

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
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- In this Act, unless the context otherwise indicates—
 - “**ancillary services**” means those services necessary to support the continuous and secure operation of electric power system and necessary to maintain reliable operations of the interconnected power system, including, but not limited to, those services necessary for voltage and reactive power control, automatic generation control, frequency control and black start capabilities; 40
 - “**Board**” means the Board of ISMO contemplated in section 10;
 - “**chief executive officer**” means the person appointed by the Board in terms of section 20;
 - “**chief financial officer**” means the person appointed by the Board in terms of section 20; 45

- “**Commission**” means the Companies and Intellectual Property Commission 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; 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
- “**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;
- “**Grid Code**” means the transmission or distribution Grid Code applicable in terms of the Electricity Regulation Act; 20
- “**integrated power system**” means the power system that is interconnected to the 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—
- (a) to whom ISMO may sell electricity;
- (b) from whom ISMO may buy electricity; and 30
- (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
- “**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;
- “**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; 40
- “**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); 45
- “**Public Finance Management Act**” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- “**System Operator**” means that portion of the ISMO which is responsible for the safe, secure and efficient operation of the integrated power system in real time, including the dispatch of generation; 50
- “**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;
- “**transmission power system**” means an interconnected network for the conveyance of electricity which operates above a nominal voltage of 132kV; and 55
- “**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; 60

- (b) will act as a trader of electricity to ISMO Customers in line with Government policy;
- (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; 5
- (e) is empowered to order the interruption of supply to preserve system integrity in times of power shortages;
- (f) is responsible for 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; 10
- (g) ensures efficient dispatch within the integrated power system; and
- (h) manages electricity dispatch and tariff aggregation in respect of electricity sale by generators, and provide for matters related thereto. 15

CHAPTER 2

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. 20
- (b) The Minister must effect the incorporation of ISMO in terms of the Companies Act.
- (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. 25
- (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 30
 - (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. 35

Functions of ISMO

- 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 40
 - (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.
- (2) In relation to system operation and expansion, ISMO must— 45
- (a) act as the System Operator and 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; 50
 - (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; 55
 - (f) dispatch available generation in accordance with the dispatch schedules in the Grid Code as far as practically possible;

- (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; 5
 - (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; 10
 - (k) develop the short-term operations 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; 15
 - (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;
 - (n) coordinate the start-up, shut-down and dispatch generation under its jurisdiction; 20
 - (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; 25
 - (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; 30
 - (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; and
 - (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 schedules and costing. 35
- (3) As a market operator, ISMO must—
- (a) act as the buyer of electricity from a generator;
 - (b) conclude and enter into transaction agreements as may be necessary for the procurement of electricity, including sufficient capacity and energy supply; 40
 - (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;
 - (d) procure electricity on such terms and conditions as may be agreed upon by the parties— 45
 - (i) from generation licensees within the Republic and outside its borders, with the exception of generation licensees exempted by licence from selling to ISMO in terms of the Electricity Regulation Act; and
 - (ii) consistent with the integrated resource plan and in terms of procurement processes contained in the Electricity Regulation Act; 50
 - (e) in line with the Republic's international obligations, agreements and undertakings—
 - (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; 55
 - (g) 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;

- (h) 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; 5
- (i) 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; 10
- (j) enter into power sales agreements with ISMO Customers; 10
- (k) ensure that metering points are established and maintained to allow billing quality metering of all electricity sales and purchases; 10
- (l) develop processes to manage the efficient implementation of agreements concluded with ISMO Customers with regard to the trading of electricity; 15
- (m) 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; 15
- (n) 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; 20
- (o) develop accounting procedures to reconcile the energy accounts and the monetary accounts related to the market and system operation; and 20
- (p) maintain a complete and accurate set of accounts for all the power system transactions. 20

Memorandum of Incorporation 25

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.

(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. 30

(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).

Subsidiaries and accountability 35

6. (1) ISMO may establish subsidiary companies.

(2) (a) ISMO must, before it establishes a subsidiary or revives a dormant subsidiary, submit a feasibility study and business plan of the proposed subsidiary to the Minister for consideration.

(b) The Minister may, subject to section 51(1)(g) of the Public Finance Management Act, after consideration of the feasibility study and business plan and after consultation with the Minister of Finance, approve the establishment of the subsidiary or revival of the dormant subsidiary, as the case may be. 40

(c) The Minister must, before the approval contemplated in paragraph (b), table the feasibility study and business plan in the National Assembly for consideration. 45

(3) The board of any subsidiary is accountable to ISMO in respect of the performance of its functions.

Application of Companies Act

7. (1) The provisions of the Companies Act which are not in conflict with this Act apply to ISMO, subject to subsection (2). 50

(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 8.

Request for exemption from application of provision of Companies Act

- 8.** (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. 5
- (2) The Commission must publish particulars about the request and motivation 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— 10
- (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, 15
- 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 20

Management of ISMO by Board

- 9.** The Board is responsible for managing the business and affairs of ISMO.

Composition of Board

- 10.** (1) The Board consists of—
- (a) not more than seven non-executive members appointed in terms of section 13; 25
and
- (b) two executive members appointed in terms of Chapter 4.
- (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 30
may be reappointed by the Minister to ensure continuity and maintain expertise, but may not serve for more than eight consecutive years.
- (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 35
remuneration as the Minister may, with the concurrence of the Minister of Finance, stipulate in that member's letter of appointment.

Acting Chairperson

- 11.** (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 40
Chairperson is absent or unable to act as Chairperson, the Minister must designate another member of the Board to act as Chairperson until the Chairperson or Deputy Chairperson is available.
- (2) Any person acting as Chairperson of the Board in terms of subsection (1) must 45
exercise all the functions and perform all the duties of the Chairperson.

Functions of Board

- 12.** The Board—
- (a) must give effect to the corporate plan of ISMO contemplated in section 52 of 50
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;

- (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
- (f) must generally refer to the Minister any matter that may adversely affect the functioning of ISMO.

Appointment of non-executive members of Board

13. (1) For the purposes of appointing the non-executive members, the Minister must, by notice in at least two newspapers and in the *Gazette*, invite interested persons to submit, within the period and in the manner mentioned in the notice, the names of persons fit to be appointed as non-executive members.

(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 geographic areas of the Republic and that both males and females are represented; and
- (b) ensure that the committee members have the necessary skills, knowledge, qualifications and experience to serve on the committee.

(4) The Minister, and the nomination committee in making a recommendation to the Minister, must consider—

- (a) the proven skills, knowledge, qualifications and experience of a candidate in areas of—
 - (i) electrical engineering;
 - (ii) financial management;
 - (iii) economics;
 - (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 15(3).

(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.

(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.

(8) (a) Any vacancy occurring in the Board in terms of section 14, must be filled in the manner provided for in this section.

(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.

(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;
- (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
- (d) is appointed on a part-time basis.

Resignation, removal from office and vacancies

- 14.** (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.
- (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 15;
 - (c) after having been appointed, acquires any direct or indirect interest contemplated in section 15(3)(b)(ii), read with section 15(1)(g);
 - (d) refuses or fails to divest himself or herself of the interest contemplated in section 15(3)(b);
 - (e) neglected to properly perform the functions of his or her office; or
 - (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 15.

Disqualification from membership of Board and disclosure

- 15.** (1) A person may 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;
 - (c) has been declared by a court 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
 - (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 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 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
 - (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;
 - (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

- 16.** 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 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, 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.
- (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;
 - (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;
 - (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
 - (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.

Procedures at meetings

- 17.** (1) The Board determines its procedures at meetings.
- (2) Seventy per cent 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—
- (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.

Committees of Board

- 18.** (1) The Board may appoint one or more committees with the concurrence of the Minister, but must appoint the following committees:
- (a) Remuneration and Performance Committee;
 - (b) Human Resources Committee; and
 - (c) Audit Committee.
- (2) The Board must—
- (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;
 - (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) The Board may appoint any person with particular knowledge, expertise or qualifications to assist a committee in the performance of its functions.
- (5) Unless specially delegated by the Board, a committee has no decision-making powers, and can only make recommendations to the Board.

(6) A committee must meet as often as is necessary in order to carry out its functions, and may determine its own procedures.

(7) Each committee must be chaired by a non-executive member.

Delegation of functions by Board

19. (1) The Board may, by resolution passed by seventy-five per cent of its members— 5

(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 18, the chief executive officer, the chief financial officer or any employee of ISMO; and 10

(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)—

(i) may be made subject to such conditions as the Board may determine; and 15

(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.

(4) The Board may not delegate— 20

(a) the power to appoint the chief executive officer or the chief financial officer; and

(b) its role in deciding on—

(i) the appointment of the chief executive officer or the chief financial officer; 25

(ii) the mandate and strategic plan of ISMO.

CHAPTER 4

ISMO STAFF

Appointment of chief executive officer and chief financial officer

20. (1) The Board must, with the approval of the Minister, appoint a chief executive officer and a chief financial officer to ensure that ISMO meets its objects. 30

(2) The Board must invite applications for the posts of chief executive officer and chief financial officer by publishing advertisements in the media.

(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 35

(b) not be disqualified on the grounds as contemplated in section 15.

Conditions of appointment of chief executive officer and chief financial officer

21. (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 and the chief financial officer— 40

(a) are 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. 45

(4) The chief executive officer and the chief financial officer are members of the Board by virtue of their office.

(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 with the concurrence of the Minister, the Minister acting after consultation with the Minister of Finance. 50

Termination of employment of chief executive officer or chief financial officer

- 22.** (1) The Board must, with the concurrence of the Minister 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 14(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 15.
- (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

- 23.** (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.

Delegation by chief executive officer and chief financial officer

- 24.** (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 and 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

- 25.** (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

26. (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 40.

Personnel of ISMO 10

27. (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**

28. (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

29. (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

30. 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

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

- (a) the assets and rights transferred to ISMO as contemplated in section 40; 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 of Finance.

ISMO tariffs, fees and charges 20

32. (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 24 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

33. (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

34. (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 (annual reporting on financial affairs), are duly complied with. 10

(3) (a) The Minister must table in Parliament the annual report and financial statements of ISMO and its subsidiaries, 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

35. (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 an 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

36. (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. 5

Intervention by Minister

37. (1) The Minister may direct ISMO to take any action specified by the Minister if ISMO— 10

- (a) is in financial difficulty or is being mismanaged;
- (b) fails to perform its functions effectively or efficiently;
- (c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act; or 15
- (d) 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. 20

(3) If ISMO fails to comply with the directive contemplated in subsection (1) within the stated period, the Minister may—

- (a) after having given ISMO a reasonable opportunity to be heard; and
- (b) after having afforded ISMO a hearing on any submissions received, replace the members in the same manner as the departing members have been appointed or, where circumstances so require, appoint a person as an administrator to take over the relevant function of ISMO. 25

(4) If the Minister appoints an administrator in terms of subsection (3)—

- (a) the administrator may do anything which ISMO might otherwise be empowered or required to do by or under this Act, to the exclusion of ISMO; 30
- (b) the Board may not, while the administrator is responsible for the relevant function, exercise any of its powers or perform any of its duties relating to that function;
- (c) an employee or a contractor of ISMO must comply with a directive given by the administrator. 35

(5) The Minister must—

- (a) review the performance of ISMO regularly whilst it is under administration; and
- (b) within six months of appointing the administrator, table a report on his or her findings in the National Assembly. 40

(6) Once the Minister is satisfied that ISMO is able to perform its functions effectively, the Minister must terminate the appointment of the administrator.

(7) (a) Notwithstanding subsection (3), the Minister may dissolve the Board if the Minister, on good cause shown, loses confidence in the ability of the Board to perform its functions effectively and efficiently. 45

(b) The Minister may dissolve the Board only—

- (i) after having given the Board a reasonable opportunity to be heard; and
- (ii) after having afforded the Board a hearing on any submissions received.

(c) If the Minister dissolves the Board, the Minister— 50

- (i) may 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 three months after the dissolution of the Board, replace the members of the Board in the same way as the way in which they were appointed. 55

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

(b) The appointment of the administrator terminates when the Board members have been replaced in terms of subsection (6)(c)(ii).

(9) 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.

5

Offences and penalties

38. (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 36; 10
- (b) fails to give data or information, or give false or misleading data or information when required to do so in terms of section 36 or when required by the administrator contemplated in section 37(4);
- (c) fails to comply with a directive issued under section 37(4)(c);
- (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; 15
- (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 20
- (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. 25

(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

39. (1) The Minister may make regulations regarding— 30

- (a) any matter relating to the functioning of the Board that is necessary to ensure efficiency and effectiveness in the performance of its functions; and
- (b) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act. 35

(2) The Minister, after consultation with the Board, may make policies on matters of national policy applicable to ISMO and its subsidiaries, consistent with the objects of this Act, and may at any time thereafter amend any such policies made.

(3) When making or amending a policy under subsection (2), the Minister must—

- (a) obtain Cabinet approval; 40
- (b) table the policy in the National Assembly at least 30 days before publishing the final version of the policy in terms of paragraph (c); and
- (c) publish the final version of the policy in the *Gazette*.

CHAPTER 7

TRANSITIONAL PROVISIONS AND SHORT TITLE AND COMMENCEMENT

45

Transfer of assets, rights, liabilities and obligations

40. (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 immediately prior to the commencement of this Act, which can legally be 50

transferred, ceded or assigned 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.

(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.

(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—

(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

(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.

(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.

(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.

(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—

(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.

(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.

(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.

(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. 5

(9) When an employee of Eskom Holdings becomes an employee of ISMO in terms of subsection (5) or (7)— 10

- (a) such employee's salary and salary scale may not be reduced;
- (b) he or she retains all vacation and sick leave which on the date immediately preceding his or her employment by ISMO stood to his credit with Eskom Holdings, including all monetary benefits attached thereto;
- (c) any other conditions of employment may not be less favourable to him or her than those applicable prior to him or her becoming an employee of ISMO; 15
- (d) he or she remains, notwithstanding any provision to the contrary in any law or in the rules of any pension fund or medical scheme, a member of that pension fund or medical scheme for all purposes, and the Board must contribute to the said pension fund or medical scheme in respect of that person to the same extent as an employer is required in terms of the laws on and the rules of that pension fund or medical scheme to contribute to that pension fund or medical scheme in respect of an employee who is a member of that fund or medical scheme; and 20
- (e) any enquiry or other action instituted or contemplated in respect of alleged misconduct committed by such employee prior to his or her employment by ISMO must be disposed of or instituted by ISMO, and ISMO must take steps against the employee concerned if he or she is found guilty of misconduct as if he or she were still in the employment of Eskom Holdings. 25

Transfer of functions and deemed validity of licences 30

41. (1) From the effective date, ISMO is responsible for the functions listed in section 4.

(2) ISMO must enter into a contractual arrangement with Eskom Holdings for the execution of the 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. 35

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

(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. 40

(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.

(7) The Minister may, by notice in the *Gazette*, extend the period within which to apply for a licence as contemplated in subsection (6). 45

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

Short title and commencement

42. 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*. 50

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 operations 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 newspapers and in the *Gazette*, invite interested persons to submit 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 IPP 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 Operations:** ISMO will also be responsible for the system operations' 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 *Definition (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 *Subsidiaries and accountability (Clause 6):* This clause provides for establishment of subsidiaries. ISMO is required, before establishing any subsidiary, to submit a feasibility study and a business plan for approval by the Minister. The Minister may approve the establishment of a subsidiary in accordance with the submitted business plan in consultation with the Minister of Finance. The Minister is also required to table the feasibility study and the business plan to the National Assembly for consideration.

- 4.7 *Application of the Companies Act (Clause 7)*: 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.
- 4.8 *Request for exemption from application of Companies Act (Clause 8)*: 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.
- 4.9 *Management of ISMO by Board (Clause 9)*: This clause gives the Board powers to manage the business and the affairs of ISMO.
- 4.10 *Composition of Board (Clause 10)*: 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.
- 4.11 *Acting Chairperson (Clause 11)*: 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 chair the meeting.
- 4.12 *Functions of Board (Clause 12)*: 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.
- 4.13 *Appointment of non-executive members of Board (Clause 13)*: This clause outlines the framework for the appointment of a non-executive member of the Board. The Minister is required, through a notice in a newspaper or in the *Gazette*, to invite people interested in serving 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.
- 4.14 *Regulation, removal from office and vacancies (Clause 14)*: 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 representation.
- 4.15 *Disqualification from membership of Board and disclosure (Clause 15)*: 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. This clause sets out in detail the grounds for disqualification.
- 4.16 *Fiduciary duties of Board members (Clause 16)*: 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.

- 4.17 *Procedure at meetings (Clause 17)*: In terms of this clause the Board may determine a procedure to be followed in a meeting. Every meeting must have at least seventy per cent of the serving members to constitute a quorum.
- 4.18 *Committees of Board (Clause 18)*: The Board is also empowered to establish one or more committees to deal with certain matters such as remuneration, audit and human resources.
- 4.19 *Delegation of functions by Board (Clause 19)*: This clause stipulates that the Board may, by resolution passed by seventy-five per cent 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 sets out its role in deciding on the mandate and strategic plan on ISMO.
- 4.20 *Appointment of chief executive officer and chief financial officer (Clause 20)*: This clause empowers the Board to appoint both the chief financial officer and the chief executive officer with the approval of the Minister.
- 4.21 *Conditions of appointment of chief executive officer and chief financial officer (Clause 21)*: 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.
- 4.22 *Termination of employment of chief executive officer or chief financial officer (Clause 22)*: 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.
- 4.23 *Acting chief executive officer or chief financial officer (Clause 23)*: The Board may, in writing appoint any senior employee of ISMO to be an acting chief executive office or chief financial officer.
- 4.24 *Delegation by chief executive officer and chief financial officer (Clause 24)*: 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.
- 4.25 *Functions of chief executive officer (Clause 25)*: 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.
- 4.26 *Appointment of staff (Clause 26)*: This clause allows the chief executive officer to appoint senior staff in accordance with the policies and guidelines as approved by the Board.
- 4.27 *Personnel of ISMO (Clause 27)*: 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.
- 4.28 *Loans and government guarantees for loans (Clause 28)*: The Minister is empowered by this clause, on recommendation by the Board, to make regulations on any matter relating to the functioning of the Board that is necessary to ensure the efficiency and effectiveness in the performance of its functions, and any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

- 4.29 *Business, financial plan and strategic plans (Clause 29)*: This clause outlines what constitutes offences, and penalties to be imposed.
- 4.30 *Judicial management and liquidation (Clause 30)*: This clause deals with judicial management and liquidation.
- 4.31 *Funds and assets (Clause 31)*: 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 approval of the Minister of Finance.
- 4.32 *ISMO fees, tariffs and charges (Clause 32)*: 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.
- 4.33 *Borrowings secured by ISMO assets and revenue (Clause 33)*: ISMO must borrow money against its assets and revenue.
- 4.34 *Application of Public Finance Management Act (Clause 34)*: 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.
- 4.35 *Powers of entry and inspection (Clause 35)*: This clause gives ISMO powers to inspect certain areas 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.
- 4.36 *Investigation of ISMO (Clause 36)*: In terms of this clause, the Minister may appoint a person to investigate the affairs or the financial position of ISMO.
- 4.37 *Intervention by Minister (Clause 37)*: 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. The Act further provides the framework for such intervention by the Minister.
- 4.38 *Offences and penalties (Clause 38)*: 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.
- 4.39 *Regulations and policy (Clause 39)*: The Minister may make any regulations regarding any matter relating to the functioning of ISMO.
- 4.40 *Transfer of assets, rights, liabilities and obligations (Clause 40)*: 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.
- 4.41 *Transfer of functions and deemed validity of licences (Clause 41)*: 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.
- 4.42 *Short title and commencement (Clause 42)*: 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.
- 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.