - (a) buy electricity from a generator or external trader in line with Government policy;
 - (b) conclude and enter into transaction agreements as may be necessary for the procurement of electricity, including sufficient capacity and energy supply;
 - (c) conclude transaction agreements as may be necessary for the procurement of ancillary services, interruptible load, load shifting or other demand-side options necessary for efficient and secure operation of the system; 50
 - (d) procure electricity on such terms and conditions as may be agreed upon by the parties—
 - (i) from licensees with the exception of licensees exempted from selling electricity to ISMO in terms of the Electricity Regulation Act; and 55
 - (ii) consistent with the integrated resource plan and in terms of procurement processes contained in the Electricity Regulation Act;
 - (e) in line with the Republic's international obligations, agreements and undertakings— 60
 - (i) conclude electricity import agreements that ensure a reliable and stable supply of electricity for customers within the Republic; and

- (ii) conclude electricity export agreements, having regard to the interests of the Republic over the long term;
 - (f) procure sufficient energy and capacity to be able to meet the projected load on the transmission power system and to serve its contractual commitments in accordance with the Electricity Regulation Act; 5
 - (g) procure sufficient flexible resources to support ISMO's real time function of balancing load to generation, including sufficient ramping capability (MegaWatt range and ramp rate) and automatic generation control capability (AGC) to meet the projected hour to hour and minute to minute system balancing requirements; 10
 - (h) maintain sufficient black start capability (number of units, and location on the transmission power system) under contract in order to be able to restart the system after a partial or total blackout, and ensure that this capability is functional through periodic performance testing;
 - (i) enter into power sale agreements with ISMO Customers; 15
 - (j) ensure that metering points are established and maintained to allow billing quality metering of all electricity sales and purchases;
 - (k) develop processes to manage the efficient implementation of agreements concluded with ISMO Customers with regard to the trading of electricity;
 - (l) develop a risk management policy and associated implementing procedures to ensure that risks associated with the purchase and sale of energy, capacity or other products are addressed, including currency exchange and price risk; 20
 - (m) develop and implement energy supply tariffs for all sales to ISMO Customers, but such energy supply tariffs must be developed and implemented subject to the approval of NERSA; 25
 - (n) develop accounting procedures to reconcile the energy accounts and the monetary accounts related to the market and system operation; and
 - (o) maintain a complete and accurate set of accounts for all the power system transactions.
- (4) ISMO may, with the concurrence of the Minister, perform such other functions as may be necessary to give effect to or are ancillary to its functions as set out in subsections (1) to (3). 30

Memorandum of Incorporation

5. (1) The Memorandum of Incorporation of ISMO must be drawn up in such a manner that the contents thereof are consistent with this Act. 35
- (2) Despite the Companies Act, an amendment of the Memorandum of Incorporation affecting an arrangement made by any provision of this Act will not be operative or have any legal force unless and until the relevant provision of this Act has been amended accordingly and that amendment has come into effect.
- (3) The Memorandum of Incorporation may vest ISMO with such powers as are typically required for the operation of a company, having regard to the provisions of subsection (1). 40

Application of Companies Act

6. (1) The provisions of the Companies Act which are not in conflict with this Act: apply to ISMO, subject to subsection (2). 45
- (2) A provision of the Companies Act will not apply to ISMO in circumstances where—
- (a) any contrary arrangement is provided for in this Act; or
 - (b) the Minister of Trade and Industry has issued an exemption under section 7.

Request for exemption from application of provision of Companies Act 50

7. (1) (a) The Minister may on the recommendation of ISMO request the Minister of Trade and Industry to exempt ISMO from the whole or part of a provision of the Companies Act, as contemplated in section 9 of that Act.
- (b) The request referred to in paragraph (a) must be fully motivated.
- (2) The Commission must publish particulars about the request and motivation 55 contemplated in subsection (1) by notice in the *Gazette*.

(3) The Minister of Trade and Industry, having considered the request contemplated in subsection (1) and if satisfied on reasonable grounds that the non-application of the provision of the Companies Act to ISMO will—

- (a) contribute to the efficiency of ISMO and reduce its operating costs;
- (b) not reduce or limit the accountability of ISMO as a public institution or detract from the requirements of transparency regarding its functioning and operations; and
- (c) not be detrimental to the interests of the State, employees of ISMO or claims of creditors of ISMO,

may, by notice in the *Gazette*, declare, with effect from the date stated in the notice, the whole or part of a provision of the Companies Act not applicable to ISMO.

CHAPTER 3

MANAGEMENT OF ISMO

Management of ISMO by Board

8. The Board is responsible for managing the business and affairs of ISMO. 15

Composition of Board

9. (1) The Board consists of—

- (a) not more than seven non-executive members appointed in terms of section 12; and
- (b) two executive members appointed in terms of Chapter 4. 20

(2) The Minister must appoint one member as the Chairperson of the Board.

(3) The Board must elect a Deputy Chairperson from among its members.

(4) A member holds office for a maximum period of four years, provided that he or she may be reappointed by the Minister to ensure continuity and maintain expertise, but may not serve for more than eight consecutive years. 25

(5) The term of office of members may be rotated and staggered in order to ensure efficiency and continuity.

(6) A member is appointed on such terms and conditions and is entitled to such remuneration as the Minister may, with the concurrence of the Minister of Finance, stipulate in that member's letter of appointment. 30

Acting Chairperson

10. (1) Whenever the Chairperson is absent or unable to perform his or her functions as Chairperson, the Deputy Chairperson must act as Chairperson and, if the Deputy Chairperson is absent or unable to act as Chairperson, the Board must designate another non-executive member of the Board to act as Chairperson until the Chairperson or Deputy Chairperson is available. 35

(2) Any person acting as Chairperson of the Board in terms of subsection (1) must exercise all the functions and perform all the duties of the Chairperson.

Functions of Board

11. The Board— 40

- (a) must give effect to the corporate plan of ISMO contemplated in section 52 of the Public Finance Management Act in order to achieve the objectives of ISMO;
- (b) is the accounting authority of ISMO;
- (c) takes decisions on behalf of ISMO and gives effect to those decisions; 45
- (d) provides guidance and gives instructions to the chief executive officer concerning the exercise of the functions of ISMO;
- (e) must notify the Minister immediately of any matter that may prevent or materially affect the achievement of the objectives or financial targets of ISMO; and 50
- (f) must generally refer to the Minister any matter that may adversely affect the functioning of ISMO.

Appointment of non-executive members of Board

12. (1) For the purposes of appointing the non-executive members, the Minister must, by notice in at least two national newspapers and in the *Gazette*, invite interested persons to submit applications, or interested parties to nominate a candidate, within a specified period and in the manner mentioned in the notice. 5
- (2) The Minister must appoint a nomination committee to make recommendations to the Minister for the appointment of the non-executive members contemplated in subsection (1).
- (3) In establishing a nomination committee, the Minister must—
- (a) ensure that the committee is broadly representative of the various racial groups and that both males and females are represented; and 10
 - (b) ensure that the committee members have the necessary skills, knowledge, qualifications and experience to serve on the committee.
- (4) The nomination committee in making a recommendation to the Minister, must consider— 15
- (a) the proven skills, knowledge, qualifications and experience of a candidate in areas of—
 - (i) electrical engineering;
 - (ii) financial management;
 - (iii) economics; 20
 - (iv) law;
 - (v) environment; or
 - (vi) any other field of expertise relevant to the functions of ISMO;
 - (b) the need for representation of historically disadvantaged persons; and
 - (c) whether a candidate has any direct or indirect interest in conflict with the business of ISMO as contemplated in section 14(3). 25
- (5) The Minister must ensure that the non-executive members represent a sufficient spread of skills, knowledge, qualifications and experience to enable ISMO to function efficiently and effectively.
- (6) (a) Nominations of suitable persons as contemplated in subsection (4) must include at least one and a half times the number members to be appointed. 30
- (b) If a suitable person or the required numbers of suitable persons are not nominated as contemplated in subsection (4), the Minister may call for further nominations in the manner set out in subsection (1).
- (7) The Minister must, within 30 days after appointing the members, by notice in the *Gazette* publish the names of the members so appointed and the date of commencement of their terms of office. 35
- (8) (a) Any vacancy occurring in the Board in terms of section 13, must be filled in the manner provided for in this section within six months of such vacancy occurring.
- (b) Any member appointed under paragraph (a) holds office for the rest of the period of the predecessor's term of office, unless the Minister directs that such member holds office for a longer period, which may not exceed one subsequent term of up to four years. 40
- (9) A non-executive member—
- (a) may be reappointed, but may not serve for more than two terms consecutively;
 - (b) is appointed according to the terms and conditions determined by the Minister; 45
 - (c) must be paid from the revenue of ISMO such remuneration and allowances as may be determined by the Minister, taking into consideration prescriptions and guidelines issued by the Minister for the Public Service and Administration and the National Treasury; and 50
 - (d) is appointed on a part-time basis.

Resignation, removal from office and vacancies of Board

13. (1) A non-executive member may resign by giving to the Minister—
- (a) one month's written notice; or
 - (b) less than one month's written notice, with the approval of the Minister. 55
- (2) The Minister may, after having afforded the member concerned a reasonable opportunity to be heard, remove the member from office if that member—
- (a) acted in conflict with this Act or the Memorandum of Incorporation of ISMO;
 - (b) refuses or fails to make a disclosure or declaration contemplated in section 14;

- (c) after having been appointed, acquires any direct or indirect interest contemplated in section 14(3) (b)(ii), read with section 14(1) (g);
- (d) refuses or fails to divest himself or herself of the interest contemplated in section 14(3) (b);
- (e) neglected to properly perform the functions of his or her office; or 5
- (f) is absent from two consecutive Board meetings without prior leave of the Chairperson.

(3) Any member must vacate the office if he or she becomes disqualified from membership of the Board in terms of section 14.

Disqualification from membership of Board and disclosure 10

14. (1) A person must not be appointed as a member or remain a member if he or she—

- (a) is a member of Parliament, any provincial legislature or any municipal council;
- (b) is an unrehabilitated insolvent; 15
- (c) has been declared by a court of law to be mentally ill or disordered;
- (d) has at any time been convicted, whether in the Republic or elsewhere, of—
 - (i) theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or any other offence involving dishonesty; or 20
 - (ii) an offence under this Act;
- (e) has been sentenced, after the commencement of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), to a period of imprisonment of one year or more without the option of a fine;
- (f) has at any time been removed from an office of trust on account of 25 misconduct;
- (g) has any direct or indirect interest in conflict with the business of ISMO; or
- (h) is not a South African citizen.

(2) A person who is subject to a disqualification contemplated in subsection (1) (a), (b) or (g) may be nominated for appointment as a member, but may only be appointed if at 30 the time of such appointment he or she is no longer subject to that disqualification.

(3) (a) A person nominated for appointment as a member must, before appointment and upon a request from the Minister, submit to the Minister a written statement containing—

- (i) a full disclosure of all his or her financial interests; and 35
- (ii) a declaration that he or she has no direct or indirect interests that are in conflict with the business of ISMO as contemplated in subsection (1) (g).
- (b) If, after appointment, a member of the Board acquires any—
 - (i) further financial interest contemplated in paragraph (a)(i), the member must immediately in writing disclose that fact to the Minister and the Board; or 40
 - (ii) direct or indirect interest contemplated in subsection (1) (g) the member must immediately declare that fact to the Minister and the Board.

Fiduciary duties of Board members

15. In addition to any other applicable legislation, the following applies to members:

- (a) A member may not be present, or take part in, the discussion of or the taking 45 of a decision on any matter before the Board in which that member or his or her family member, business partner or associate has a direct or indirect interest.
- (b) A member or his or her family member, business partner or associate, or an organisation or enterprise in which a member or his or her family member, 50 business partner or associate has a direct or indirect interest, may not—
 - (i) offer goods or services to ISMO or conclude any business with ISMO; or
 - (ii) make improper use, in any manner whatsoever, of the position of a member or of any information acquired by a member by virtue of his or her position as a member. 55
- (c) A member must perform his or her functions at all times with the utmost good faith, honesty and integrity, care and diligence and, in furtherance of his or her functions, without limiting their scope, must—

- (i) take reasonable steps to inform himself or herself about ISMO, its business and activities and the circumstances in which it operates;
- (ii) take reasonable steps, through the processes of the Board, to obtain sufficient information and advice about all matters to be decided by the Board to enable him or her to make conscientious and informed decisions; 5
- (iii) regularly attend Board meetings;
- (iv) exercise an active and independent discretion with respect to all matters to be decided by the Board;
- (v) exercise due diligence in the performance of his or her functions as a member; 10
- (vi) comply with any internal code of conduct that ISMO may establish for Board members;
- (vii) not engage in any activity that may undermine the integrity of ISMO;
- (viii) not make improper use of his or her position as a member or of information acquired by virtue of his or her position as a member; and 15
- (ix) treat any confidential matters relating to ISMO, obtained in his or her capacity as a member, as strictly confidential, and may not divulge them to anyone without the authority of ISMO or as required as part of that person's official functions as a member. 20

Procedures at meetings

16. (1) The Board determines its procedures at meetings.
- (2) Fifty percent plus one of serving members constitute a quorum at any meeting of the Board.
- (3) A decision taken by the Board or an act performed under that decision is not invalid merely by reason of— 25
- (a) any irregularity in the appointment of a member;
 - (b) a vacancy in the Board; or
 - (c) the fact that any person not entitled to sit as a member sat as such at the time when the decision was taken, provided such decision was taken by a majority of the members present at the time and entitled so to sit, and those members at the time constituted a quorum. 30

Committees of Board

17. (1) The Board may appoint one or more committees but must appoint the following committees: 35
- (a) Remuneration and Performance Committee;
 - (b) Human Resources Committee;
 - (c) Audit Committee; and
 - (d) Risk Committee.
- (2) The Board must— 40
- (a) assign members to serve on a committee, based on their knowledge and skills;
 - (b) determine the—
 - (i) terms of reference of a committee;
 - (ii) composition of a committee;
 - (iii) tenure of members of a committee; 45
 - (iv) reporting mechanisms of a committee; and
 - (v) method and reasons for removal of a member from a committee.
- (3) Non-executive members must make up the majority of the members of a committee.
- (4) Unless specially delegated by the Board, a committee has no decision-making powers, and can only make recommendations to the Board. 50
- (5) A committee must meet as often as is necessary in order to carry out its functions, and may determine its own procedures.
- (6) Each committee must be chaired by a non-executive member.

Delegation of functions by Board

18. (1) The Board may, by resolution passed by two thirds of its members—
- (a) subject to subsection (4), delegate any of its powers and assign any of its duties to any member of the Board or any committee established in terms of section 17, the chief executive officer, the chief financial officer or any employee of ISMO; and 5
 - (b) amend or revoke such delegation or assignment.
- (2) Notwithstanding a delegation or assignment contemplated in subsection (1), the Board is not divested of any power or duty so delegated or assigned.
- (3) (a) Any delegation or assignment contemplated in subsection (1)— 10
- (i) may be made subject to such conditions as the Board may determine; and
 - (ii) must be communicated to the delegate or assignee in writing.
- (b) The written communication contemplated in paragraph (a)(ii) must contain full particulars of the matters being delegated or assigned and of the conditions subject to which the power may be exercised or the duty must be performed. 15
- (4) The Board may not delegate—
- (a) the power to appoint the chief executive officer or the chief financial officer; and
 - (b) its role in deciding on— 20
 - (i) the appointment of the chief executive officer or the chief financial officer;
 - (ii) the mandate and strategic plan of ISMO.

CHAPTER 4

ISMO STAFF

Appointment of chief executive officer and chief financial officer 25

19. (1) The Board must—
- (a) with the approval of the Minister, appoint a chief executive officer; and
 - (b) appoint a chief financial officer,
- to ensure that ISMO meets its objects.
- (2) The Board must invite applications for the posts of chief executive officer and chief financial officer by publishing advertisements in the media and consider applications received. 30
- (3) A person appointed as chief executive officer or chief financial officer must—
- (a) have the qualifications or experience relevant to the functions of ISMO; and
 - (b) not be disqualified on the grounds as contemplated in section 14. 35

Conditions of appointment of chief executive officer and chief financial officer

20. (1) The appointment of the chief executive officer and the chief financial officer is subject to the conclusion of an annual performance agreement with ISMO.
- (2) The chief executive officer— 40
- (a) is appointed for a term not exceeding four years; and
 - (b) may be reappointed by the Board with the concurrence of the Minister, but only for one such additional term not exceeding four years.
- (3) The chief executive officer and the chief financial officer hold office on terms and conditions determined by the Board, with the concurrence of the Minister.
- (4) The chief executive officer and the chief financial officer are members of the Board by virtue of their office. 45
- (5) The chief executive officer and the chief financial officer are accountable to the Board.
- (6) The chief executive officer and the chief financial officer are entitled to a remuneration package determined by the Board in line with the remuneration guidelines for state-owned companies as approved by Cabinet. 50

Termination of employment of chief executive officer or chief financial officer

21. (1) The Board must, with the concurrence of the Minister in the case of a chief executive officer and subject to compliance with the Labour Relations Act, 1995 (Act

No. 66 of 1995), terminate the employment of the chief executive officer or the chief financial officer—

(a) for misconduct, which includes any act or failure to act contemplated in section 13(2); or

(b) for failing to perform the duties connected with that office diligently.

(2) The Board may suspend the services of the chief executive officer or the chief financial officer pending the finding of any misconduct proceedings against him or her, during which period the chief executive officer or the chief financial officer is also suspended as an executive member.

(3) The chief executive officer or the chief financial officer must vacate the office if he or she becomes disqualified from membership of the Board in terms of section 14.

(4) The chief executive officer or the chief financial officer may resign by written notice of at least 30 days to the Chairperson of the Board.

Acting chief executive officer or chief financial officer

22. (1) The Board may in writing appoint any senior employee of ISMO to act as chief executive officer or chief financial officer for a period not exceeding six months when the holder of that office—

(a) is for any reason temporarily unable to perform the duties connected with that office;

(b) has been suspended from office; or

(c) has vacated or has been removed from that office and a new chief executive officer or chief financial officer, as the case may be, has not yet been appointed.

(2) An acting chief executive officer or acting chief financial officer may exercise all the powers and must perform all the duties of the chief executive officer or chief financial officer, as the case may be.

(3) The Minister may extend the period referred to in subsection (1) for a further period not exceeding six months if the Minister is satisfied that such an extension is justified.

Delegation by chief executive officer and chief financial officer

23. (1) The chief executive officer and the chief financial officer may delegate to an employee of ISMO any of his or her powers and assign any of his or her duties.

(2) Any delegation or assignment contemplated in subsection (1)—

(a) may be made subject to such conditions as the Board may determine;

(b) must be communicated to the delegatee or assignee in writing;

(c) may be amended or withdrawn in writing by the chief executive officer or chief financial officer, as the case may be; and

(d) does not prohibit the holder of the office that made the delegation or assignment from exercising that power or performing that duty.

(3) Notwithstanding a delegation or assignment contemplated in subsection (1), the chief executive officer or the chief financial officer, as the case may be, are not divested of any power or duty so delegated or assigned.

Functions of chief executive officer

24. (1) The chief executive officer must, subject to the policy and directives of the Board—

(a) assume responsibility for the management of ISMO;

(b) ensure that ISMO achieves its goals;

(c) liaise with and report to the Board with regard to the management of ISMO; and

(d) ensure that all information required for Board meetings has been made available to the Board in appropriate time for such meetings.

(2) The Board must, in accordance with and subject to the applicable laws, including the Public Finance Management Act, delegate and assign to the chief financial officer such of his or her powers and duties as may be necessary to enable the management of ISMO based on a delegation policy and framework pre-approved by the Board.

Appointment of staff

25. (1) The chief executive officer may, in accordance with a human resource, remuneration and service benefit structure approved by the Board, enter into employment or other agreements with persons for the performance of specific duties or the provision of specific services as may be necessary for the proper discharge of ISMO's functions. 5

(2) All employees of Eskom Holdings employed in the fulfilment of the functions contemplated in this Act, including support staff, must be transferred to ISMO in accordance with the provisions of section 39.

Personnel of ISMO

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26. (1) The Board must determine the structure or organogram of ISMO and the conditions of service, remuneration and service benefits of the personnel of ISMO after consultation with the chief executive officer and with the concurrence of the Minister and the Minister of Finance.

(2) The work relating to the functions of ISMO is performed by such persons as the chief executive officer may appoint. 15

(3) The chief executive officer must determine and supply each employee with a copy of the code of conduct, applicable to all members of staff of ISMO and justiciable for purposes of disciplinary proceedings, to ensure—

- (a) compliance with applicable laws; 20
- (b) the effective, efficient and economical use of ISMO's resources; and
- (c) the promotion and maintenance of a high standard of professional ethics.

(4) Personnel may be transferred or seconded to ISMO from the public service subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

CHAPTER 5

25

FUNDING AND FINANCIAL ACCOUNTABILITY

Loans and Government guarantees for loans

27. (1) The State, represented by the Minister, may grant loans to ISMO from monies made available by Parliament for that purpose.

(2) ISMO will pay interest on such a loan at a rate determined by the Minister acting with the concurrence of the Minister of Finance, and must repay the loan in line with the arrangements agreed with the Minister. 30

Business, financial plan and strategic plans

28. (1) (a) Not later than 30 days before the end of each financial year ISMO must submit its business and financial plan for the following financial year to the Minister for approval. 35

(b) Notwithstanding paragraph (a), the business and financial plan for ISMO's first financial year must be submitted to the Minister for approval within 90 days after the incorporation date.

(2) A business and financial plan must set out and explain ISMO's proposed operations, projects, activities and other objectives for the following financial year, as well as— 40

- (a) the cost of those operations, projects, activities and other objectives;
- (b) the manner in which it is proposed to finance them;
- (c) the planned performance indicators applicable to them; 45
- (d) a statement of ISMO's estimated income and expenditure for that financial year;
- (e) any other information and particulars that may be prescribed; and
- (f) any additional relevant information that may be requested by the Minister in writing. 50

(3) (a) ISMO must submit to the Minister for approval, not later than 30 days before the end of its financial year and of every financial year thereafter, a strategic plan covering the period of five years commencing on the first day of the ensuing financial year.

(b) A strategic plan must be annexed to ISMO's business and financial plan for any financial year which is also the first year of the five-year period to be covered by the strategic plan.

Judicial management and liquidation

29. Notwithstanding the provisions of any law, ISMO may not at the instance of any person other than the government be placed under judicial management or in liquidation except if authorised by an Act of Parliament adopted specifically for that purpose. 5

Funds and assets

30. (1) The funds and assets of ISMO consist of—

- (a) the assets and rights transferred to ISMO as contemplated in section 39; 10
- (b) funds, assets and rights acquired by ISMO in the performance of its functions;
- (c) shareholder contributions approved by the Minister of Finance; and
- (d) such other funds and assets as may be approved by the Minister after consultation with the Minister of Finance.

(2) The funds and assets of ISMO may only be used for the performance of its functions and activities related thereto. 15

(3) ISMO may not dispose of the majority of its assets or such part of its assets as would have a significant impact on the ability to perform its functions without the prior approval of the Minister in consultation with the Minister of Finance.

ISMO tariffs, fees and charges

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31. (1) All of ISMO's normal costs must be recovered from tariffs, fees and charges to ISMO Customers, provided that ISMO must not be allowed to recover a tariff, fee or charge to the extent that it is prohibited by legislation or regulation from levying such tariff or service charge.

(2) In the event that an ISMO Customer does not pay any tariff or service charge due, and notwithstanding ISMO's remedies in law, ISMO may, notwithstanding any provision to the contrary in any law, refuse to provide part or all of any services to such customer until all outstanding arrears, including administration fees, collection costs and legal fees, have been paid by such customer. 25

(3) Notwithstanding subsection (1) and subject to section 23 and the limitations and conditions as may be prescribed in the Memorandum of Incorporation, Public Finance Management Act and the Companies Act, ISMO may— 30

- (a) borrow money or arrange for facilities to be made available to it to meet its capital and operational requirements;
- (b) raise capital by issuing bonds or making use of other financial instruments; 35
- and
- (c) provide security for money thus borrowed or raised.

Borrowings secured by ISMO assets and revenue

32. (1) All borrowings effected by ISMO and any interest or other costs due or to become due in respect thereof, unless otherwise agreed between ISMO and the lender, must be a first charge against all revenues and assets of ISMO and on all monies recovered or to be recovered by it. 40

(2) (a) If any interest due in respect of any securities remains unpaid for three months after demand therefor in writing has been lodged with ISMO, the holder thereof may apply to a High Court having jurisdiction for the appointment of a receiver of the revenues and assets referred to in subsection (1). 45

(b) The court may—

- (i) make such order and give such directions as in the circumstances it may deem necessary for the raising and payment of the monies due; and
- (ii) in particular, order that any prices of electricity supplied or to be supplied be increased to meet the deficit, and the exercise of such order does not require the sanction of any authority. 50

(3) If such default in payment of interest in whole or in part continues for a further period of three months, the holder of the securities may apply to a High Court having jurisdiction for a declaration that the outstanding principal sum for the time being has 55

become due, and the court may make such declaration, together with any consequential order or declaration.

(4) In the event of default in payment of the principal sum of any security for one month after the date on which it is repayable, the provisions of subsections (2) and (3) apply with the necessary changes.

5

Application of Public Finance Management Act

33. (1) ISMO is a public entity for the purposes of the Public Finance Management Act, and must comply with the provisions of that Act.

(2) The Board must ensure that the provisions of the Public Finance Management Act, in particular sections 52 (submission of annual budget and corporate plan) and 55 10 (annual reporting on financial affairs), are duly complied with.

(3) (a) The Minister must table in Parliament the annual report and financial statements of ISMO as contemplated in section 55 of the Public Finance Management Act—

- (i) within 14 days after receiving the report, if Parliament is in session; or 15
- (ii) if Parliament is not in session, within 14 days after the commencement of the next session.

(b) The annual report and financial statements must clearly differentiate between the annual report and financial statements of ISMO and those of its subsidiaries.

(4) The Board must submit such other accounts, reports and statements as the Minister 20 or the Minister of Finance, or both, may require.

CHAPTER 6

GENERAL PROVISIONS

Powers of entry and inspection

34. (1) In addition to the powers, duties and functions of ISMO contained in the Memorandum of Incorporation and set out in this Act, any person authorised for this purpose by ISMO— 25

(a) may enter upon any land for the purpose of carrying out surveying, tests and such other forms of investigations in relation to design or construction of new generation capacity; 30

(b) may at all reasonable times enter any premises to which electricity is or has been supplied by ISMO, in order to inspect any lines, meters, fittings, works and apparatus belonging to ISMO, or for the purpose of ascertaining the quantity of electricity consumed, or where a supply is no longer required, or where ISMO may cut off the supply, for the purpose of removing any lines, 35 meters, fittings, works and apparatus belonging to ISMO.

(2) Any person wishing to enter any premises in terms of subsection (1) must—

(a) if possible, make the necessary arrangements with the legal occupant or owner of the premises before entering such premises and must adhere to all reasonable security measures, if any, of the occupant or owner of the 40 premises; and

(b) exhibit his or her authorisation at the request of any person materially affected by his or her activities.

(3) If any person fails to comply with the provisions of this section, ISMO may—

(a) disconnect the electricity of such a person until such time as access to the 45 premises is granted; or

(b) in an area where there is no electricity connection, apply to a High Court for a court order authorising entry to the premises.

(4) ISMO must, before disconnecting the electricity of a person in terms of subsection (3), notify the property owner or legal occupant of the premises in writing of the 50 intention to disconnect the electricity supply.

(5) If any person fails to grant entry onto any premises for the purpose contemplated in this section, ISMO may apply to a judge of a High Court for a court order authorising such entry to the premises.

(6) Damage caused by such entry, inspection or removal must be repaired or 55 compensated for by ISMO.

Investigation of ISMO

35. (1) The Minister may appoint a person to investigate the affairs or financial position of ISMO and compliance by ISMO with this Act and may recover from ISMO the fees and disbursements incurred by that person during the investigation.

(2) ISMO or an employee of ISMO must, for the purposes of subsection (1), provide the Minister or a person authorised by the Minister with such data, information, books, accounts, documents and assets of ISMO as the Minister or the authorised person may require.

Intervention by Minister

36. (1) The Minister may direct ISMO to take any action specified by the Minister if ISMO—

- (a) is in financial difficulty or is being mismanaged;
- (b) fails to perform its functions effectively or efficiently; or
- (c) has failed to comply with any law or any policy envisaged in this Act.

(2) A directive contemplated in subsection (1) must state—

- (a) the reason for issuing the directive;
- (b) the steps which must be taken to remedy the situation; and
- (c) a reasonable period within which the steps contemplated in paragraph (b) must be taken.

(3) If ISMO fails to comply with the directive contemplated in subsection (1) within the stated period, the Minister may dissolve the Board after having given it a reasonable opportunity to be heard.

(4) If the Minister dissolves the Board, the Minister must appoint an administrator to take over the functions of the Board and to do anything which the Board might otherwise be empowered or required to do by or under this Act, subject to such conditions as the Minister may determine.

(5) The costs associated with the appointment of an administrator must be borne by ISMO as prescribed by the Minister.

(6) The Minister must—

- (a) review the performance of ISMO regularly whilst it is under administration; and
- (b) within three months of appointing the administrator, table a report on his or her findings in the National Assembly.

(7) The Minister must, as soon as it is feasible but not later than six months after the dissolution of the Board, appoint a new Board as contemplated in chapter 3.

(8) The appointment of the administrator terminates when the Board members have been replaced in terms of subsection (7).

(9) (a) Notwithstanding subsections (3), (7) and (8), the Minister may dissolve the Board, on good cause shown, if the Minister loses confidence in the ability of the Board to perform its functions effectively and efficiently.

(b) The Minister may dissolve the Board only after having given it a reasonable opportunity to be heard.

(c) If the Minister dissolves the Board, the Minister—

- (i) must appoint an administrator to take over the functions of the Board and to do anything which the Board might otherwise be empowered or required to do by or under this Act, subject to such conditions as the Minister may determine; and
- (ii) must, as soon as it is feasible but not later than six months after the dissolution of the Board, replace the members of the Board in the manner contemplated in chapter 3.

(d) The appointment of the administrator terminates when the Board members have been replaced in terms of paragraph (c)(ii).

(10) Notwithstanding this section, the Minister retains the right at any time to approach a competent court for relief in any matter he or she considers appropriate in furtherance of this Act.

Offences and penalties

37. (1) A person commits an offence if he or she—
- (a) fails to provide access to any books, accounts, documents or assets when required to do so in terms of this Act or when required by the Minister as contemplated in section 35; 5
 - (b) fails to give data or information, or gives false or misleading data or information when required to do so in terms of section 35;
 - (c) fails to comply with a reasonable directive issued by an administrator appointed by the Minister in terms of section 36;
 - (d) intentionally refuses to perform a duty or obstructs any person in the exercise of a power or performance of a duty in terms of this Act; 10
 - (e) accepts any unauthorised fees or reward, either directly or indirectly, as a result of his or her position with ISMO;
 - (f) refuses to grant ISMO access to land or property for electricity-related inspection; or 15
 - (g) impedes, interferes with or attempts to frustrate ISMO in its attempt to gain access to the land or property.
- (2) Any person who contravenes subsection (1), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment. 20
- (3) Where a person is again convicted for an offence contemplated in subsection (1), he or she is liable to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.

Regulations and policy

38. (1) The Minister may make regulations regarding— 25
- (a) criteria to be used by the Minister in determining customers to whom ISMO may sell electricity, or who may purchase electricity directly from generators, including technical criteria, financial criteria and criteria of national importance or from a security of supply perspective;
 - (b) the transfer of customers and related rights and obligations from Eskom Holdings or other suppliers to ISMO, including the compulsory transfer of customer contracts, the handling of existing long term contracts, the splitting of contracts between energy and wheeling, and matters associated therewith; 30
 - (c) the transfer of assets, rights, obligations and staff, excluding transmission;
 - (d) the transfer of functions, including the timelines within which ISMO must assume the execution thereof; 35
 - (e) any matter relating to the functioning of the Board that is necessary to ensure efficiency and effectiveness in the performance of its functions; and
 - (f) any ancillary or incidental administrative or procedural matter that is necessary to prescribe for the proper implementation or administration of this Act. 40
- (2) The Minister, after consultation with the Board, may make policies on matters of national policy applicable to ISMO, consistent with the objects of this Act, and may at any time thereafter amend any such policies made.
- (3) When making or amending the regulations contemplated in subsection (1), the Minister must— 45
- (a) invite public comment and duly consider comments prior to finalising the regulations; and
 - (b) table the regulations in Parliament before publishing the final version in the *Gazette*. 50

CHAPTER 7

TRANSITIONAL PROVISIONS AND SHORT TITLE AND COMMENCEMENT

Transfer of assets, rights, liabilities and obligations

39. (1) (a) Eskom Holdings must, within the time period determined by the Minister 5
by notice in the *Gazette*—

- (i) compile a list of all the fixed property and other real rights in fixed property, movable assets, intellectual property and all liabilities, rights and obligations, including the values applicable to each asset, right, liability and obligation, arising from or relating to or attributable to the functions performed by Eskom Holdings immediately prior to the commencement of this Act, which can legally be transferred, ceded or assigned to ISMO in order that it can perform its functions as set out in terms of this Act; and 10
- (ii) submit such list to the Board for its consideration. 15

(b) The Board must consider the list provided in terms of paragraph (a) and may consult and negotiate with Eskom Holdings thereon with a view of obtaining a comprehensive list of all assets, rights, liabilities and obligations arising from or relating or attributable to the functions that will be the responsibility of ISMO in terms of this Act, with a view of determining their associated values, and with a view of determining whether such assets, rights, liabilities and obligations can be transferred, ceded or assigned to ISMO. 20

(c) Upon agreement between the Board and Eskom Holdings as to the contents of the list and the values as contemplated in subsection (1), the Minister may determine by notice in the *Gazette* that the fixed property, servitudes and other real rights in fixed property, movable assets, intellectual property and all liabilities, rights and obligations set out in such list, with effect from a date specified in such notice, be transferred, ceded or assigned to ISMO from another organ of state, after consultation with such organ of state: Provided that— 25

- (i) in the event that no agreement is reached between the Board and Eskom Holdings within a reasonable time, the Minister must finally determine the fixed property, servitudes and other real rights in fixed property, movable assets, intellectual property and all liabilities, rights and obligations and corresponding values to be transferred, ceded or assigned to ISMO; and 30
- (ii) different vesting dates can be determined by the Minister for different assets, rights, liabilities and obligations to facilitate the phasing in of functions of ISMO contemplated in this Act. 35

(2) (a) Any reference to an organ of state in the patents register, trademarks register, designs register, deeds register or any other register is with effect from a vesting date contemplated in subsection (1)(c) deemed to be a reference to ISMO.

(b) Notwithstanding section 5 of the State Land Disposal Act, 1961 (Act No. 48 of 1961), and the Deeds Registries Act, 1937 (Act No. 47 of 1937), a registrar of deeds referred to in section 102 of the latter Act must, on submission of a certificate by the Minister that land, servitudes, real rights in land or leases have vested in ISMO under this section, make such entries and endorsements free of charge as the registrar considers necessary in any appropriate register in order to register the transfer thereof in the name of ISMO. 45

(3) Notwithstanding any provision to the contrary in any other law, ISMO and an organ of state contemplated in subsection (2)(a) must be exempt from any value-added tax, donations tax, capital gains tax, provincial or municipal fees or taxes, stamp duties, transfer duties or registration fees payable in terms of any law in relation to the transfer of anything specified on the list. 50

(4) At least one month prior to the transfer date the chief executive officer of the Eskom Holdings must inform any employee of Eskom Holdings performing functions pertaining to ISMO to make an election provided for in subsection (5).

(5) An employee who— 55

- (a) elects in writing addressed to the chief executive officer of Eskom Holdings prior to the transfer date to become an employee of ISMO, becomes, without any interruption of service, from the transfer date, an employee in a similar post in ISMO, subject to conditions of employment which may not be less

favourable than those applicable to him or her on the date immediately preceding the applicable transfer date; and

- (b) does not in terms of paragraph (a) elect to become an employee of ISMO and is seconded to ISMO, to perform services in a post similar to the post occupied by him or her at Eskom Holdings, remains, while he or she is so seconded, subject to the laws governing officers and employees of Eskom Holdings. 5

(6) If, for the purposes of subsection (5), the question arises whether any person performs functions pertaining to ISMO, such question must, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), be decided by the chief executive officer of Eskom Holdings. 10

(7) If any person seconded in terms of subsection (5) (b) elects to become an employee of ISMO, he or she becomes, without interruption of service, from a date determined by the chief executive officer, an employee of ISMO in a post similar to the post occupied by him or her while so seconded, subject to the conditions of service of ISMO: Provided that where such election is made more than one year after the applicable transfer date, ISMO may not be obliged to employ such employee and he or she may remain seconded to ISMO. 15

(8) For the purposes of the Income Tax Act, 1962 (Act No. 58 of 1962), it is deemed that no change of employer took place when employment is taken up at ISMO by employees in terms of subsection (5) or (7) and that the position of officers and employees in respect of the phasing in of any tax levied on benefits or advantages derived by reason of employment or the holding of any office as contemplated in Schedule 7 to the Income Tax Act, 1962, remained unchanged. 20

(9) When an employee of Eskom Holdings becomes an employee of ISMO in terms of subsection (5) or (7), section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995) applies. 25

Transfer of functions and deemed validity of licences

40. (1) From the effective date, ISMO is responsible for the functions listed in section 4: Provided that the execution thereof by ISMO may be assumed in a phased manner, as determined by the Minister by notice in the *Gazette*. 30

(2) Subject to subsection (1), ISMO must enter into a contractual arrangement with Eskom Holdings for the execution of such of its functions contemplated in section 4.

(3) The contract contemplated in subsection (2) must be finalised within three months from the date of incorporation of ISMO as a state-owned company.

(4) The Minister may, in consultation with Cabinet, determine by notice in the *Gazette* the date for the transfer of the functions to ISMO as referred to in subsection (2). 35

(5) The notice referred to in subsection (4) must provide a detailed plan and measures for the transfer of such functions in order to ensure continuity of electricity supply.

(6) ISMO must, within six months after publication of the notice referred to in subsection (4), obtain the required licence as prescribed in the Electricity Regulation Act. 40

(7) The Minister may, by notice in the *Gazette*, extend the period within which to apply for a licence as contemplated in subsection (6).

(8) ISMO must, after the transfer of any functions in accordance with this Act, honour the contracts transferred with those functions. 45

Short title and commencement

41. This Act is called the Independent System and Market Operator Act, 2012, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE INDEPENDENT SYSTEM AND MARKET OPERATOR BILL, 2012

1. BACKGROUND

- 1.1 The Electricity Regulation Act, 2006 (Act No. 4 of 2006) ("the ERA"), provides for private sector participation on electricity generation through a competitive process. Through the ERA, the Minister may promulgate regulations pertaining to, amongst others, private sector participation. To this effect, the Minister may promulgate regulations relating to new generation capacity, outlining the procurement process and the cost recovery mechanism thereafter.
- 1.2 Despite the provisions of this Act, the South African electricity industry has a monopolistic structure regulated by the National Energy Regulator of South Africa ("the Regulator"). This structure does not provide for the independent purchase of power from the private sector. There is a need for an independent structure focusing on issues pertaining to independent power generation such as procurement, buying of power and electricity dispatch.

2. CURRENT REGULATORY FRAMEWORK

- 2.1 The ERA outlines the regulatory framework for the electricity industry. It requires the Regulator to regulate the electricity industry including private sector participation.
- 2.2 The ERA provides, amongst others, for a licensing framework for generation, transmission, distribution, trading, import and export of power. The ERA allows licensing of vertically integrated licensed activities such as trading and generation. All licensed entities are required to comply with the conditions of the licence and any person failing to comply can be penalised.
- 2.3 The current regulatory framework does not provide for an independent regulation System Operator and Market Operator. However, for an efficient electricity sector, it is imperative to have an independent entity to deal with both system operation and market operation.

3. OBJECTS OF BILL

- 3.1 The Independent System and Market Operator Bill ("the Bill") creates an independent structure (Independent System and Market Operator) as a state-owned company responsible for system operation and the purchase of electricity from electricity generators. The Independent System and Market Operator ("ISMO") will further serve as electricity wholesaler, selling electricity to distributors and large customers at a wholesale tariff. To avoid conflict of interest, ISMO should be independent from activities related to electricity generation to ensure equal treatment of all generators.
- 3.2 The Bill provides for the establishment of ISMO as a state-owned company with a maximum of nine Board members appointed by the Minister. The Minister must, by notice in at least two national newspapers and in the *Gazette*, invite interested persons to submit, or interested parties to nominate a candidate, within a specified period and in the manner mentioned in the notice, the names of persons fit to be appointed as non-executive members of the Board. The Minister must appoint a nomination committee to make recommendation to the Minister for the appointment of the non-executive members of the Board. The Minister must ensure that the non-executive members of the Board represent a sufficient spread of skills, knowledge, qualifications and experience to enable ISMO to function efficiently and effectively.

3.3 The Bill seeks to provide for, amongst others, the following ISMO functions:

- 3.3.1 Buying of power from generators, including Independent Power Producers (IPP): In terms of the Bill, ISMO is required to purchase power from the generators, including IPP's through a power purchase agreement. ISMO is also empowered to sell this power to distributors and large customers at a wholesale tariff.
- 3.3.2 Wholesale trading: Trading refers to the buying of power from generators at different prices and sale to large customers and distributors at a wholesale tariff. ISMO will be expected to include in the wholesale tariff its operational cost in accordance with the approval of the Regulator. The Regulator will regulate the wholesale tariff in terms of the ERA.
- 3.3.3 System Operation: ISMO will also be responsible for the system operation function through dispatch. ISMO will dispatch all the generation plants into the national grid except for self-dispatched plants such as wind and solar.
- 3.3.4 Planning for new generation capacity: The Bill acknowledges that planning is the responsibility of the national Government. However, ISMO will be required from time to time to assist with certain planning activities as requested by the Minister.

3.4 Some of the above activities require a licence to be issued under the ERA. ISMO is required to acquire such licence within six months of its operation. The Minister may extend this period through a notice in the *Gazette*.

4. SUMMARY OF BILL

- 4.1 *Definitions (Clause 1)*: This clause provides for the definitions of words or terms used in the legislation and to ensure proper interpretation for the primary purpose of the Bill.
- 4.2 *Objects of Act (Clause 2)*: This clause provides for the objects of the Act which include the incorporation of ISMO as a legal person and further give and overview of the functions of the entity.
- 4.3 *Establishment of ISMO (Clause 3)*: This clause provides for the establishment of ISMO as a state-owned company and provide for matters pertaining to the registration of the entity thereafter.
- 4.4 *Functions of ISMO (Clause 4)*: This clause outlines the functions of ISMO, which, amongst others, include system operation, market operation and support on matters pertaining to generation planning in accordance with the ERA.
- 4.5 *Memorandum of Incorporation (Clause 5)*: This clause provides for the drafting of a Memorandum of Incorporation which must be drawn up consistent with the provisions of the Bill. The Memorandum of Incorporation may vest with ISMO such powers as are typically required for the operation of a company.
- 4.6 *Application of Companies Act (Clause 6)*: This clause allows ISMO to function in accordance with the Companies Act, 2008 (Act No. 71 of 2008) ("Companies Act"), unless a contrary arrangement is provided for in the Bill.
- 4.7 *Request for exemption from application of Companies Act (Clause 7)*: The Minister may request exemption from the Companies Act on recommendations from ISMO. The request for exemption must be fully motivated and be directed to the Minister of Trade and Industry as the responsible Minister with such powers under the Companies Act.

- 4.8 *Management of ISMO by Board (Clause 8)*: This clause gives the Board powers to manage the business and the affairs of ISMO.
- 4.9 *Composition of Board (Clause 9)*: This clause outlines the composition of the Board. According to this clause, the Board must have not more than seven non-executive members appointed by the Minister and two executive members. The Minister is also required to appoint a Chairperson among the members whilst the Board may appoint a Deputy Chairperson. Each member may serve for four years at a time and may be reappointed for another four years but cannot serve more than eight years.
- 4.10 *Acting Chairperson (Clause 10)*: This clause allows the Deputy Chairperson to chair the meetings in the absence of the Chairperson. In the absence of both the Chairperson and the Deputy Chairperson, the Board may elect another Board member to act as Chairperson.
- 4.11 *Functions of Board (Clause 11)*: This clause outlines the functions of the Board. In terms of this clause, the Board is the accounting authority of ISMO and must conduct its business in accordance with the Public Finance Management Act, 1999 (Act No. 1 of 1999). The Board is further required to provide guidance to the chief executive officer on matters pertaining to ISMO's functions.
- 4.12 *Appointment of non-executive members of Board (Clause 12)*: This clause outlines the framework for the appointment of a non-executive member of the Board. The Minister is required, by notice in at least two national newspapers and in the *Gazette*, to invite interested persons to submit applications, or interested parties to nominate a candidate, to serve as a non-executive member of the ISMO Board. The Minister must appoint a nomination committee to deal with matters pertaining to the appointment of the non-executive members and recommend the suitable person to the Minister. Detailed requirements in terms of the skills, knowledge and qualification for the non-executive members and the process relating the appointment are outlined in this clause.
- 4.13 *Resignation, removal from office and vacancies of Board (Clause 13)*: This clause outlines the procedure for resigning, and removal of a member from office. The non-executive member may resign by giving the Minister one month's written notice. The Minister may remove a member from office, if the member, amongst others, acted in conflict with the Act. However, the Minister is required to give such a member an opportunity to make representations.
- 4.14 *Disqualification from membership of Board and disclosure (Clause 14)*: This clause deals with disqualification from membership of the Board. In terms of this clause, no person may be appointed as a member of the Board if he or she is a member of Parliament, a provincial legislature or a municipal council amongst others. This clause sets out in detail the grounds for disqualification. The clause also sets out what a nominated person should disclose in writing.
- 4.15 *Fiduciary duties of Board members (Clause 15)*: In terms of this clause, the Board has fiduciary duties over the functions of ISMO. All Board members are required to perform their function at all times with utmost good faith, honesty and integrity, and care and diligence. This clause also sets out an obligation for a person nominated for appointment as a member to disclose in writing his or her financial interests and any other conflict of interest.
- 4.16 *Procedures at meetings (Clause 16)*: In terms of this clause the Board may determine a procedure to be followed in a meeting. Every meeting must have at least fifty per cent plus one of the serving members to constitute a quorum.
- 4.17 *Committees of Board (Clause 17)*: The Board is also empowered to establish one or more committees to deal with certain matters such as remuneration, audit, risk and human resources.

- 4.18 Delegation of functions by Board (Clause 18):* This clause stipulates that the Board may, by resolution passed by two-thirds of its members, delegate any of its powers and assign any of its duties to any member of the Board. The clause also states that the Board may not delegate the power to appoint the chief executive officer and the chief financial officer, and its role in deciding on the mandate and strategic plan on ISMO.
- 4.19 Appointment of chief executive officer and chief financial officer (Clause 19):* This clause empowers the Board to appoint the chief executive officer with the approval of the Minister. The clause also empowers the Board to appoint the chief financial officer.
- 4.20 Conditions of appointment of chief executive officer and chief financial officer (Clause 20):* This clause provides conditions under which both the chief executive officer and the chief financial officer may be appointed, such as the signing of an annual performance agreement.
- 4.21 Termination of employment of chief executive officer or chief financial officer (Clause 21):* This clause provides for the procedure to be followed for the termination of employment of both the chief executive officer and the chief financial officer. In terms of this clause, the board has powers to suspend both the chief executive officer and the chief financial officer in accordance with the provisions of the Act.
- 4.22 Acting chief executive officer or chief financial officer (Clause 22):* The Board may, in writing appoint any senior employee of ISMO to be an acting chief executive office or chief financial officer.
- 4.23 Delegation by chief executive officer and chief financial officer (Clause 23):* This clause provides that the chief executive officer and the chief financial officer may delegate their powers to employees of ISMO. All delegation must be communicated in writing and is subject to such condition as may be imposed by the Board.
- 4.24 Functions of chief executive officer (Clause 24):* This clause provides for the functions of the chief executive officer as they relate to ISMO objectives. Under this section, the Board must delegate certain functions under the Public Finance Management Act, 1999, to the chief financial officer.
- 4.25 Appointment of staff (Clause 25):* This clause allows the chief executive officer to appoint senior staff in accordance with the policies and guidelines as approved by the Board.
- 4.26 Personnel of ISMO (Clause 26):* In terms of this clause the Board is required to determine the structure or the organogram for ISMO, the conditions of service, remuneration and service benefits for the employees.
- 4.27 Loans and government guarantees for loans (Clause 27):* This clause allows the Minister to provide loans to ISMO, with the concurrence of the Minister of Finance.
- 4.28 Business, financial plan and strategic plans (Clause 28):* This clause requires ISMO to submit its business plan to the Minister for approval within the specified time.
- 4.29 Judicial management and liquidation (Clause 29):* This clause deals with judicial management and liquidation.

- 4.30 *Funds and assets (Clause 30)*: This clause deals with the management of funds and assets of ISMO. In terms of this clause ISMO may not dispose majority of its assets without the prior approval of the Minister in consultation with the Minister of Finance.
- 4.31 *ISMO tariffs, fees and charges (Clause 31)*: This clause allows ISMO to recover fees, tariffs and charges, provided that such recovery is in accordance with prevailing law. ISMO may refuse to provide a service to a customer should the customer fails to pay the required fees. According to this provision, ISMO may borrow money subject to the provision of the Public Finance Management Act, 1999.
- 4.32 *Borrowings secured by ISMO assets and revenue (Clause 32)*: ISMO must borrow money against its assets and revenue.
- 4.33 *Application of Public Finance Management Act (Clause 33)*: For the purposes of the Public Finance Management Act, 1999, ISMO will be classified as a public entity. The Board is required to comply with the provisions of the Public Finance Management Act, 1999.
- 4.34 *Powers of entry and inspection (Clause 34)*: This clause gives ISMO powers to inspect certain land in accordance with its functions. In terms of this provision ISMO is required to make the necessary arrangements with the legal occupant of owner of any premises before entering such premises.
- 4.35 *Investigation of ISMO (Clause 35)*: In terms of this clause, the Minister may appoint a person to investigate the affairs or the financial position of ISMO.
- 4.36 *Intervention by Minister (Clause 36)*: The Minister may direct ISMO to take a particular action if ISMO fails to perform its functions effectively, fails to comply with any applicable law, operates under financial difficulty or is being mismanaged, etc. This clause further provides the framework for such intervention by the Minister.
- 4.37 *Offences and penalties (Clause 37)*: In terms of this clause, ISMO will be committing an offence if it fails to give access to its books, accounts and assets in accordance with the provision of the Act. Any person contravening the provisions of this Act is liable for a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.
- 4.38 *Regulations and policy (Clause 38)*: The Minister may make any regulations regarding any matter relating to the functioning of ISMO as well as policies applicable to ISMO.
- 4.39 *Transfer of assets, rights, liabilities and obligations (Clause 39)*: This clause prevails for the transitional arrangements in respect of the transfer of assets, rights liabilities and obligations from Eskom Holdings to ISMO in accordance with the process outlined. The clause further provides for the procedure for the transfer of employees employed at Eskom Holdings who elect to be transferred to ISMO.
- 4.40 *Transfer of functions and deemed validity of licences (Clause 40)*: This clause provides for the transfer of functions transferred from Eskom Holdings to ISMO on the effective date, including the timeframes for obtaining the relevant licences as prescribed under the ERA.
- 4.41 *Short title and commencement (Clause 41)*: This clause provides for the short title and commencement.

5. PARTIES CONSULTED

- 5.1 The draft Bill was approved by Cabinet, and consultation took place at intergovernmental level, with the following departments:
The National Energy Regulator of South Africa;
The Department of Public Enterprises;
The Department of Economic Development;
The National Treasury;
The Presidency; and
Eskom Holdings.

- 5.2 The Bill was also published in the *Gazette* for public comment.

6. FINANCIAL IMPLICATIONS FOR STATE

ISMO will be funded through service charges imposed on ISMO customers. The State may be required to fund the establishment cost, which will be populated and presented to the National Treasury through a Business Case for their approval and listing of under the PFMA.

7. IMPLICATIONS FOR PROVINCES

None.

8. PARLIAMENTARY PROCEDURE

- 8.1 The State Law Advisers and the Department of Energy are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 8.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1) (a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.