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Non Profit Organisation (NPO) No. 004-159-NPO

A project of Earthlife Africa Jhb

Comments on the draft Independent System and Market Operator Bill – B9- 2012

Date: 13 April 2012

Hon. Sisa Njikelana
Chairperson Portfolio Committee on Energy
Attention: Mr Arico Kotze
Committee Secretary:
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Dear Comrades,

Below are our main comments on the draft Independent System and Market Operator Bill – B9- 2012 ("ISMO Bill"). Please note that this submission also serves notice of our intent to make verbal submissions, please do register us and provide confirmation thereof. We would like to present on the 15th of May 2012, and if more information become available in the interim we will present it at the hearing.

Our comments are:
1. We support the SAFCEI submission, hereto attached as Annex A.

2. ISMO profit-making: As the ISMO Bill stands at the moment, it seems possible that the ISMO, in performing a public good, could make profit off the buying and selling of electricity. This is unacceptable, and would likely destabilise the electricity sector and cause unnecessary increases in electricity tariff. **It must be made clear in the Bill (perhaps Section 32) that the ISMO is run on a non-profit basis. Anything else represents an effective privatisation of public assets, which we are opposed to, particularly in the electricity sector. To this end, the ISMO needs to be incorporated as a state institution, rather than a private (or quasi-private) sector entity.**

3. Tariffs and ISMO: As the ISMO is essentially the breaking up of Eskom into two parts, the question is then, will the tariffs granted to Eskom be broken up too? Eskom already receives revenue from tariffs for transmission, wheeling, distribution, etc. In order to prevent double-charging, NERSA would have to review all the tariffs and unbundle them into generation and transmission components. This is not clear in the Bill.

4. Eskom Domestic Customers: Eskom currently supplies about 4 million households with electricity, including FBE. The Bill is silent on whether the ISMO will take over this function and how it will fund FBE, and the powers it would have to increase FBE in accordance with development and social welfare aims of the country.

5. SPA: Eskom currently has 3 Special Purchase Agreements with BHP Billiton and Anglo. The Bill needs to be clear on whether the ISMO will take over these contracts and be empowered to renegotiate these loss-making deals.

6. Access to information: As the ISMO is preforming a public function as part of the State's responsibilities and functions and duties to the citizenry, all the tariffs charged by the ISMO for buying and selling electricity need to be in the public domain and without confidentiality clauses.

7. Disclosure of conflicts: All employees of the ISMO should disclose all conflicts that they may have and those of their family members. The Bill is silent on the conflicts of interests that partners, children and other relatives may have.

8. Parliamentary Powers: It appears that Parliament is not legislating overview powers to itself, and thus not fulfilling its oversight of the Executive Branch, including DoE and NERSA. For example, Section 37 gives the power to the Minister of Energy to intervene in the ISMO, especially under a case of maladministration within the ISMO. This is serious and presenting a report to Parliament within six months is not enough, such a case should trigger an immediate Parliamentary Committee of Enquiry with the power to take corrective action as it would be a failure of the Executive to fulfil the mandate of the public's general will. Given the importance of the electricity sector to the nation, Parliament needs to legislate its oversight explicitly in this Bill.

9. Electricity Regulation Act: The ISMO Bill is dependent upon the ERA and the National Regulator Act for its operations. Both of these acts are under revision by the DoE, and the draft bills have been defined as unconstitutional by us. If passed in their current format, these bills would have serious implications for the ISMO Bill, and would undermine many of the efforts of this Bill. We are worried that the ordering of Bills before the Portfolio Committee is wrong in this regard; as foundational bills, DoE should deal with them before attempting to legislate on the basis of bills set to change within this year.

10. Lastly, the ISMO Bill represents an opportunity for the possibility of net metering in terms of micro-generation (below 500kW or 1MW). The ISMO could be empowered through this Bill to set up such a system.

All the best,

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Annex A

SOUTHERN AFRICAN FAITH COMMUNITIES' ENVIRONMENT INSTITUTE (SAFCEI)

Faith communities committed to cherishing living earth.

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12 April 2012

final

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Dear Honourable Chairperson,

Response to publication of draft legislation – Independent System and Market Operator bill – B9- 2012

Introduction:

This input is prepared in response to the notice issued by parliament calling for input into this draft legislation. It should be noted that SAFCEI prepared and submitted detailed comments on this bill as it was released for public comment during 2011. Our expectation was that some of the substantive issues we submitted would have been addressed. In that submission, we pointed out a number of drafting inconsistencies that we felt undermined good governance. We are pleased to see that many of these concerns have been addressed and commend the department for the redrafted bill.

For ease of reading, we have structured our input to reflect where the latest draft of the bill has addressed our concern or failed to do so.

This input is submitted in response to the Department of Energy's call for submissions on its proposed Independent System and Market Operator bill (hereafter referred to as the ISMO). In addition to this written submission, **we also request an opportunity to present at the public hearing** that is organised to hear representations on this bill and where we may elaborate on this written submission. The Southern African Faith Communities Environment Institute (SAFCEI) is an institute of people of many faiths, united in our diversity through our common commitment to earthkeeping. Our aim is to support the faith communities in fulfilling their environmental & socio-economic responsibility. As part of the faith community that believes we have a responsibility to care for the earth and with the climate

changes that we face, we believe that South Africa must take a sustainable energy road, rather than continuing to plough monies into our current non-sustainable energy trajectory.
We thank the national parliament for this opportunity to provide input into this process and our detailed comments follow below.

Our key concerns relate to:

- The need for physical transmission infrastructure to be transferred to ISMO and for this to be specified within this legislation. It is our contention that leaving transmission within the ambit of Eskom is a conflict of interest, as we believe that Eskom would naturally plan to locate the transmission infrastructure where it will benefit its own generation, rather than in the interests of IPPs for example.
- The need for greater oversight and public participation of ISMO plans and operations (given its significant economic importance)
- The need for greater understanding of the accountability and governance mechanisms between the minister of public enterprises and the minister of energy in the governance of ISMO
- It is our contention that the functions of ISMO could be served as well through the creation of a state institution, and we fail to understand the rationale for the creation of a corporate structure, rather than a state institution.

In our detailed comments, please note that we have used shading to demonstrate where an issue is still outstanding in our view.

Comments submitted in June 2011 – submitted to Department of Energy	**Additional Comments on the draft bill – B9 – 2012 – submitted to national parliament portfolio committee on energy**
Process comments: In his state of the nation address of February 2010, President Zuma announced that the ISMO would be established. It is therefore disappointing that it would take more than a year to draft one piece of legislation to implement this. Given this length of time, it would be expected that the legislation would be well drafted and robust. Instead, there are a number of troubling loopholes and issues of concern, and the legislation appears poorly drafted.	It is now 2012 and there has been a two year delay in bringing this much needed piece of legislation to completion, a further year from when we submitted our last comments**.** **This** version of the bill appears to be much better structured although no substantive changes appear to have been made in response to our inputs.
Environmental considerations: Section 2 states that the mandate of the ISMO would be to buy and sell electricity in a manner that " will minimize the overall costs of electricity to customers" . It is not clearly stated in the legislation but the "overall costs" must include the environmental and socio-economic costs as per the constitutional mandate that provides for the right to a healthy environment.	Section 2 and 4 of the bill describe the functions of ISMO. We applaud the detailed description of the ISMO activities. However, there is no reference to environmental best practice that should be followed by ISMO in carrying out its functions. **Our comments from 2011 remain valid**. It is also not clear how energy efficiency and external costs of electricity are to be addressed in ISMOs activities.
Conflicting mandates:	

Eskom was established in terms of act 13 of 2001, and in terms of that act, the articles of association, and any performance agreement that Eskom would enter into with the state, would be under the authority of the Minister of Public Enterprises.
It would be assumed that in establishing the ISMO, the Eskom act may therefore need to be amended, or the articles of association that determine its mandate would need amendment; so that the functions of the ISMO are now divorced from the responsibility of the Minister of Public Enterprise and handed over to the Minister of Energy.
It is therefore unclear, whether the Department of Energy has the mandate to create a piece of legislation that will take away some functions from another minister's responsibility without some corresponding legislative agreement from the minister of public enterprises (in this case).
If this is not clarified, the situation would arise where two state organs have the same function and are located under two different ministers.
Further, page 5 of the bill states that the ISMO bill is to provide for the " establishment of an Independent System and Market Operator as a national public entity…".
Page 9 - *3. (1) (a) The Minister must take all such steps as are necessary to establish a public company*
If a public company is envisaged as the best mechanism for the ISMO to operate as, and it is also envisaged that this is a state owned enterprise, then does it not then fall under the mandate of the Minister of Public Enterprises?

Our comments from 2011 remain valid.

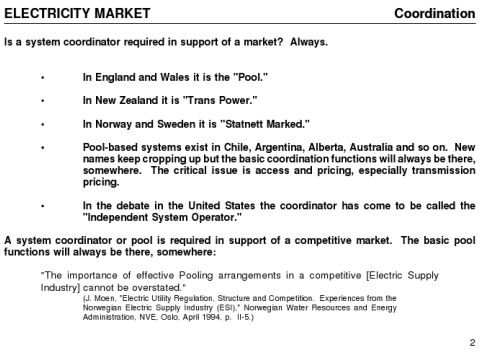
Section 27 in referring to assets to be transferred to ISMO, states that the minister will make decisions, make pronouncements in the gazette, etc. According to the definitions contained in the proposed bill, the minister is then defined as the minister of energy. Surely the Minister of Energy cannot dispose of Eskom Holdings' assets? Is this not the mandate of the Minister of Public Enterprise?

Other examples in other countries:

Our comments from 2011 remain valid.
Applicable to section 40 in new bill.

Additionally, we recommend that the transmission infrastructure be specifically mentioned in the legislation as needing to be transferred as a priority.

Canada has an independent systems operator:
The Independent Electricity System Operator is a not-for-profit corporate entity established in 1998 by the Electricity Act of Ontario. It is governed by an independent Board whose Chair and Directors are appointed by the Government of Ontario. Its fees and licences to operate are set by the Ontario Energy Board and it operates independently of all other participants in the electricity market.
The IESO has full statute-based authority for establishing, monitoring and enforcing reliability standards in the province. All the companies that make up the power system in Ontario must meet the IESO's standards. An audit by the North American Electric Reliability Corporation cited the IESO as a model for system operators, while a peer review showed that its practices in enforcing reliability are exemplary. [1]
A 1998 Harvard paper describes the need for an independent operator where there has been a decision to open up the electricity market, lists some of the countries that had ISMOs at that time.[2]



ELECTRICITY MARKET **Coordination**

Is a system coordinator required in support of a market? Always.

- **In England and Wales it is the "Pool."**
- **In New Zealand it is "Trans Power."**
- **In Norway and Sweden it is "Statnett Marked."**
- **Pool-based systems exist in Chile, Argentina, Alberta, Australia and so on. New names keep cropping up but the basic coordination functions will always be there, somewhere. The critical issue is access and pricing, especially transmission pricing.**
- **In the debate in the United States the coordinator has come to be called the "Independent System Operator."**

A system coordinator or pool is required in support of a competitive market. The basic pool functions will always be there, somewhere:

"The importance of effective Pooling arrangements in a competitive [Electric Supply Industry] cannot be overstated."
(J. Moen, "Electric Utility Regulation, Structure and Competition. Experiences from the Norwegian Electric Supply Industry (ESI)," Norwegian Water Resources and Energy Administration, NVE, Oslo, April 1994, p. II-5.)

2

Duplication and apparent loose drafting of the bill.
Chapter 2 – section 3 Section 3 – Establishment of ISMO

1 http://www.ieso.ca/imoweb/siteShared/whoweare.asp

2 http://docs.google.com/viewer?a=v&q=cache:79FLY2mD-UYJ:ksgaccman.harvard.edu/ksgutilities/getmywebpage.asp%3Fuser%3Dwhogan/swit0698.pdf+electricity+independent+systems+operators&hl=en&gl=za&pid=bl&srcid=ADGEESjFWFf_Fa7PjClKhX61SBsj8G7nEZZY0kjWqDGeT0a4bNWLbzOV3VBp-g3AzhxewpzC-XvvFSdZtH0HnSSJgkMpWvcPD1LXqsyr26S7nxDrEl4Ywi9iOww_5v26S8ADXjn5pRrO&sig=AHIEtbQOJQAFh8pOtYmZ-6B9qHzdJ55pKg

This section is supposed to be the piece of law that establishes the ISMO but it refers to other steps that must be undertaken.
The Eskom conversion act of 2001 simply states that a company is established:
3. (1) Eskom is, with effect from a date determined by the Minister by notice in the *Gccette.* deemed to be a public company incorporated in terms of the Companies Act and is to be known as Eskom Holdings Limited from such date.
Section 3.2.2 also appears to provide a convoluted description of procedure. Again, if the Eskom Conversion Act is referred to,
6. *(1) The Registrar of Companies, appointed in terms of section 7o f the CompaniesAct, must, on the date of conversion, register the memorandum and the articles of association of Eskom in terms of section 63(1) of the Companies Act, but no fee is payable in respect of such registration.*
In our opinion, there are existing examples of legislation that establish state owned companies and the wording of those existing entities appears to be clearer and simpler than that in the proposed bill. We recommend that the drafters amend this proposed bill in line with other legislation that establishes such state owned companies.
One last example will suffice:
3.1.b (page 9) states that " *despite the provisions of the Companies Act, the government shall, on incorporation of the Company and for as long as it wishes, be the only member of the company*".
In the Eskom amendment act, one assumes that a similar issue arose, and is provided for thus:
(2) The provisions of sections 32, 44(l), 54(2), 59, 63(2), 64, 172 and 344(b) of the Companies Act do not apply to Eskom

This section has been tightened and our concerns regarding the drafted have been addressed.

The current provisions of the bill raise questions. Can an entity be exempt from all provisions of the companies act – surely the relevant sections should be listed? Section 3.3 of the act then lists a range of sections of the Companies Act that shall not apply.
Why is section section 3.1.b necessary then if the issue is covered under section 3.3? Section 3.1.b appears too broad, we recommend it be deleted.
The phrase "as long as it wishes" is confusing – under what circumstances can the government change its mind? The manner in which this section is drafted appears to allow amazing leeway for government to act on a whim!

Section 7 and section 8 provide for exemptions and detail circumstances for such exemptions and provide for transparency of decision-making. This addresses most of our concerns.

Section 7 suggests that the provisions of this Act override the companies act which there is a contrary provision. It would be useful to gain an understanding of what these exact points of conflict are, and the motivation for this.

Small point of clarity: section 8.2 – is this publication for comment or for information once section 3 has been completed. The structure of the section implies that the publication contemplated in 8.2 is for public comment – in which case, we would suggest that this is made clear.
And that section 3 be then amended :
….having considered the request contemplated, *and comments received* in subsection 1 *and 2 respectively*, and if satisfied….

For Profit or not for profit?

In preparing this input, there was not sufficient time to conduct in depth research but it is not clear why the ISMO is constituted as a company, apparently for profit. Is this the best institution? Should it be a non-profit organisation? Public company not for gain?
In Canada, as outlined in a previous section above*: "The Independent Electricity System Operator is a not-for-profit corporate entity"*
Similarly in California*,* the ISO is a not for profit company. This should be clarified?

Our comments from 2011 remain valid.
Applicable to section 3 in new bill.

In a range of countries, there are a number of different systems, and there appears to be some cases where the transmission assets are transferred to the ISMO and in other situations, only the operational side is transferred.

In order to effectively implement section 4, it is our view that ISMO must take over the physical assets of transmission and associated infrastructure. This must remain in the hands of the state and we therefore submit that ISMO should be structured in such a manner as to preclude privatisation.
This clause has been removed and chapter 5 (section 28- 34) provides adequate financial accountability procedures. We welcome the increased role of parliament in the scrutiny of operational plans and financial plans.

According to the bill, (definition of transmission network), the infrastructure and assets would be under the ISO. Should the state at any stage allow private companies to become shareholder in the ISMO, this would effectively be privatising state assets. We would argue that the transmission network is key strategic infrastructure that should remain under state control in perpetuity and this should be reflected in the legislation.
It is therefore of concern that section 6.2 contains the clause "*for as long as ISMO remains a public entity*". We would therefore wish that section 6.2 be amended to delete this clause.

There is no provision in the bill for supplying information in a transparent manner. Given that this is a state owned company and is in effect, a public asset, it is imperative that access to information be provided accordingly. Can we be sure that transparency and access to information will be dealt with as per public entities and not a private commercial entities?
We would also recommend that the ISMO be registered as a section 21 company, not for profit, with independent board members – the following principles taken from the USA system could be incorporated into the legislation to remove the unacceptably wide discretion that currently exists in the proposed bill:

Public information: There are now some provisions within the bill to address this concern – section 6,34 and 36 for example.
However, there is no specific function of the ISMO that relates to transparent information provision.

This has been addressed in that much more detail has been provided to address the wide discretion. We remain unconvinced of the need for the ISMO to be a corporation.

The USA experience – see alongside – provides two specific helpful mechanisms that we believe would strengthen the functioning of the ISMO and should be included in our legislation in some form:

INDEPENDENT SYSTEM OPERATOR **United States Experience**

The Federal Energy Regulatory Commission outlined 11 principles for ISOs in its Order No. 888 of May 10, 1996.

1. The ISO's governance should be structured in a fair and non-discriminatory manner.
2. An ISO and its employees should have no financial interest in the economic performance of any power market participant. An ISO should adopt and enforce strict conflict of interest standards.
3. An ISO should provide open access to the transmission system and all services under its control at non-pancaked rates pursuant to a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner.
4. An ISO should have the primary responsibility in ensuring short-term reliability of grid operations. Its role in this responsibility should be well-defined and comply with applicable standards set by NERC and the regional reliability council.
5. An ISO should have control over the operation of interconnected transmission facilities within its region.
6. An ISO should identify constraints on the system and be able to take operational actions to relieve those constraints within the trading rules established by the governing body. These rules should promote efficient trading.

4

The Federal Energy Regulatory Commission ISO principles (continued).

7. The ISO should have appropriate incentives for efficient management and administration and should procure the services needed for such management and administration in an open and competitive market.

8. An ISO's transmission and ancillary services pricing policies should promote the efficient use and investment in generation, transmission, and consumption. An ISO or an RTG (regional transmission group) of which the ISO is a member should conduct such studies as may be necessary to identify operational problems or appropriate expansions.

9. An ISO should make transmission system information publicly available on a timely basis via an electronic information network consistent with the Commission's requirements.

10. An ISO should develop mechanisms to coordinate with neighboring control areas.

11. An ISO should establish an ADR (alternative dispute resolution) process to resolve disputes in the first instance.

"An ISO should make transmission system information publicly available on a timely basis via an electronic information network consistent with the commission's requirements"

"An ISO should establish an ADR (alternative dispute resolution) process to resolve disputes in the first instance.

We find much of the wording of the bill to be confusing or seemingly poor drafting. There is too wide powers of discretion and the bill appears to make the case for the ISMO being exempt from any oversight. We provide some details of wording that is either duplicates or confuses what the act intends to do:

3. (1) (a) The Minister must take all such steps as are necessary to establish a public
company …….and for another matters as are
within the contemplation of this Act to be the responsibility of iSMO.

Shouldn't these matters be spelt out? Even if reference to specific sections of the act.

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.

Hasn't this already been said in 3.1.a – if you are setting up a company as per this act, the articles of association must be consistent with the act? Under what circumstances could this conceivably be otherwise?

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).

What does this mean? This seems to be a circular argument. If the act exists, then by its existence, if a company is established in terms of the act, then surely all provisions of the act should apply – why do we keep cross-referencing?

Section 5:

What is the point of the other acts if the minister of Energy, at their whim, can ask for exemption from any provision as they may wish to be exempted from? If the Minister of Energy can do it, then so can any other minister.

If there is a specific section that is of particular relevance, then the law should specifically refer to this as a motivation for exemption from that specific provision.

But can a law be made that specifically exempts a body from the provisions of another act? Do other acts not contain a clause that covers the application for exemptions that could be applied here? If this is the case, then section 5 should be deleted.

This section has far too much discretion – it refers to **exemption from any other act**, at the **sole discretion** of this minister. This is open to abuse.

Under this clause, it could be possible for the ISMO to be exempt for PAJA or the criminal justice act and enter into all sorts of corrupt agreements claiming that it is totally legal for it to do so!

The wording implies that the ISMO could be exempt from the law of South Africa – claim some sort of diplomatic immunity – this is clearly absurd and the section needs rewriting or deleting.

Section 6.2

There is reference to " as long as ISMO remains a public entity". What exactly does the Department have in mind in the long term? Is the plan to privatise electricity transmission?

This is of immense concern. Recent history has demonstrated the folly of allowing Eskom to have monopoly control over the generation, transmission system. It is our contention that Eskom is to all intents and purposes, a private company acting in the interests of large industrial customers – the state has failed to provide direction or control to force this monopoly to act in the public interest. Further details will be provided on request.

The wording of the bill has been considerably tightened and we commend the drafters on a much tighter version.

Our concerns have been addressed through the revised draft of the bill.

While there may be private generators that sell power into the transmission system, the ownership and control of the transmission system must be retained in government hands.

Section 7:

Addressed through the amended drafts although a non-corporate structure would further address this concern.

Chapter 3

(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. This is useful and important although there is possibly a more elegant legal wording. However, in practice, this means that the first batch of directors will serve 4 years and then up to 4 directors will be replaced every 4 years. Should there be some mandatory period of chairing to avoid one chairperson serving for 8 years and then leaving? It is suggested that the chairperson can only serve for one term of 4 years. How about people who serve for four years or 8 and then are replaced – can they be reappointed after another 4 years? This may lead to an unhealthy revolving door syndrome and it is suggested that board members must serve a maximum of two terms irrespective of whether they are consecutive or not.	Section 10. This section has been redrafted and again we commend the drafters in making it easier and clearer to understand. However, section 10.5 has not really solved the issue we raised re ensuring continuity.
Section 7.10:	
Although it may be required to appoint interim board members to ensure a correct balance of skills, it is felt that such an interim arrangement could be open to abuse. It is therefore recommended that a maximum period be included in this clause – of three months.	Addressed through 13.8
This section also refers to " non-executive" directors but it is not clear if all directors are non-executive as the board appointment clauses only refer to directors and does not distinguish between executive and non-executive directors. Clarity is needed.	Addressed in redrafting
Section 7.11.	
Missing 5 meetings without explanation appears to be a serious derogation of duty and it is suggested that missing two meetings without explanation could be grounds for removal.	Addressed – section 14.2.f.
However, to be removed "on good cause shown" without a hearing, appears to be too broad a discretionary power. It is therefore suggested that this be removed or coupled with a hearing.	Addressed – section 14.2.
Section 8:	
Section 8.1 also refers to "non- executive" directors and needs clarity.	Addressed in redrafting
This appointment procedure appears fair. However, it would seem important to have someone with a social science skills as well. We welcome the mandatory inclusion of environmental skills into the new board.	Addressed through 13.4.a.vi. However, we would suggest that the "or" be changed to "and" in order to ensure that the spread of skills outlined in section 4 is mandatory, although Section 13.5 does cover this to some degree.
Section 10.	
These sections do cover a conflict of interest. However, recent events (Hitachi, use eskom/ is (old story) etc) demonstrate that remaining part of the board but " not being in the room" while the decision is made, is not sufficient. It is suggested that where there is any conflict of interest, which has a value of Rx amount, the board member should not only recuse his or herself from the decision, but should the board opt to appoint the family member with financial interest, then the board member should resign, to avoid any further conflict of interest.	Addressed comprehensively through section 14 and 15, particularly 15.1.f,g; 15.2, and section 16.
	Although section 17.3.a is necessary to avoid unnecessary review of decision-making, it does

	leave the board potentially open to undue influence. Details of the decision-making processes involved in the arms deal might suggest that a clause 17.4 be added that might state that where a decision was made where a board member (or any person not entitled to sit as a member) was present and subsequently found to be guilty in terms of section 15g or 16a and b; that such a board decision *may* be reviewed.
Section 11.4 Committees should not have executive decision-making powers and should only be advisory. For the board to delegate executive authority to a committee with only one board member present is tantamount to outsourcing its responsibility. 11.4a and 114.b should be deleted. 12.1 " subject to this act" – is this not superfluous – delete!	Addressed through section 18.5, read with 19.2 and section 19.4 Addressed through redrafting
The board charter: Why is there a need for a charter? Is there a legal necessity for this in terms of other legislation? If so, why is it necessary for it to be included in this piece of legislation? Would there not be an implied process and associated documentation to cover the functions of the executive and the board. – a constitution or articles of association. If this does need to be in the act, then there should be timeframes and provisions for how such a " charter" is amended and provision for the dissolution of the board etc. There should also be mandatory provision for such a charter to be subject to public scrutiny. However it is our contention that the roles and responsibilities of the board should be contained in regulations or as part of this legislation.	Addressed through clear detailed legislation regarding the appointment and functioning of the board and also to reference to a code of conduct in section 16.c.vi.
Section 13 Section 13.4a. Why are such positions only for ten years? If such persons are only in the job for a maximum of ten years, they will need to concentrate on ensuring that they have a professional life after their term of duty on the board. This may lead to unintended consequences of encouraging conflicts of interest and corruption. There should be provisions that explicitly prevent the revolving door syndrome. Once a senior person has left the ISMO, there may not be reappointed.	Section 21 refers to the senior staff only being appointed for a maximum of 8 years. Why? Our issue remains unresolved, particularly with regard to encouraging a conflict of interest. Why are there no permanent appointments?
Section 14 Would the charter not cover this? Surely, the common definition of a CEO is to carry out the mandate of the organisation – why do we have to have a clause that says she is responsible for the " goals" - under what circumstances would this not be the case? It is suggested that a similar clause to 14.2 but adjusted for the CEO be drafted to replace clause 14.1. **Functions of the ISMO**	Section 25: Given that clause 21.1 requires a performance agreement, which we assume would outline the goals of ismo, it is unclear why section 25.b is necessary. It is our view that clause 25.2 should be adjusted and applied to the CEO – as per our previous submission

Section 3.1.a states that the ISMO will assist with planning of generation? It is unclear what this entails. Electricity planning is the mandate of the Dept of Energy – and the regulation of electricity is the mandate of the regulator, NERSA.
In terms of the 2010 IRP process, both NERSA and DoE were involved although it was not clear how their responsibilities differed. The ISMO should only be involved in planning in as much as it provides grid operational data to the planning authorities, and participates in planning processes at that level. This should be defined in the act to avoid duplication of functions and confusion as to who is actually planning the Country's energy future.

Addressed through section 2.c and section 4.1.

System Operation and Expansion Planning

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

This title implies that the ISMO is involved in energy planning but only for expansion. It may be that the planning might be for contraction due to some or other technological breakthrough that results in transmission reduction, and a more decentralised approach to systems operation. It is suggested that the word " expansion" is removed.

Our concern has not been addressed.
4.1.b the use of the words "expansion plan" should be removed. While it may be that over the next few years, the transmission and distribution grid may be expanded, this is not a continuous business – at some point, the grid will be at the optimal size and will not expand. Similarly, our electricity demand will also reach a steady state. It cannot increase ad infinitum.

17.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.

The wording of the clause implies that NERSA's role is restricted to determining threshold size of generators. However, one assumes that regulatory controls would include specifying the information as listed in the second part of the clause 17.q. As such the sentence might be reworded:

develop generation integration agreements that specify the technical requirements as determined by NERSA, that must be met by all generators above a threshold size, including information to be included such as protection, metering, control, communication, var/voltage control and maintenance scheduling requirements.

Section 4 provides a detailed list of functions and as such our concern has mostly been addressed.

Section 18a

"constitutional" requirements – it is not clear what is being alluded to. Are we talking about the constitutional delegated powers of electricity distribution or is this a reference to an organisation constitution?
How does the constitution of the country govern electricity generation?, particularly the procurement of new generation.

Addressed through redrafting - section 4

What are the Integrated resource planning guidelines? Is this the same as the IRP as published in the gazette? If not, what are these?, and how are they determined?
18l.

Addressed through section 4.3.d.ii

(l) develop and implement capacity and energy supply tariffs for all sales to ISMO Customers. There seems to be some overlap with NERSA functions. Is it not NERSA's mandate to set tariffs? It is suggested that the ISMO would not develop energy supply tariffs but would implement those that are decided by the regulator.	Addressed through section 4.3.n
Section 19.1. Why is this needed? What other purpose would the ISMO fulfil if not the execution of the functions of the act?	Has been addressed through the removal of such clauses
Section 19.2 This clause is too broad. Who are these functions to be transferred to? It is suggested that this clause be scrapped. There is little point in setting up a ISMO to perform certain functions and then inserting a clause that allows any of these functions to be transferred to anyone in the universe with the publishing of them in a government gazette which would have 30 days notice for comment and no transparent or accountable process for ensuring that the aims of the act are not undermined.	Has been addressed through the removal of such clauses
Section 21 This is a larger question than just being applicable to this section. Eskom as a public enterprise is accountable and reports to the Minister of Public Enterprises – not the Minister of Energy. This act assumes to divide off the transmission side of the Eskom utility and place it under the jurisdiction of the Minister of Energy. There is no mention of the minister of public enterprises in the proposed legislation. Is it not necessary to have a separate piece of legislation to amend the eskom act and separate out the functions of eskom compared to the new ISMO? For this specific section, it is suggested that the ISMO also report to parliament particularly with regard to its five year strategic plan. It would be argued that the plan of the entity that controls the electricity grid that currently underpins a large part of the economy should receive additional scrutiny and not be limited to one minister.	Addressed through provisions of chapter 5 section 28 - 34 This issue has not been addressed and we hope that this will be clarified through the parliamentary process Section 29 contains the same text as the 2011 version. However, Section 34 appears to address our concern in terms of reporting. Possibly it might be appropriate to cross-reference to this clause in section 29.
Section 24. ISMO rates, tariffs etc must be governed by the regulator – ISMO cannot be allowed to set its own tariffs but the clause is not specific on this. It is suggested that a specific clause is added that states that all tariffs, rates etc must be approved by NERSA.	Addressed in section 4.3.n
Section 25 There is no motivation for why such special powers are necessary and it seems that if such action is necessary, it should be covered in other laws and if not, and included in this act, it would probably contravene other laws that govern private property and access. The Eskom Act specified a period of seven days notice to a landowner where Eskom needs access. Why is this not carried forward to this legislation? It is also unclear why there is a specific clause governing new generation. This clause seems to allow fracking prospecting – if prospecting is defined as surveying! As the ISMO is not implementing generation, it is not clear what the rationale for this clause is.	Section 35 **Our concern has not been addressed.** **Our concern has not been addressed.** **Our concern has not been addressed.**
Section 26 This appears to be related to debt collection – are there not other laws that can be referred to that cover the specifics of debt payments. It is unclear why this needs to be	Section 33 This section has now been placed under the funding and financial accountability chapter, chapter 5. If it must be in the act, this makes more sense for it to be

specifically contained within energy law?	located here.
Section 27. The negotiations between Eskom and ISMO again raise the issue of which minister has jurisdiction over ISMO. It is our understanding the Eskom is accountable to the Minister of public enterprises – not energy. Yet in the definitions part of this act, " Minister" refers to the Minister of Energy. This needs clarity and possibly some amendment of the acts that govern Eskom.	**Our concern has not been addressed.** It is hoped that clarity will be provided by the department and state law advisors during the parliamentary process.
Section 27. 2b and 27.3 These sections appear to allow the ISMO to gain state assets for free and not to pay tax – is this the current status with ESKOM? Is this the standard for State Owned Enterprises?	Section 40 If this is the standard for the transfer of state assets, we accept this.
Section 28: It appears sensible to allow for extensions for license application, given that there may be a period of confusion in the transferring of functions, licences etc. However, the extension should not be open-ended and it is suggested that the extension should be restricted to a maximum period of a further 6 months.	Addressed through section 41.6
	Additional comments on B9-12 Section 39: It is our understanding that any policy that is drafted by the minister would be presented to the national assembly for discussion, public hearings and consideration. This clause appears to centralise decision-making and fails to allow sufficient time for transparent, accountable decision-making. We recommend that the timeframe be extended and specific mention be made of the National Assembly's role in considering such a policy
Overall, given the necessity of providing for an independent grid operations system, we welcome the publication of this bill. However, we must express our concern at the seemingly slow progress with this drafting of the bill as it is our contention that the subject has been drafted in a superficial manner. The apparent poor drafting seems to speak to a lack of priority in the department to implement the ISMO as it is clear that significant re-drafting will be needed.	The poor drafting has been addressed. This bill is significantly improved on the 2011 version in terms of its drafting, creating improved accountability in electricity governance.

Once again, we thank you for the opportunity to comment and provide this submission in the spirit of constructive engagement, the cornerstone of strengthening our democracy.

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