

STANDING COMMITTEE REPORT NO. 20-06

RE: C.B. NO. 20-15/T&C

SUBJECT: PERTAINING TO ASSETS AND LIABILITIES
OF THE OPEN ACCESS ENTITY

MAY 23, 2017

The Honorable Wesley W. Simina
Speaker, Twentieth Congress
Federated States of Micronesia
First Regular Session, 2017

Dear Mr. Speaker:

Your Committee on Transportation and Communications, to which was referred C.B. No. 20-15, entitled:

"A BILL FOR AN ACT TO AMEND SECTIONS 389 AND 391, AND INSERT A NEW SECTION 392, UNDER CHAPTER 3 OF TITLE 21 OF THE CODE OF THE FEDERATED STATES OF MICRONESIA (ANNOTATED) AS AMENDED, PERTAINING TO ASSETS AND LIABILITIES OF THE OPEN ACCESS ENTITY, AND FOR OTHER PURPOSES.",

begs leave to report as follows:

The intent and purpose of the bill are expressed in its title.

Public Hearing

Your Committee held a widely attended public hearing on the bill on May 18, 2017.

Because of the number of witnesses who appeared, your Chairman asked each witness to introduce himself and explain the role in which he was appearing before the Committee. Each witness did so. Among others, the following were present at the hearing to testify:

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- Secretary of Transportation, Communication, and Infrastructure;
- Secretary of Finance and Administration;
- Attorney General;
- Assistant Secretary of TC&I in his capacity as both TC&I employee and as a member of the Board of the new Open Access Entity;
- TC&I Project Coordinator;
- Former Assistant Secretary of TC&I now retained by TC&I Division of Communication as ICT advisor;
- President and CEO of FSM Telecommunications Corporation (FSMTC);
- Two members of the Board of FSMTC;
- Legal counsel to FSMTC;
- Consultant employed by Macmillan Keck; and
- A member of the media.

Your Chairman began the hearing by stating that your Committee has been frustrated by the brinkmanship approach to legislation: "Congress must do X, or the World Bank will not disburse the funds." The Project Coordinator explained that the government made a commitment to reform the sector, but has "kicked the can down the road" with respect to hard decisions. He explained that "FSMTC can go wholesale or retail," but the World Bank will not release the funds until certain guarantees are in place. He explained that the original telecommunications liberalization bill called for the transfer of the HANTRU1 cable system, but that due to objections by FSMTC this was removed.

Members and the Project Coordinator then engaged in a discussion as to whether the Financing Agreement between the FSM government and the World Bank explicitly requires the transfer of legal ownership of the HANTRU1 cable. Members emphasized that the only mention of HANTRU1 in the Financing Agreement relates to FSMTC giving the OAE capacity and access "free of charge on terms as may be demanded by the FSM Open Access Entity." Members noted that it seems that there is still wide disagreement between TC&I and FSMTC on this crucial issue.

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Your Committee then asked TC&I to make its presentation about the bill. The Secretary of TC&I requested the Project Coordinator to speak about the bill. He explained that the World Bank had recently sent the FSM government a letter stating that there must be certain "guarantees" in place before the funds are disbursed. He then explained that the bill has three objectives:

1. FSMTC can not compete with the OAE;
2. Provides a place for the OAE to land the new cables; and
3. Requires that capacity be used by FSMTC.

He explained that the passage of the bill would have very little or no economic impact on FSMTC because it provides FSMTC full access at very little cost.

Members returned to the issue of the transfer of HANTRU1 because the explanation did not clarify the confusion as to whether transfer is legally required.

The Project Coordinator then explained that the wholesale and retail layers must be separated and that not transferring HANTRU1 would result in "regulatory nightmares and economic inefficiencies."

The Secretary of Finance and Administration then sought to respond to the concern of Members about whether the Financing Agreement requires the legal transfer of HANTRU1 from FSMTC to the new OAE. She explained that after Congress passed resolution CR 18-249, which accepted the \$47 million grant from the World Bank (the largest single grant in the history of the FSM), the FSM government signed a Financing Agreement with the World Bank. She explained that it was her understanding that the transfer of HANTRU1 is the last condition before the funds can be disbursed and that the money will not be released without it. She explained that without the release of funds, the FSM government would have a loss of \$10 million and be responsible to pay \$25 million.

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Members again returned to the question of whether the Financing Agreement requires transfer of legal ownership of HANTRU1. The Attorney General was then asked for his legal opinion as to the terms of the Financing Agreement. He responded that before rendering a legal opinion he would need to review the precise language of the Financing Agreement on this particular issue. (See below for action taken by the Committee after the hearing to obtain this legal opinion.)

Members then raised concerns about whether FSMTC had been consulted about the terms of the Financing Agreement before it was signed and whether FSMTC had been consulted before the bill was transmitted to Congress. Members also inquired as to whether RUS, which holds the outstanding loan that FSMTC took to fund the purchase of HANTRU1, had agreed to the transfer required by the bill. Members noted that there seemed to be a great deal of confusion already surrounding the bill and its consequences.

At this point, your Committee asked the representatives from FSMTC to offer their perspective on the bill and the ensuing discussions. The FSMTC President began by stating that already during the hearing other parties had been making representations about the position of FSMTC with respect to the bill. He explained that FSMTC understands why there is a push for this bill because there is a large grant at stake and having access to fiber optic cable is highly desirable. However, he reiterated FSMTC's position, made known to the Executive in writing in November 2016, that FSMTC is not bound by the terms of the Financing Agreement. He further stated that nowhere in the Financing Agreement does it say that HANTRU1 must be transferred to the OAE.

For context, he explained that FSMTC has invested over \$120 million in the FSM building its network, and it has repaid over \$70 million to RUS on its two loans. He explained that these sums are tantamount to the sums of money at stake in the World Bank grant. He also stated clearly that passage of the bill would absolutely affect FSMTC's bottom line despite previous assertions by other parties to

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the contrary. He further explained that the national government would suffer a decline in gross revenue tax because the new OAE, unlike FSMTC, will not pay tax whereas FSMTC had paid in excess of \$1.5 million in GRT over the past four years.

With respect to C.B. No. 20-15, the FSMTC President explained that implementation of the bill would be extremely difficult because there are so many parties connected to the HANTRU1 cable system. For example, he explained that he sent a copy of the bill to MINTA, which responded that they are not interested in working with the new OAE because their relationship is with FSMTC, not a new entity.

He stated that all this bill does is disrupt FSMTC, compromise its ability to service customers, and cripple its ability to pay its loans to RUS. He stated that FSMTC does not want to be put in a position where it must take action against its major shareholder.

He further explained that, although the discussion had primarily centered on the transfer of HANTRU1, the bill also requires the transfer of FSMTC's satellite connectivity contracts. He explained that the transfer of these contracts raise a whole host of other difficulties.

He explained that FSMTC is willing to engage with the new OAE to explore how to meet the "free access" provisions of the Financing Agreement perhaps by pursuing some sort of "contra deal." However, FSMTC does not agree with the "hostile takeover" approach inherent in the bill. He concluded his comments by urging your Committee not to pass the bill.

Members then raised questions about the hiring of the new CEO for the new OAE. Members expressed concern that the new CEO would be paid in excess of \$300,000 per annum when the appropriation for the OAE was for only \$500,000. Members asked the Attorney General whether he had reviewed the contract; he replied that he had not. He also stated that it was his view that any contract must still go through the internal national government review process. Members inquired with

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the Secretary of Finance and Administration whether any of the \$500,000 appropriation for the OAE had been disbursed. They encouraged her to withhold disbursement until the Attorney General had rendered a legal opinion as to the validity of the contract.

By the conclusion of the hearing it was apparent to your Committee that, despite your Committee's exhortation to TC&I and FSMTC at the conclusion of its public hearing on proposed telecommunications restructuring on January 26, 2017, the parties have yet to agree on a constructive way forward. Members expressed the view that the parties should perhaps go back and meet "in the Micronesian way" to talk, listen, and iron out their differences before they return to the Committee. The parties should be encouraged to come back with something that will be good for all.

After the hearing your Chairman sent a letter to the Attorney General documenting the request for legal opinions on two issues:

1. whether the Financing Agreement (Palau-FSM Connectivity Project) between Federated States of Micronesia and International Development Association dated March 6, 2015 ("Financing Agreement"), specifically requires the transfer of legal ownership of the HANTRU1 Cable System from FSMTC to the new OAE; and
2. whether the OAE must comply with the standard national government procedures (e.g. review by Department of Finance and Administration and Department of Justice) before signing a management agreement or consulting contract.

Conclusion

Your Committee on Transportation and Communications makes the following recommendations with respect to the bill:

