

Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 551

Pretoria, 13 May
Mei 2011

No. 34289

IMPORTANT NOTICE

The Government Printing Works will not be held responsible for faxed documents not received due to errors on the fax machine or faxes received which are unclear or incomplete. Please be advised that an "OK" slip, received from a fax machine, will not be accepted as proof that documents were received by the GPW for printing. If documents are faxed to the GPW it will be the sender's responsibility to phone and confirm that the documents were received in good order.

Furthermore the Government Printing Works will also not be held responsible for cancellations and amendments which have not been done on original documents received from clients.

CONTENTS • INHOUD

No.

Page
No. Gazette
 No.**GENERAL NOTICE****Energy, Department of***General Notice*

290 Independent System and Market Operator Establishment Bill, 2011: Request to submit written comments 3 34289

GENERAL NOTICE

NOTICE 290 OF 2011

Independent System and Market Operator Establishment Bill

The Department of Energy (the Department) intends to submit an Independent System and Market Operator Bill to Parliament. You are hereby requested to submit your comments on this Bill to the Department no later than 13 June 2011. Your written comments may be submitted to the Director General for attention of Matthews Bantsijang or Maduna Ngobeni as follows:

By hand:

Director General
Attention: Matthews Bantsijang/Maduna Ngobeni
Travenna Campus
70 Meintjies Street
Sunny Side
0001

Or

By post:

Director General
Attention: Matthews Bantsijang/Maduna Ngobeni
Private Bag X19
Acardia
0007

Or

By Email:

epar@energy.gov.za

DEPARTMENT OF ENERGY
REPUBLIC OF SOUTH AFRICA

INDEPENDENT SYSTEM AND MARKET OPERATOR BILL

(To be introduced in the National Assembly as a section 75 Bill)
(The English text is the official text of the Bill)

(MINISTER OF ENERGY)

[B - 2011]

ISMO DRAFT BILL

INDEPENDENT SYSTEM AND MARKET OPERATOR DRAFT BILL

To provide for the establishment of an Independent System and Market Operator as a national public entity, for the electricity supply industry in South Africa, in line with government policy and for matters associated therewith.

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

CONTENTS

CHAPTER ONE

DEFINITIONS AND OBJECTS OF ACT

1. Definitions
2. Objects

CHAPTER TWO

ESTABLISHMENT OF ISMO

3. Establishment of ISMO
4. Memorandum of Incorporation
5. Non-application of certain provisions of Companies Act, Public Finance Management Act and other acts
6. Financial year and auditing

CHAPTER THREE

ISMO BOARD OF DIRECTORS

7. Board of Directors
8. Appointment procedure
9. Persons disqualified from membership of ISMO Board
10. Declarations of interest
11. Committees of the Board
12. Board Charter

CHAPTER FOUR

ISMO STAFF

13. Appointment and functions of the Executive Officers
14. Powers, duties and functions of the Chief Executive Officer and senior staff
15. Appointment of senior staff

CHAPTER FIVE

ISMO FUNCTIONS

16. Generation Planning
17. System Operation and Expansion Planning
18. Buyer of Electricity

19. Execution of ISMO functions

CHAPTER SIX

FUNDING

- 20. Loans and Government Guarantees for loans
- 21. Business, financial and strategic plans
- 22. Judicial Management and Liquidation
- 23. Funds and assets
- 24. ISMO fees, rates and charges

CHAPTER SEVEN

SPECIAL POWERS

- 25. Powers of entry and inspection
- 26. Borrowing secured by ISMO assets and revenue

CHAPTER EIGHT

TRANSITIONAL PROVISIONS

- 27. Transfer of assets, rights, liabilities and obligations
- 28. Deemed validity of licences

CHAPTER NINE

GENERAL

- 29. Regulations
- 30. Short title and commencement

CHAPTER ONE DEFINITIONS AND OBJECTS OF ACT

Definitions

1. In this Act, unless the context otherwise indicates –

“Board” means the Board of Directors of ISMO;

“Chief Executive Officer” means the chief executive officer of ISMO contemplated in section 13;

“Chief Financial Officer” means the chief financial officer of ISMO contemplated in section 13;

“Companies Act” means the Companies Act, 2008 (Act No. 71 of 2008);

“cross-border customer” means any customer outside the borders of the Republic of South Africa;

“Department” means the department responsible for energy in the Republic of South Africa;

“Director General” means the Director General of the Department;

“distribution” means the conveyance of electricity at or below 132kV through a distribution power system;

“distribution power system” means a distribution power system consisting of the distribution lines and all associated distribution infrastructure, assets and rights owned, controlled or exercised by a distribution licensee;

“Electricity Regulation Act” means the Electricity Regulation Act, 2006 (Act No. 4 of 2006);

“Eskom distribution” means the division within Eskom Holdings distributing and trading electricity;

“Eskom Holdings” means the company envisaged in section 2 of the Eskom Conversion Act, 2001 (Act No. 13 of 2001);

“generation” means the production of bulk electricity by a generator for purposes of supplying to the national transmission power system or the distribution;

“generator” means a generating plant and associated generation infrastructure, assets and rights used in the generation of electricity, and as a noun means the entity owning or operating such generating plant;

“Grid Code” means the transmission or distribution Grid Code applicable in terms of the Electricity Regulation Act;

“integrated resource plan” means an integrated resource plan as contemplated in the Electricity Regulation Act;

“ISMO” means ISMO Ltd established in accordance with section 3;

“ISMO Customers” means the customers to which ISMO may sell electricity as identified by the Minister from time to time by notice in the *Government Gazette*;

“licence” means a licence issued under the Electricity Regulation Act;

“licensee” means the holder of a licence;

“Memorandum of Incorporation” means the Memorandum and Articles of Association of ISMO referred to in sections 3 and 4;

“Minister” means the Minister responsible for Energy;

“national control center” means the control center operated for the control and management of the dispatch and supply of electricity by the generators into the national transmission power system;

“national transmission power system ” means the transmission power system used for connection of energy generated by a generator to the grid for purposes of supply of the electricity to consumers;

“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);

“SAPP” means the Southern African Power Pool;

“trading” means the wholesale or retail buying and selling of electricity as defined in the Electricity Regulation Act;

“transmission” means the conveyance of electricity above 132kV through a transmission network; and

“transmission network” means a transmission power system consisting of transmission lines and all associated transmission infrastructure, assets and rights owned, controlled or exercised by a transmission licensee.

Objects of Act

2. The objects of this Act are to provide for an Independent System and Market Operator (ISMO) as a company that is financially viable and responsible for the planning of supply of electricity by generators through the national transmission system, electricity dispatch and aggregation in respect of sale of electricity by generators, act as the buyer of electricity from generators for the Republic of South Africa and sell electricity to ISMO Customers, in a manner that will minimize the overall costs of electricity to customers and to provide for matters incidental thereto.

CHAPTER TWO ESTABLISHMENT OF ISMO

Establishment of ISMO

3. (1) (a) The Minister must take all such steps as are necessary to establish a public company that will be responsible for assisting with the planning of generation, implement electricity dispatch, coordinate electricity wholesale by generators, act as the buyer of electricity generated by generators for the Republic of South Africa, selling electricity purchased by it to ISMO Customers and for another matters as are within the contemplation of this Act to be the responsibility of ISMO.
- (b) Despite the provisions of the Companies Act, the government shall, on incorporation of the Company and for as long as it so wishes, be the only member of such company.
- (2) The Registrar of Companies must, notwithstanding any other provisions of the Companies Act to the contrary, upon receipt of the Memorandum of Incorporation from and such other documents provided by the Minister for the purposes hereof –
- (a) register a company as a public company under the name “Independent System and Market Operator of South Africa Ltd.” with “ISMO Ltd” as its shortened form;
- (b) authorise such changes to standard documentation as may be necessary to give effect to the registration of the company as a public company; and
- (c) issue to that entity the necessary documents to enable it to conduct business as a corporate entity.

- (3) The Minister shall exercise the rights of a shareholder in ISMO in respect of the shares held by the government provided that for as long as the government is the sole or majority shareholder in ISMO, sections 60, 66, 190 and 344(d) of the Companies Act shall not apply.

Memorandum of Incorporation

- 4.(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) The Memorandum of Incorporation shall vest ISMO with the authority to assist the Minister with the planning for new generation capacity, to make recommendation with regard to planning for required additions to the national transmission power system and transmission network, to act as a buyer of electricity from generators and seller of electricity to ISMO Customers, and for all matters connected therewith as may be necessary or expedient.
- (3) The Memorandum of Incorporation may vest ISMO with such powers as are typically required for the operation of a company, having regard to provisions of section 4(1).

Non-application of certain provisions of Companies Act, the Public Finance Management Act and other acts

5. (1) The Companies Act, or any other act identified by the Minister shall not apply to ISMO to the extent that -
- (a) any contrary arrangement is provided for in this Act; or
- (b) the relevant minister responsible for such act has issued a declaration under subsection (2).
- (2) The Minister may from time to time and when considered necessary, at the sole discretion of the Minister, request the minister responsible for the Companies Act, or any other act identified by the Minister not to be applicable to ISMO.
- (3) The request issued in terms of subsection (2) must be appropriately motivated to the relevant minister or other responsible authority, for such act.

Financial year and auditing

6. (1) The financial year of ISMO shall be from 1 April in any given year to the end of March the following year.

- (2) ISMO's books of account shall be audited in compliance with the Public Finance Management Act and/or such other legislation as is applicable in relation to the audit of the books of national public entities, for as long as ISMO remains to be a public entity.

CHAPTER THREE

ISMO BOARD OF DIRECTORS

Board of Directors

7. (1) Subject to the provisions of section 3, the Board is responsible for managing the business and affairs of the ISMO.
- (2) The Board shall consist of a minimum of seven and a maximum of nine members.
- (3) The members of the Board shall be appointed by the Minister from a short-list of candidates presented to the Minister by the Chairperson of the nominations committee in terms of section 8.
- (4) The Minister must appoint one member of the Board as the Chairperson.
- (5) The Board must elect a Deputy Chairperson from among the directors.
- (6) A director shall hold office for a maximum period of four years at a time, provided that they may be reappointed by the Minister to ensure continuity and maintain expertise, but may not serve for more than a maximum of eight consecutive years.
- (7) The term of office of non-executive directors terms shall be rotated and staggered in order to ensure efficiency and continuity in that only a minority of the directors term of office ends at the same time.
- (8) A director 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.
- (9) Whenever a position on the Board becomes vacant, the Minister may appoint any person to serve as interim Board member until such time as a replacement director has been nominated and appointed in terms of section 8.
- (10) The Minister may extend the term of office of a non-executive members of the Board upon the expiry of their terms of office for such period as may be necessary to finalise the appointment of new Board members in terms of section 8.
- (11) Without limiting such powers of termination of a Board or a member of the Board in terms of the Companies Act or company law, the Minister may, in addition to such powers of a shareholder in terms of the Companies Act or company laws to

terminate or remove the board or members of the board, terminate the appointment of a director, without any need for a hearing -

- (a) for misconduct, incapacity or incompetence;
- (b) for becoming disqualified from being a member of the board of a company in terms of the Companies Act;
- (c) if the member fails to attend five consecutive meetings of the Board without a valid explanation; or
- (d) on good cause shown.

Appointment procedure

8.(1) Whenever a vacancy of a non-executive member of the Board occurs, the Director-General shall as soon as possible by notice in the press invite nominations for candidates to be appointed as non-executive directors to the ISMO Board.

(2) The Director General must ensure that notice contemplated in subsection (1) shall stipulate the period within which nominations must be made and specify that nominees must have special knowledge and experience that would add value to ISMO in performing its functions, at least in the following areas –

- (a) electrical engineering;
- (b) economics;
- (c) finance;
- (d) legal.; and
- (e) environment.

(3) As soon as possible after the closing date for nominations referred to in subsection (1), the Director-General shall call together an ad-hoc nomination committee consisting of representatives of the Department, the National Treasury, and any other department that the Director General may recommend to the Minister to compile a short list of candidates who have skills in the areas referred to subsection (2).

(4) The nomination committee shall be chaired by the Director General.

(5) The nomination committee shall strive for a unanimous decision in compiling a short list of candidates but in the event that this cannot be achieved the Director General shall have a deciding vote in addition to a deliberative vote.

(6) The Director General shall submit the short list of candidates compiled in terms of subsection (3) to the Minister who shall select a candidate from such list for each vacancy on the Board.

Persons disqualified from membership of ISMO Board

9. A person may not be appointed or remain a director if such a person is disqualified in terms of the Companies Act.

Declarations of interest

10. (1) A member of the Board must, upon appointment, and whenever such member's interests changes, submit to Board a written statement in which that member's interests in any other business are declared, and whether he or she has any direct or indirect financial interest in the business of ISMO which could reasonably be perceived to be a conflict of interest.

(2) A member of the Board may not be present at, 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 or is perceived to have a financial interest.

(3) If any member of the Board acquires an interest that could reasonably be expected to be an interest contemplated in this section, he or she must immediately in writing declare that fact to the Board.

(4) If an organisation or enterprise in which a member of the Board has an interest contemplated in subsection (2) offer its services to ISMO, the organisation or enterprise must immediately, in writing, declare the member's interest to the Board.

Committees of the Board

11. (1) The Board-

(a) may establish committees to assist it in discharging its functions;

(b) must establish an audit committee and such other committees as required by the PFMA and other applicable legislation.

(2) A committee may be established as a permanent committee or an ad hoc committee.

(3) A committee must-

(a) consist of at least one member of the Board and such other persons, as the Board may appoint; and

- (b) be chaired by a member appointed by the Board.
- (4) Committees will not have executive powers unless-
 - (a) the Board delegates any of its powers to the committee; or
 - (b) legislation requires that such power should be exercised by the committee.
- (5) The Board must determine for each committee -
 - (a) its functions and duties;
 - (b) the procedures for its meetings; and
 - (c) the frequency of meetings, provided that standing committees must meet at least twice in each calendar year.
- (6) Committee members who are not Board members may be remunerated on the basis determined by the Minister with the concurrence of the Minister of Finance.

Board Charter

12. (1) The Board must, not later than 60 days after its appointment, formulate a Charter for the Board which must at least, subject to this Act-

- (a) outline the roles and responsibilities of the Board, its committees and individual members;
 - (b) outline the purpose and vision of the Board in terms of the Act;
 - (c) confirm the Board's responsibility to monitor operational performance and management and develop policy on risk management and internal controls;
 - (d) contain a code of conduct for Board and staff members;
 - (e) identify functions intended to be delegated to management and provide a framework for appointing senior staff for the Agency; and
 - (f) deal with any other matter that may be prescribed.
- (2) The Charter must be submitted to the Minister before it is finalized in order to allow the Minister to comment on its contents.
- (3) The Board must summarise the Charter in the annual report and review it at least every three years.

CHAPTER FOUR ISMO STAFF

Appointment and Functions of the Executive Officers

13.(1) The Board shall, subject to the prior approval of the Minister, appoint a Chief Executive Officer, Chief Financial Officer and Chief Operating Officer.

(2) Whenever a vacancy for the position of the Chief Executive Officer occurs, the Chairperson of the Board must invite applications for the posts contemplated in subsection (1) by advertisement in a national newspaper.

(3) A person appointed as Chief Executive Officer, Chief Financial Officer and Chief Operating Officer –

- (a) must have qualifications and experience appropriate to the functions of ISMO and the position applied for; and
- (b) may not be a person disqualified from holding position of trust or a person who would not qualify to be appointed as a director of a company in terms of the Companies Act.

(4)(a) The appointment of the Chief Executive Officer, Chief Financial Officer and Chief Operating officer is subject to the conclusion of a contract for a specific period of time not exceeding five years on such conditions, including conditions relating to remuneration and performance incentives, as the Board may determine.

(b) The Chief Executive Officer, Chief Financial Officer and Chief Operating Officer may with the prior approval of the Minister be reappointed for a further periods not exceeding five years at a time, provided that he or she may not serve for a period of more than ten successive years.

(5) The non-executive members of the Board shall appoint a person to serve as the acting Chief Executive Officer until such time as a Chief Executive Officer is appointed: Provided that –

- (a) the acting Chief Executive Officer may exercise all the powers, duties and functions assigned to the Chief Executive Officer in terms of this Act.; and
- (b) the acting Chief Executive Officer shall designate persons to respectively act as Chief Financial Officer and Chief Operating Officer until such time as a Chief Financial Officer and Chief Operating Officer are appointed in terms of this section.

Powers, duties and functions of the Chief Executive Officer and senior staff

14. (1) The Chief Executive Officer shall, subject to the policy and directives of the Board –

- (a) assume responsibility for the organisation, control and management of the day-to-day affairs of ISMO;
- (b) ensure that ISMO achieves its goals;

- (c) liaise with and report to the Board with regard to the management of ISMO;
- (d) ensure that all information required for the Board meetings has been made available to the Board in appropriate time for such meetings; and
- (e) at the request of the Board, attend Board meetings (together with such other officers of ISMO as may be required for such meetings) in order to assist the Board with its deliberations, provided that the CEO and any such officers shall not thereby have any powers to vote in the meetings.

(2) The Board shall, 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 of ISMO.

Appointment of Senior staff

15. 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.

CHAPTER FIVE ISMO FUNCTIONS

Generation Planning

16. With respect to the Integrated Resource Plan (IRP), the Minister may require ISMO to provide assistance for the purpose of developing, implementing, and monitoring the IRP.

System Operation and Expansion Planning

17. With respect to systems operation and expansion planning, ISMO shall -

- (a) be responsible for electricity dispatch through the national transmission power system and related systems within the Republic;
- (b) maintain and operate a national control center to control the integrated generation, national transmission power system and related systems, including all of its operating desks, computer and control systems and its backup functions and facilities;
- (c) direct the operation of transmission operations centers located throughout the Republic to ensure their operation is coordinated with the overall operation of the integrated generation, national transmission power system and related systems;
- (d) 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, including municipalities and Eskom Distribution and their control centers;

- (e) maintain the real time balance of generation and electricity demand within the Republic and coordinate operation with adjacent control areas;
- (f) develop short term operations plans for using the resources that are procured or otherwise arranged for by a buyer of electricity generated by generators;
- (g) co-ordinate with operators of generators with regard to the maintenance planning, scheduling for and availability of generators and transmission power systems within the Republic in accordance with the Grid Code;
- (h) co-ordinate with the operators of the SAPP generators with regard to the maintenance planning and scheduling of SAPP related generators and transmission power systems affecting interconnections and wheeling paths affecting the Republic;
- (i) sell electricity to ISMO Customers in compliance with applicable license requirements for selling or trading in electricity;
- (j) co-ordinate operations with neighboring systems and control areas in accordance with SAPP operating guidelines;
- (k) co-ordinate the start up, shut down and dispatch of generation under its jurisdiction;
- (l) managing adequate operating reserves in accordance with the Grid Code as part of the dispatch activities;
- (m) implement system energy and capacity emergency plans and procedures as required to maintain acceptable level of reliability;
- (n) participate in the SAPP as the operating representative of the Republic;
- (o) perform contingency studies on line or as required and react in due time to mitigate any possible risk for the integrated power system;
- (p) perform a short term, day to day, week to week, load forecast as an input into the short term energy and capacity planning functions; and
- (q) develop generation integration agreements that specify the technical requirements that must be met by all generators above a threshold size determined by NERSA, including information to be included such as protection, metering, control, communication, var/voltage control and maintenance scheduling requirements.

Buyer of Electricity

18. With respect to its function as a buyer of electricity generated by generators, ISMO shall –

- (a) develop and implement a procurement and acquisition system, policies and procedures aligned with Constitutional requirements for the procurement of goods and services in relation to the procurement of new generation of energy in accordance with integrated resource plan guidelines and the provisions of the Electricity Regulation Act (including regulations issued in terms thereof);
- (b) conclude transaction agreements as may be necessary for the procurement of electricity (capacity and energy);
- (c) on such conditions as may be agreed by the parties, procure electricity (capacity and energy) –
 - (i) from all generators within the Republic and outside its borders, with the exception of generators exempted by licence from selling to ISMO;
 - (ii) consistent with the integrated resource plan and in terms of separate processes for renewable and non-renewable generation;
 - (iii) in such a manner that sufficient capacity and energy are procured to meet the needs of the Republic, including a planning reserve margin as approved by NERSA;
- (d) aligned to the Republic's international obligations, agreements and undertakings –
 - (i) negotiate and conclude electricity import agreements that ensure a reliable and stable supply of electricity for customers within the Republic;
 - (ii) negotiate and conclude electricity export agreements having regard to the interests of the Republic over the long term; and
- (e) procure sufficient energy and capacity to be able to meet the projected load on the national transmission power system and to serve its contractual commitments;
- (f) 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;
- (g) maintain sufficient black start capability (number of units, and location on the national transmission 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;

- (h) enter into power sales agreements with customers;
- (i) ensure that metering points are established and maintained to allow billing quality metering of all electricity sales and purchases;
- (j) develop processes to manage the efficient implementation of agreements concluded between ISMO and operators of generators or customers with regard to the buying or selling of electricity;
- (k) 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; and
- (l) develop and implement capacity and energy supply tariffs for all sales to ISMO Customers.

Execution of ISMO functions

19. (1) ISMO shall be accountable for the proper execution of the functions referred to in sections 16 to 18.

(2) Notwithstanding the provisions of subsection (1), the Minister may, in consultation with Cabinet transfer the functions referred to in section 16 to 18 to ISMO by notice in the *Gazette*. The functions referred to herein may be transferred through a regulation specifying the process to be followed by both Eskom and ISMO.

CHAPTER SIX FUNDING

Loans and Government Guarantees for loans

- 20. (1) The State, represented by the Minister, may grant loans to ISMO from moneys 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.

Business, financial plan and strategic plans

- 21. (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.
- (b) Notwithstanding, 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 –
- (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;
 - (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.
- (3)(a) ISMO must submit to the Minister for approval, not later than 30 days before the end of its financial years and of every financial year thereafter, a strategic plan covering the period of five years commencing on the first day of the first-following financial year concerned.
- (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

22. 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.

Funds and assets

23. (1) The funds and assets of ISMO shall consist of –

- (a) the assets and rights transferred to ISMO;
- (b) funds, assets and rights acquired by ISMO in the performance of its functions;
- (c) shareholder contributions approved by the Minister of Finance;
- (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.

(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 fees, rates and charges

24. (1) All of ISMO's normal costs shall be recovered from tariffs, rates and charges to ISMO Customers, provided that ISMO shall only not be allowed to recover a tariff, rate or charge to the extent that it is not prohibited by legislation or regulation from levying such tariff, rate or charge .

(2) In the event that an ISMO Customer does not pay any tariff, rate or charge due, and notwithstanding ISMO's remedies in law, ISMO may, notwithstanding any provision in any law to the contrary, 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.

(3) Notwithstanding subsection (1) and subject to section 20 and the limitations and conditions as may be prescribed in the Memorandum of Incorporation, Public Finance Management Act and Companies Act, ISMO may –

- (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;
and
- (c) provide security for money thus borrowed or raised.

CHAPTER SEVEN SPECIAL POWERS

Powers of entry and inspection

25.(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 –

- (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;

(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, meters, fittings, works and apparatus belonging to ISMO.

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

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

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

(3) Damage caused by such entry, inspection or removal shall be repaired or compensated for by ISMO.

Borrowings secured by ISMO assets and revenue

26. (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, shall be a first charge against all revenues and assets of ISMO and on all moneys recovered or to be recovered by it.

(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).

(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 moneys 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.

(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 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.

CHAPTER EIGHT

TRANSITIONAL PROVISIONS

Transfer of assets, rights, liabilities and obligations

27. (1)(a) Eskom Holdings shall upon commencement of this Act, and within the time period determined by the Minister by notice in the *Gazette*, 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 arising from or relating to or attributable to the functions performed by Eskom immediately prior to the commencement of this Act and that can legally be transferred, ceded or assigned to ISMO in order that it can perform its functions as set out terms of this Act, including the values applicable to each asset, right liability or obligation, and provide such list to the Board for its consideration.

(b) The Board shall consider the list provided in terms of paragraph (a) and may consult and negotiate with the Eskom Holdings Board 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, their associated values, and whether such assets, rights, liabilities and obligations can be transferred, ceded or assigned to ISMO.

(c) Upon agreement between the Board and the Eskom Holdings Board as to the contents of the list and the values as contemplated in subsection (1), the 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 organ, after consultation with such organ of state.: Provided that –

(i) in the event that no agreement is reached between the Board and the Eskom Holdings Board within a reasonable time, the Minister shall 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 by ISMO in terms of section 20(2).

(2)(a) Any reference to such 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 the provisions of section 5 of the State Land Disposal Act, 1961 (Act No. 48 of 1961), and the provisions of 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 in any other law to the contrary, ISMO and such organ of state shall 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.

Deemed validity of licences

28. After the transfer of any of the function to ISMO in accordance with section 19, ISMO has six months to acquire the required licence in terms of the Electricity Regulation Act. The Minister may extend the period through a notice published in the government gazette.

CHAPTER NINE GENERAL

Regulations

29. The Minister may by notice in the *Gazette*, make any regulation necessary to facilitate the establishment and operation of ISMO.

Short title and commencement

30. This Act is called the Independent System and Market Operator Act, 2011, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.
