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IN THE MATTER OF THE PROPOSED ACQUISITION BY FRESH RIVER LAKES CORP. OF THE CASECNAN HYDROELECTRIC POWER PLANT OWNED BY THE POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION AND NATIONAL IRRIGATION ADMINISTRATION

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MAO Case No. M-2023-023

COMMISSION DECISION NO. 03-M-2024

This refers to the proposed acquisition by Fresh River Lakes Corp. (Fresh River) of the Casecnan Hydroelectric Power Plant (Casecnan Plant) owned by the Power Sector Assets and Liabilities Management Corporation (PSALM) and National Irrigation Administration (NIA) (hereinafter collectively referred to as the "Parties"). The Parties submit this proposed acquisition (the Transaction) to the Philippine Competition Commission (the Commission) for review.[1]

Upon careful review of the existing market conditions, various submissions and representations of the Parties to the Commission, the application of the Philippine Competition Act (PCA) and its Implementing Rules and Regulations, related issuances and regulatory framework, and based on the findings and recommendation of the Mergers and Acquisitions Office (MAO), the Commission finds that the Transaction will not likely result in substantial prevention, restriction, or lessening of competition in the relevant markets for the reasons discussed below.

The Parties

Fresh River is a domestic corporation engaged in the generation, transmission, and distribution of energy. It was incorporated on 23 February 2022 as a special purpose vehicle (SPV) to bid for the acquisition of the Casecnan Plant.[2] It has yet to generate revenues as it has not commenced commercial operations.[3] Its Ultimate Parent Entity

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1 The Philippine Competition Commission conducts review of mergers and acquisitions, including joint ventures, pursuant to Sections 16 and 17 of Republic Act No. 10667, otherwise known as the Philippine Competition Act (PCA), and Section 1, Rule 4 of the Implementing Rules and Regulations of the PCA.

2 Notifying Party's submission to the MAO.

3 *Id.*

(UPE), Lopez Inc., is a holding company with subsidiaries involved in power generation (the "Lopez Group"), real estate development, broadcasting and entertainment, and telecommunications, among others.[4]

PSALM and NIA are government-owned and controlled corporations (GOCCs). PSALM was established pursuant to Republic Act No. 9136 or the Electric Power Industry Reform Act (EPIRA),[5] with a mandate to manage the sale, disposition, and privatization of the disposable assets of the National Power Corporation (NPC).

Under Republic Act No. 3601, otherwise known as "An Act Creating the National Irrigation Administration," NIA's mandate includes the construction of multi-purpose water resource projects for irrigation and for the development of hydraulic power and/or for other uses such as flood control, drainage, land reclamation, domestic water supply, roads and highway construction, and reforestation, among others.[6]

Among the projects of NIA is the Casecnan Plant, a hydroelectric power dam equipped with power-generating units that have a total capacity of 165 megawatts (MW). Casecnan Plant is a result of a 20-year power purchase agreement (PPA)[7] under a Build-Operate-Transfer scheme with CE Casecnan Water and Energy Company, Inc.[8] In December 2021, upon the expiration of the PPA, NIA transferred 60% of its interest in the Casecnan Plant to PSALM under a Memorandum of Agreement. NIA and PSALM agreed to share all net revenues and expenses from the Casecnan Plant in proportion to their ownership ratio.[9]

The Transaction

The Transaction is an asset acquisition of the Casecnan Plant resulting from a competitive bidding process before the PSALM in the exercise of its mandate to sell disposable assets of the NPC. Fresh River submitted the highest bid.

The assets subject of the Transaction include the Casecnan Plant's structure and improvements, plant hydroelectric equipment, materials, supplies, furniture, and fixtures.

Post-transaction, the Casecnan Plant shall be wholly owned by Fresh River.

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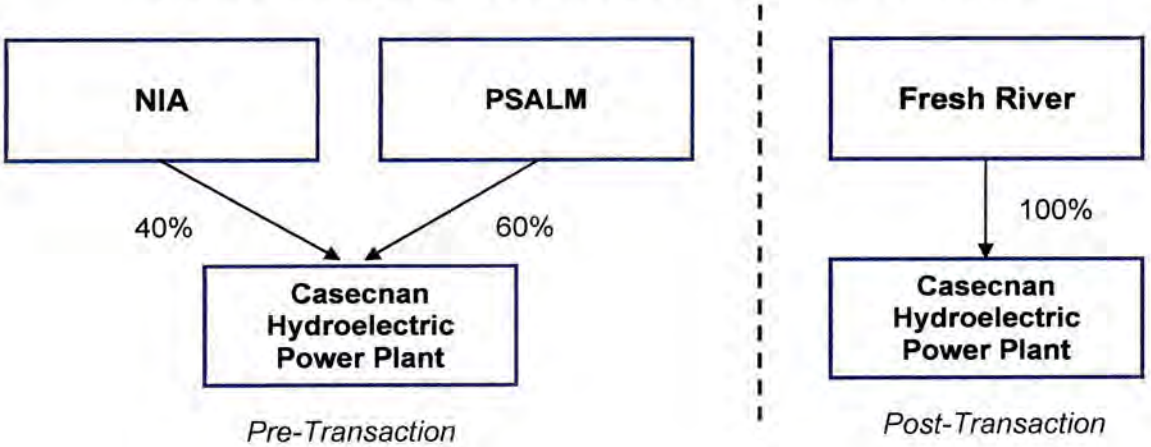
4 Corporate Profile, First Gen, *available at*: https://www.firstgen.com.ph/our-company/corporate-profile (last accessed on 8 January 2024).
5 Republic Act No. 9136 (An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes), Section 50, promulgated on 8 June 2001.
6 Republic Act No. 3601 (An Act Granting the National Irrigation Administration), Section 2, as amended by PD 552, Section 2, par. (c).
7 Executed in 2001.
8 MAO's Interview with the Notifying Parties.
9 Notifying Party's submission to the MAO.

Figure 1. Pre- and Post-Transaction Ownership Structure.



The Relevant Markets

In identifying the relevant markets,[10] the Commission examined the overlapping lines of business and vertical relationships among the Notifying Groups.

Horizontal overlaps exist among the Parties given their operation in the generation and sale of renewable energy (RE). The Lopez Group operates RE power plants through First Gen Corporation (First Gen). First Gen wholly owns Fresh River, the entity acquiring the Casecnan Plant.

By virtue of its mandate, PSALM is also engaged in the generation and sale of energy through its management of NPC's remaining RE and Independent Power Producer (IPP) plants, including the Casecnan Plant. NIA co-owns the Casecnan Plant with PSALM.

There is also a vertical relationship in the sale of RE to Retail Electricity Suppliers (RES). Fresh River, upon acquiring the Casecnan Plant, can sell its RE through power supply agreements (PSA) with the Lopez Group's RES arm.

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[10] Philippine Competition Act, Section 4(k). *Definition of Terms.* – Relevant market refers to the market in which a particular good or service is sold and which is a combination of the relevant product market and the relevant geographic market, defined as follows:

(1) A relevant product market comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices, and their intended use; and

(2) The relevant geographic market comprises the area in which the entity concerned is involved in the supply and demand of goods and services, in which the conditions of competition are sufficiently homogenous, and which can be distinguished from neighboring areas because the conditions of competition are different in those areas.

Considering the horizontal overlaps and potential vertical relationship, the following relevant markets have been identified:

1. Nationwide Generation and Sale of Electricity from Renewable Sources through Non-Feed-in-Tariff (FIT) and Green Energy Auction Program (GEAP) Generation Facilities; and

2. Nationwide sale of RE to RES.

Nationwide Generation and Sale of Electricity from Renewable Sources through Non-FIT/GEAP Generation Facilities

Electricity is a homogenous product for consumers, regardless of its source. In this context, assessing demand-side and supply-side substitution from the perspective of Distribution Utilities (DUs) and RES as electricity aggregators is appropriate to determine whether a distinction exists between conventional and renewable energy sources.

On the demand-side, conventional and RE sources serve different types of demands.[11] For example, conventional sources of energy, such as coal, serve both base load and peak load demand and are secured through PSAs.[12] In contrast, RE sources, due to their intermittent nature, are typically used for peak load demands and acquired through PSAs and the Wholesale Electricity Spot Market (WESM).[13] Further, the Renewable Portfolio Standards (RPS) require specific customers to source a portion of their electricity inputs from RE sources.[14] By 2030, the minimum RPS requirement is expected to grow to over 30% which would further distinguish it from conventional energy.[15] The current Environmental, Social and Corporate Governance

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[11] Power generation plants operate based on three (3) load ranges: (i) baseload power plants, (ii) intermediate or mid-merit load power plants, and (iii) peaking power plants. Department of Energy, *Power 101*, (10 October 2018), *available at:* https://doe.gov.ph/sites/default/files/pdf/announcements/iloilo-energy-101-05-power-101.pdf (last accessed on 25 January 2024).

[12] Base load power plants can generate consistent power to meet daily energy needs and continuously produce power enable the plant to operate throughout the year. Peaking power plants provide power during peak system demand periods, such as dam-type hydro and oil-based power plants.

[13] Department of Energy, Power 101, (10 October 2018), *available at:* https://doe.gov.ph/sites/default/files/pdf/announcements/iloilo-energy-101-05-power- 101.pdf (last accessed on 19 September 2023).

[14] Rule 3, Section 12, DOE Department Circular No. DC 2017-0015.

[15] Rule 2, Section 7, *Id.*

(ESG) initiatives from DU and RES customers will further increase demand for RE energy sources.[16]

From a supply-side perspective, the substitution between conventional and renewable power plants is constrained by the differences in its infrastructure, incentives, costs, and regulatory requirements. Conventional energy power plants cannot be easily converted into RE power plants, and *vice versa.* Suppliers who wish to switch to RE power generation will have to face high costs (e.g., investments) and barriers to entry (e.g., permits, fuel sources).

The prevailing regulatory regimes applicable to the sale of energy were also considered. An assessment of the FIT and GEAP schemes support a market definition that is limited to non-FIT/GEAP power plants.

Based on the GEAP's Guidelines,[17] power plants under the FIT scheme are covered by 20-year contracts and are required to sell its power output to the National Transmission Corporation to be dispatched on the WESM. In exchange, these eligible power plants are ensured a FIT rate throughout the contract's duration. FIT-eligible plants will not be able to compete in the market until the expiration of their contracts.

On the other hand, power plants that are not participating in FIT and GEAP accept the prevailing market price at the time of offer and usually have one- to five-year contracts with DUs or RES.[18]

The geographic market is nationwide. Industry players and regulators confirmed that the Mindanao-Visayas Interconnection Project (MVIP) is operational, enabling the Mindanao grid to be partially interconnected with the Luzon and Visayas grids. From the demand-side, customers can access electricity from power generation facilities connected to the MVIP, irrespective of location. On the supply-side, power generation companies are able to sell their capacities nationwide regardless of their facilities' location.

Based on the foregoing considerations, the relevant market is defined as the **Nationwide Generation and Sale of Electricity from Renewable Sources through Non-FIT/GEAP facilities.**

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[16] MAO's Interview with the Notifying Parties.
[17] Revised Guidelines for the Green Energy Auction Program in the Philippines (GEAP Guidelines), Department of Energy Department Circular No. DC2021-11-0036 (04 December 2021).
[18] MAO's Interview with Stakeholders.

Nationwide Sale of RE to RES

Preliminarily, the Commission notes that no entity within the Lopez Group operates as a DU. DUs operate within the captive market. In such market, electricity end-users do not have the choice of an electricity supplier.

However, the EPIRA mandates that a DU shall have the obligation to supply electricity in the least costly manner to its captive market, subject to the retail rates approved by the Energy Regulatory Commission (ERC).[19] To fulfill the EPIRA's mandate, DUs are engaged in long-term contracts for electricity supply selected through the Competitive Selection Process (CSP) under the ERC. Through the CSP, the selection of an electricity supplier undergoes a transparent and competitive bidding process to ensure that DUs secure cost-effective proposals.[20]

In contrast, RES operate in the contestable market.[21] Under the Retail Competition and Open Access (RCOA) of the EPIRA, contestable market end-users with a monthly average peak demand of at least 500 kilowatts annually are allowed to choose their electricity supplier.[22] However, unlike DUs, RES engage in short-term agreements and are not subject to the CSP. These regulatory distinctions show that the sale of RE to DUs and RES belong to separate product markets.

The geographic market is nationwide, despite the current RCOA scheme being limited to Luzon and Visayas. By 2026, the Department of Energy plans to expand the Competitive Renewable Energy Market's (CREM) scope nationwide through the integration of the RCOA, Retail Aggregation, and the Green Energy Option Program (GEOP) in Mindanao.[23]

Based on the foregoing considerations, the second relevant market is defined as the **Nationwide Sale of RE to RES.**

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19 Section 23, R.A. No. 9316.
20 Department of Energy (DOE) Department Circular No. 2021-09-0030.
21 Contestable Market refers to the electricity end-users who have a choice of a supplier of electricity, as may be determined by the ERC in accordance with the EPIRA; Section 4 (h), EPIRA.
22 Section 31, R.A. No. 9316; Implementing Rules and Regulations of the EPIRA, Rule 12, Sec. 4.
23 Section 1 of DOE Unnumbered Department Circular, "Declaring the Commercial Operations Date of Retail Competition and Open Access, Retail Aggregation and Green Energy Option Program in Mindanao" *available at*: https://www.doe.gov.ph/sites/default/files/pdf/announcements/Department%20Circular%20on%20the%20Implementation%20of%20RCOA-GEOP%20in%20Mindanao-DRAFT-24Apr2023_2.pdf (last accessed on 4 October 2023).

Competition Assessment

The energy industry is governed by the EPIRA, which establishes the regulatory framework for industry participants. The EPIRA incorporates provisions to address potential anti-competitive behavior in the industry by prohibiting cross-ownership in the value chain, establishing ownership and market share caps, price checks, and limitations on affiliate supply contracts.[24]

With the prevailing regulatory framework in mind, the Commission finds that the Transaction will not result in substantial lessening of competition considering the minimal increase in market share of the Lopez Group, the existence of sufficient competitive constraints from other major players, and the potential entry of new competitors due to recent developments in the renewable energy sector.[25]

With respect to the vertical relationship, it also appears that the Parties lack the ability and incentive to engage in input or customer foreclosure strategies in the sale of RE to RES.

No Loss of Competition in the Nationwide Market for Generation and Sale of Electricity from RE Sources

Post-Transaction, NIA effectively exits the market as it no longer maintains ownership of any other energy-generating assets. Despite divesting its shares in the Casecnan Plant, PSALM will remain active in the market and the Lopez Group would continue to compete in the market.

Post-Transaction, the horizontal overlap between PSALM and the Lopez Group would subsist.[26] However, based on market share data from the CREM, the change in market shares attributable to the acquisition of the Casecnan Plant appears minimal, as shown in Figure 2.

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[24] EPIRA Sections 6, 29, 43, and 45.

[25] The lifting of the foreign ownership restriction on the exploration, development, and utilization of solar, wind, tidal, and biomass energy is a welcome shift in the entry of new market players. This includes new interest from foreign entrants in the supply of RE. Moreover, it is expected that twenty firms unaffiliated with existing players will enter the market by 2026. Finally, due to an increasing trend in the demand for energy, more RE power generation companies will be encouraged to enter the market which will then be incentivized for their contribution in attaining the DOE targets.

[26] PSALM will continue to participate in the market, despite the divestiture of the Casecnan Plant, since it still has existing assets that are utilized to generate electricity from renewable energy sources.

Figure 2. Market shares in Renewable Energy Power Generation, pre- and post-Transaction.[27]

Competitor	Pre-Transaction Market Shares	Post-Transaction Market Shares
MERALCO	[redacted]	[redacted]
Aboitiz		
Lopez Inc.		
First Gen		
Casecnan Hydro		
PSALM		
PSALM		
Casecnan Hydro		
Ayala		
MILL		
SMC		
Others		

The Transaction will increase the market share of the Lopez Group by 1.79 percentage points. This will make the Lopez Group the second-largest competitor in the generation of RE from non-FIT/GEAP plants, post-Transaction.

However, despite this shift in ranking, the Transaction is not expected to result in a significant increase in market concentration. The presence of active competitors in the market will mitigate any potential unilateral effects resulting from changes in market structure.

Additionally, the Commission notes that post-Transaction, the market shares of the Lopez Group will likely remain within the limits set by the EPIRA.[28]

No Ability and Incentive to Engage in Input and Customer Foreclosure in the Nationwide Market for the Sale of RE to RES

[27] Energy Regulatory Commission, Competitive Retail Electricity Marker (CREM) Report as of July 2023, *available at*: https://buyyourelectricity.com.ph/pdf/CREM%20REPORT%20FOR%20JULY%202023.pdf, last accessed 8 January 2024.

[28] *See* EPIRA, Section 45, (a). EPIRA mandated that no company or related group can own, operate, or control more than thirty percent (30%) of the installed generating capacity of a grid and/or twenty-five percent (25%) of the national installed generating capacity.

As a hydroelectric power dam, the Casecnan Plant serves as a source of RE for the Lopez Group which operates through its RES entities: First Gen Energy Solutions, Inc., Bac-Man Geothermal, Inc., and Green Core Geothermal, Inc.

The Commission notes that input and customer foreclosure[29] are highly unlikely in the nationwide market for the sale of RE to RES. Fresh River, through the Casecnan Plant, would not have the ability nor incentive to exclusively supply its output to the RES arm of the Lopez Group nor raise electricity prices to foreclose competitors.

(i) Input Foreclosure

Majority of the capacity produced by the Casecnan Plant is unreliable, given the fluctuating nature of its energy source. As such, majority of its output will be sold on the WESM during peak production hours.

Fresh River could only contract the remaining [redacted] MW of the total [redacted] MW ([redacted]%) of Casecnan Plant's output through PSAs with RES.[30] The remaining capacity of the Casescan Plant would be insufficient to cause input foreclosure.

Even the aggregate market share of the Lopez Group in the RE market post-Transaction ([redacted]%) is insufficient to significantly influence the availability of inputs to customers. Customers of electricity could easily source their RE requirements from other RE suppliers operating in the grid.

(ii) Customer Foreclosure

The Commission evaluated whether foreclosure of upstream competitors may take place considering the possibility of RES entities within the Lopez Group refusing to purchase power from competing generation companies. Under the RPS, the Lopez Group's RES arm is mandated to source [redacted] MW (out of their total [redacted] MW capacity allocation) from RE.

While the Lopez Group's total RE capacity of [redacted] MW is sufficient to meet the RE requirements of its own RES arm—potentially to the exclusion of the other competing generation companies—there are 44 other RES units[31] with larger capacity requirements. These power generation companies have alternative buyers beyond the

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29 Section 7.18, PCC Non-Horizontal Merger Review Guidelines. There are two types of foreclosure – total foreclosure and partial foreclosure. Total foreclosure occurs when the upstream firm completely stops supplying downstream competitors with inputs, whereas partial foreclosure occurs when the upstream firm supplies downstream competitors at higher prices or with less quantities.

30 MAO's Interview with the Notifying Parties.

31 *Id.*

Lopez Group. As a result, the risk of customer foreclosure is effectively constrained by the presence of competing RES competitors, as shown in Figure 3.

Figure 3. Retail Electricity Suppliers (RES) Market Shares as of July 2023.[32]

RES	No. of Contestable Customers	Capacity Allocation (MW)	Market Share (%)
Aboitiz Group	[redacted]	[redacted]	[redacted]
MERALCO Group			
San Miguel Corporation Group			
Ayala Group			
EDC (Lopez Inc.)			
Yuchengco Group			
Others			
TOTAL	**1931**	**4,118.40**	**100%**

Finally, the Commission recognizes the presence of new entrants and the expansion of existing competitors in the RE market, which impose significant competitive constraints on the Parties. The entry of new players and the expansion of the portfolios of existing firms will further enhance competition. Post-Transaction, market concentration will not significantly increase as the market will remain competitive due to the continued presence of other power generation companies.

After careful review of the existing market conditions, various submissions and representations of the Parties, the application of the PCA, its Implementing Rules and Regulations, and related issuances and regulatory frameworks, the Commission finds that the Transaction is not likely to result in substantial prevention, restriction, or lessening of competition.

ACCORDINGLY, the Commission resolves to **CLEAR** the proposed acquisition by Fresh River Lakes Corp. of the Casecnan Hydroelectric Plant owned by the Power Sector Assets and Liabilities Management Corporation and National Irrigation Administration.

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[32] Energy Regulatory Commission, Competitive Retail Electricity Marker (CREM) Report as of July 2023, *available at*: https://buyyourelectricity.com.ph/pdf/CREM%20REPORT%20FOR%20JULY%202023.pdf, last accessed 8 January 2024.

This Decision is rendered solely based on the facts disclosed, circumstances of the proposed Transaction known to the Commission during the review period, and documents submitted by Lopez Inc., PSALM, and NIA.

SO ORDERED.

25 January 2024.

[redacted]

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Chairperson

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