

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on December 14, 2023

COMMISSIONERS PRESENT:

Rory M. Christian, Chair  
Diane X. Burman  
James S. Alesi  
John B. Howard  
David J. Valesky  
John B. Maggiore

CASE 23-E-0154 - Proceeding on Motion of the Commission to Seek  
Consequences against FC Energy Services Company  
LLC for Violations of the Uniform Business  
Practices.

ORDER CONFIRMING REVOCATION OF FC ENERGY SERVICES COMPANY LLC  
ELIGIBILITY

(Issued and Effective December 21, 2023)

BY THE COMMISSION:

BACKGROUND

To maintain eligibility as an energy services company (ESCO), Uniform Business Practices (UBP) §2.D.2 requires each ESCO to submit, by January 31 of each year, either a statement adopting the prior submitted information in the ESCO's Retail Access Application Form (RAAF) or to file corrections to those submissions consistent with the requirements of UBP §2.D.1 (annual compliance filing). In addition, UBP §2.D.2 requires each ESCO to submit an updated application package every three years, starting from the date of the initial eligibility letter issued by the Department of Public Service (Department).

Beginning on December 30, 2022, "Department Staff contacted FC Energy on multiple occasions to notify the Company of its obligations and of its failure to submit the required information for the most recent annual compliance filing."<sup>1</sup> Multiple extensions were granted, but FC Energy failed to file the required annual compliance documents.<sup>2</sup> Despite receiving a Notice of Apparent Violation (NOAV) letter from Department Staff warning of potential consequences, FC Energy never filed its annual compliance documents.<sup>3</sup> Similarly, beginning on January 6, 2023, "Department Staff contacted FC Energy on several occasions to notify FC Energy of the triennial compliance filing and of its apparent failure to submit the required triennial compliance information."<sup>4</sup> Ultimately, the company failed to file its required triennial compliance documents.<sup>5</sup>

On June 26, 2023 the Public Service Commission of the State of New York (Commission) issued an Order Instituting Proceeding and to Show Cause (OTSC) against FC Energy Services Company LLC (FC Energy or the Company) for failure to file its annual compliance filing and triennial compliance filing with the Secretary to the Commission.<sup>6</sup> The Commission ordered FC Energy to show cause within thirty days why its eligibility should not be revoked, or, in the alternative, have other consequences imposed upon it, as described in the Commission's

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<sup>1</sup> Case 23-E-0154, Proceeding on Motion of the Commission to Seek Consequences against FC Energy Services Company LLC for Violations of the Uniform Business Practices, Order to Revoke Eligibility (issued Sept. 18, 2023), p. 3.

<sup>2</sup> Id.

<sup>3</sup> Id., pp. 3-4.

<sup>4</sup> Id., p. 4.

<sup>5</sup> Id., pp. 4-5.

<sup>6</sup> Case 23-E-0154, supra, Order Instituting Proceeding and to Show Cause (issued June 26, 2023) (OTSC).

rules governing ESCO eligibility in the Uniform Business Practices Section 2.D.6.<sup>7</sup>

FC Energy did not timely respond to the Commission's June 2023 Show Cause Order, thereby defaulting before the Commission.<sup>8</sup> This "failure to respond reflect[ed] and confirm[ed] a continued pattern of non-compliance and disregard for regulatory authority" exhibited by the company.<sup>9</sup> By Order dated September 18, 2023, the Commission revoked FC Energy's eligibility to serve energy customers in New York State.<sup>10</sup>

By motion dated October 18, 2023, FC Energy now petitions for rehearing of this matter.<sup>11</sup> In support, the Company argues that "the Commission should grant the petition for rehearing and modify the ruling to permit FC Energy to simply withdraw its authority to operate, because FC Energy had an overall positive compliance history in New York until the company went through a corporate restructuring that led to the effective termination of the company and the delays in filing annual and triennial reports."<sup>12</sup> According to the Company, it withdrew from the New York power market and transferred all remaining customers to a different ESCO effective August 7, 2023.<sup>13</sup>

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<sup>7</sup> Id., p. 7.

<sup>8</sup> Id., p. 5. FC Energy did finally file a tardy response on September 11, 2023, a mere seven days before the Commission would finally rule on its case. Case 23-E-0154, supra, FC Energy Response to OTSC (filed Sept. 11, 2023) (FC Energy Late Response).

<sup>9</sup> Case 23-E-0154, supra, Order to Revoke Eligibility, p. 5.

<sup>10</sup> Id., p. 7.

<sup>11</sup> Case 23-E-0154, supra, FC Energy Services Company, LLC's Petition for Rehearing/Reconsideration (filed October 18, 2023) (Petition for Rehearing).

<sup>12</sup> Id., p. 1

<sup>13</sup> Id.

LEGAL AUTHORITY

Rehearing may be sought only on the grounds that the Commission committed an error of law or fact, or that new circumstances warrant a different determination.<sup>14</sup> A petition for rehearing must separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.<sup>15</sup> Pursuant to the Public Service Law, the Commission may condition ESCOs' eligibility to access utility distribution systems on terms and conditions it determines to be just and reasonable.<sup>16</sup> The UBP was adopted pursuant to this authority and set forth eligibility requirements for ESCOs to begin accessing, and continue accessing, utility distribution systems for the purpose of selling energy services to customers. The Commission has authority to enforce those terms and conditions by imposing consequences on ESCOs that fail to abide by them.<sup>17</sup>

DISCUSSION AND CONCLUSION

In its initial order, the Commission found that FC Energy violated the compliance requirements of UBP §§2.D.1 [annual compliance] and 2.D.2 [triennial compliance] on multiple occasions. Nothing in the Company's petition for rehearing alleges that the Commission made an error of fact or law in

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<sup>14</sup> Sixteen NYCRR 3.7(b).

<sup>15</sup> Id.

<sup>16</sup> Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y. 3d 336, 350, rearg. denied, 33 N.Y.3d 1130 (2019); Pub. Serv. Law §§5(1)(b), 65(1), 66(5), 66-d(2); see generally Gen. Bus. Law §349-d(11).

<sup>17</sup> Id. See also Case 17-M-0415, In the Matter to Seek Consequences against Flanders Energy LLC for Violations of the Uniform Business Practices, Order Denying Flanders Energy, LLC's Petition for Rehearing, Reconsideration and Clarification (issued January 18, 2019), p. 3.

making that determination.<sup>18</sup> Indeed, those factual circumstances and legal determinations appear to now be conceded.<sup>19</sup>

Nor does anything in the petition identify “new” circumstances sufficient to warrant a rehearing; there are no new or additional facts or law that have been discovered in the intervening time that would impact the Commission’s determination.<sup>20</sup> In an attempt to excuse its nonfeasance and nonresponsiveness, the petition states that “prior to the deadline for filing FC Energy’s 2023 annual compliance filing and triennial, the individual responsible for handling FC Energy’s regulatory compliance retired, leaving a void in the company’s operations.”<sup>21</sup> Assuming this to be true, the company identifies this retirement as occurring in late 2022.<sup>22</sup> FC energy offers no reason why this constitutes a “new circumstance[],” nor does it explain why it could not have been brought, with due diligence, to the Commission’s attention in response to the Order to Show Cause within 30 days as required. Alternatively, it gives no reason why it could not have requested an extension of time if the thirty-day deadline was not feasible. FC Energy’s neglect in this regard is a continuation of its pattern of failing to respond to the Commission’s lawful process and mandates.

As for FC Energy’s assertion that its unilateral decision to leave the New York energy market should result in no penalty at all, “[t]he Commission is compelled to reject [the] argument that an ESCO facing revocation of its eligibility to

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<sup>18</sup> Case 23-E-0154, supra, Petition for Rehearing; 16 NYCRR 3.7(b).

<sup>19</sup> Case 23-E-0154, supra, Petition for Rehearing, p. 2.

<sup>20</sup> Sixteen NYCRR 3.7(b).

<sup>21</sup> Case 23-E-0154, supra, Petition for Rehearing, p. 2.

<sup>22</sup> Case 23-E-0154, supra, FC Energy Late Response, p. 1.

operate in New York may escape that consequence by purporting to leave the market.”<sup>23</sup> Even assuming that the company’s decision to abandon the market (post-violation but pre-consequence) is a change in circumstance, it is not a factor the Commission finds relevant in determining punishment for the company’s repeated violations of the UBP.<sup>24</sup> Moreover, to permit FC Energy “to escape consequences for its actions would permit other ESCOs to temporarily step away from New York’s market prior to possible revocation without any subsequent consideration, accounting, or consequence for such conduct should a company later seek to restore its eligibility to market energy products to New York customers.”<sup>25</sup> Indeed, in its filings, FC Energy itself disclaims only any “current plans to provide electric supply services” in the future,” leaving open the possibility that it could reenter the market at any time.<sup>26</sup>

Finally, while the company points to two cases it says establish that the Commission has previously allowed ESCOs facing penalties to withdraw from the market, those cases are inapposite. In one case, the company at issue had already ceased operating prior to the issuance of an order to show cause

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<sup>23</sup> Case 22-M-0187, Proceeding on Motion of the Commission to Seek Consequences against Sirius Energy LLC for Violations of the Uniform Business Practices, Order Denying Rehearing (issued Feb. 17, 2023), p. 11. In Sirius, the Commission rejected a claim that withdrawal from the New York market deprived it of jurisdiction or rendered the proceeding moot. Id., pp. 10-12. While it does not appear that FC Energy takes this tack, to the extent their Petition can be read as such the Commission reaffirms that ruling for the reasons stated in Sirius. Id., pp. 2-12.

<sup>24</sup> See Columbia Gas of New York, Inc. v. Pub. Serv. Comm'n, 118 A.D.2d 305, 309, 504 N.Y.S.2d 816, 818 (1986).

<sup>25</sup> Case 22-M-0187, supra, Order Denying Rehearing, pp. 11-12.

<sup>26</sup> Case 23-E-0154, supra, FC Energy Late Response, p. 2. (emphasis added).

and did "not intend to provide such service [in New York] at any future time."<sup>27</sup> Unlike FC Energy, the company in that case was not operating in New York, had not established a clear pattern of ignoring the Commission's mandates, and promptly responded to an OTSC within five days.<sup>28</sup> The other case FC Energy points to does even less to prove its point; in that case the ESCO did not withdraw its eligibility - it simply complied with the UBP.<sup>29</sup> Neither case supports the company's proposition, and granting relief to the companies in those cases would not promote the sort of gamesmanship the Commission seeks to avoid.

#### CONCLUSION

FC Energy has not satisfied the requirements for a rehearing under the Public Service Law.<sup>30</sup> In the alternative, the company's petition is denied on the merits. The Commission is not satisfied that FC Energy's future eligibility to operate in New York would serve the best interests of consumers in New York. Accordingly, the Commission confirms the denial of the company's application for eligibility.

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<sup>27</sup> Case 15-G-0735, Proceeding on Motion of the Commission to Seek Consequences Against Econopower, LLC for Violations of the Uniform Business Practices, Econopower, LLC-Termination Letter (filed Jan. 11, 2016).

<sup>28</sup> Id. See also Case 15-G-0735, supra, Order Instituting Proceeding and to Show Cause (filed Jan. 22, 2016), pp. 1-3.

<sup>29</sup> Case 15-M-0259, Proceeding on Motion of the Commission to Seek Consequences Against Light, Power, & Gas, LLC for Violations of The Uniform Business Practices, Response of Light, Power & Gas, LLC to Order Instituting Proceeding and to Show Cause (filed June 30, 2015), pp. 2-4.

<sup>30</sup> Public Service Law §22; 16 NYCRR 3.7(b).

The Commission orders:

1. That the petition for rehearing and reconsideration of FC Energy Services Company LLC is denied.
2. This proceeding is closed.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS  
Secretary