

erred in the Hearing Order has passed. **Accordingly, the Hearing Order is final as to that issue.**⁴

To be clear, DCR Transmission did not seek rehearing of that finality determination either, which would have been procedurally fruitless.

The Rehearing Order also violates the Administrative Procedure Act by changing the legal and jurisdictional basis for a Commission mandated hearing in the middle of the hearing. The Administrative Procedure Act prohibits precisely that kind of late surprise for hearing participants.

The Electricity Transmission Competition Coalition (Transmission Competition Coalition), a 98-member group representing rate paying consumers, ranging from the nation's largest industrial electricity users to residential customers, has been an active participant in the captioned proceedings. DCR Transmission's rate filing arises out of a competitively awarded transmission project. The Transmission Competition Coalition seeks rehearing of the Rehearing Order as it violates not only federal law but the Commission's statutory obligation to consumers. At a time when electricity affordability is at cross-roads, the Rehearing Order puts utility interests over consumers interests while ignoring the Commission's obligations to adhere to the Federal Power Act and the Administrative Procedure Act. The Rehearing Order should be immediately set aside to allow the hearing to resume with the proper assignment of the burden of proof.

I. SUMMARY OF ARGUMENT

In the Rehearing Order the Commission purports to rely on "section 313(a) of the Federal Power Act (FPA)" to permit the Commission, 853 days after its initial order, to

⁴ Interlocutory Appeal Order at P 28 (emphasis added).

“modify[] the discussion in the Interlocutory Appeal Order and set[] aside the order, as discussed below.” However, the Interlocutory Appeal Order and the Rehearing Order both confirmed that DCR Transmission did **NOT** seek rehearing or clarification of the Hearing Order.⁵ The Hearing Order was therefore a final Commission Order over which the Commission had no legal authority to modify. The Interlocutory Appeal Order did not change the outcome of the Hearing Order, but instead it reenforced conclusion of the Hearing Order after the presiding Administrative Law Judge found the Hearing Order unclear and interpreted it differently than the Commission intended. As noted above, the Interlocutory Appeal Order unequivocally held that the Hearing Order was final as to the issue of whether the hearing would proceed under Section 205 or 206.⁶ Thus, DCR Transmission’s purported request for rehearing of the Interlocutory Appeal Order, on a different issue, was procedurally defective and offered the Commission no authority under Section 313 to revise the final Hearing Order.

The Rehearing Order also fundamentally violates the Intervenors’ due process rights under the Administrative Procedure Act. More than two years and five months into this proceeding—and three weeks into the hearing based on the Hearing Order with all parties proceeding under the Hearing Order’s presumption that DCR Transmission had the burden of proving its entitlement to its extraordinary rate request⁷—the

⁵ Interlocutory Appeal Order at P 3; Rehearing Order at P 4.

⁶ Interlocutory Appeal Order at P 28.

⁷ *See*, Protest of Northern California Power Agency, filed July 21, 2023 in Docket ER23-2309-000 at 1-2 (noting that “DCRT’s Project cost is over double the cost cap . . . and DCRT has not demonstrated that it meets the conditions that would allow it to exceed the cost cap.”); Protest of California Department of Water Resources State Water Project, filed July 21, 2023 in ER23-2309-000 at 1-2 (noting that DCR Transmission’s filing “dramatically exceeds the cost caps DCRT committed to in the competitive solicitation . . . [and] DCRT does not demonstrate that the filing is just and reasonable and so DCRT

Commission’s Rehearing Order now purports to shift the burden of proof in the ongoing hearing to the Commission and intervenors. The Administrative Procedure Act provides that parties to an agency hearing **shall be timely informed of** “the legal authority and jurisdiction under which the hearing is to be held.”⁸ Informing hearing participants after testimony is submitted and the hearing underway that the Commission has changed its mind regarding a final agency order and that the burden of proof should shift, is inconsistent with the APA. The Hearing Order set forth that legal authority and jurisdiction as a proceeding under Section 205 and the Interlocutory Appeal Order confirmed that legal authority and jurisdictional approach was final and unassailable. The APA does not permit the Commission to change that approach mid-hearing.

The Rehearing Order not only provided an entirely new approach related to the burden of proof mid-hearing, it purports to set a refund effective date that has arguably already expired, potentially leaving consumers holding the bag for the Commission’s flip-flop. The Rehearing Order must be set aside promptly to allow the hearing to resume as it was progressing, with DCR Transmission holding the burden of proving its entitlement to any of the claimed \$300 million more than its binding contractual cost cap.

has not met its Section 205 burden.”); Protest of Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California filed July 21, 2023 in ER23-2309-000 raising issues regarding DCR Transmission’s rate claims in light of unsubstantiated claims of force majeure, the justness and reasonableness of the claimed return of equity and AFUDC costs); Comments of California Independent System Operator, filed July 21, 2023 in ER23-2309-000 at 1 (noting “Under an Approved Project Sponsor Agreement between DCRT and the CAISO, DCRT is subject to a cost cap of \$258,961,024 for the Ten West Link project. However, DCRT’s proposed Base Transmission Revenue Requirement is based on a project cost of \$555,261,497, almost \$300 million more than its binding cost cap and more than double its agreed-upon project costs. DCRT has not shown that the vast majority of the costs in excess of the cost cap are recoverable under the provisions of the Approved Project Sponsor Agreement or are just and reasonable.”)

⁸ 5 U.S.C. § 554.

II. SPECIFICATION OF ERRORS

The Transmission Competition Coalition submits the following Specification of Errors pursuant to Rule 713(c)(1) of the Commission's Rules of Practice and Procedure:⁹

1. The Rehearing Order violates the Federal Power Act which requires requests for rehearing within 30 days of a Commission Order. 16 U.S. Code § 8251; 18 C.F.R. § 385.713. DCR Transmission did not seek rehearing of the Hearing Order and that order became final. *Granholm ex rel. Mich. Dep't of Nat. Res. v. FERC*, 180 F.3d 278, 280-81, 336 U.S. App. D.C. 343 (D.C. Cir. 1999) (stating that neither the court nor the Commission retains "any form of jurisdictional discretion" to ignore the mandatory "petition-for-rehearing requirement") (internal citations omitted); *New England Power Generators Ass'n, Inc. v. FERC*, 879 F.3d 1192, 1197-98, 434 U.S. App. D.C. 31 (D.C. Cir. 2018) (finding the court lacked jurisdiction to consider a party's objections to a Commission order because the party had not sought rehearing of that order in accordance with section 313(a) of the FPA); *Boston Gas Co. v. FERC*, 575 F.2d 975 (1st Cir. 1978) ("the time requirements of the statute are as much a part of the jurisdictional threshold as the mandate to file for a rehearing."). The Interlocutory Appeal Order did not change the substance of the Hearing Order and offered DCR Transmission no Federal Power Act supported opportunity to resurrect arguments that DCR Transmission failed to timely make in response to the Hearing Order. *ANR Pipeline Co. v. FERC*, 988 F.2d 1229 (D.C. Cir. 1993)(denial of clarification does not excuse failure to ask for rehearing of the original order when it issued.)

⁹ 18 C.F.R. § 385.713(c)(1).

2. The Commission's late reversal of the burden of proof, three witnesses into an ongoing hearing with testimony fully submitted, violates the Administrative Procedure Act and due process. 5 U.S.C. § 554; *Hatch v. F.E.R.C.*, 654 F.2d 825 (D.C. Cir. 1981) ("The Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing 'shall be timely informed of ... (the) law asserted.' 5 U.S.C. § 554(b)(3) . . . we conclude from the record before us that Petitioner was not sufficiently apprised of the pending change in the burden of proof to have a meaningful opportunity to meet it.")

III. REQUEST FOR REHEARING

The Rehearing Order must be promptly vacated in advance of the resumption of the hearing in the captioned matters. The order improperly provided DCR Transmission relief from a final order that DCR Transmission failed to timely challenge and in doing so placed the interests of consumers, like those represented by the Transmission Competition Coalition, which the Commission is statutorily obligated to protect, behind those of a utility the Commission is supposed to be regulating. The import of the Commission reversal, 853 days into this proceeding, is to shift the burden away from DCR Transmission to prove why it is contractually entitled to nearly \$300 **more than** its contractually 'binding' cost cap. Instead, the rehearing order places the burden on the Commission itself and ratepayers to prove that DCR Transmission is not entitled to ignore its contractual commitments. Consumers deserve better from the Commission and both the Federal Power Act and the Administrative Procedure Act demand more from the Commission.

A. DCR Transmission’s Failure To Seek Rehearing Of The Hearing Order Prohibited Its Subsequent Request For Rehearing And The Commission’s Ultimate Reversal On The Burden Of Proof

As the Commission itself noted, DCR Transmission did not challenge the Hearing Order by seeking rehearing of that order. “On September 29, 2023, the Commission issued an order accepting and suspending DCRT’s Tariff Records, to become effective March 8, 2024, subject to refund. . . . Neither DCRT nor any other party sought rehearing or clarification of the Hearing Order. The Interlocutory Appeal Order reiterated that legal authority and jurisdiction.”¹⁰ The Commission made the same finding related to DCR Transmission’s follow-up filing that sought to change the effective date of the rate filing set for hearing in the Hearing Order.¹¹ DCR Transmission’s failure to seek rehearing of the Hearing Order is dispositive of the burden of proof in this case.

The Federal Power Act requires any party that is aggrieved by an order of the Commission to seek rehearing within 30 days of the aggrieving order.¹² “No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon.”¹³ Commission regulations provide that “A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.”¹⁴ DCR

¹⁰ Interlocutory Order at P 3.

¹¹ Interlocutory Order at P 4 (noting “DCRT’s filings ‘reflect the same rates, terms, and conditions of those the Commission accepted and suspended, subject to refund’ in its Hearing Order. Neither DCRT nor any other party sought rehearing or clarification of the Consolidation Order.”)

¹² 16 U.S. Code § 8251(a).

¹³ *Id.*

¹⁴ 18 C.F.R. § 385.713(b).

Transmission made no such request. “This petition-for-rehearing requirement is mandatory.”¹⁵ Importantly, “[n]either the court nor the Commission retains ‘any form of jurisdictional discretion’ to ignore it.”¹⁶ DCR Transmission’s failure to seek rehearing ends any ability for it to challenge the allocation of the burden of proof as set forth in the Hearing Order. More importantly, the Commission has no discretion to ignore the fact that DCR Transmission failed to seek rehearing of the Hearing Order.

Although the Interlocutory Appeal Order changed nothing from the Hearing Order, DCR Transmission sought rehearing of the Interlocutory Order, asserting that “the necessary result of that finding being *to shift the burden of proof in the ongoing hearing* proceeding in this case from those challenging the DCRT Initial Rate Filing to DCRT itself.”¹⁷ That assertion is fundamentally untrue, both in fact and DCR Transmission action.

Following the Hearing Order, the active parties proceeded though 17 months of, ultimately fruitless, settlement discussions. On April 2, 2025 the Chief Administrative Law Judge issued an order terminating settlement and designating a hearing Judge to preside over the required hearing, along with designating a Track II procedural schedule.¹⁸ Consistent with a Track II schedule, the Presiding Administrative Law Judge

¹⁵ *Granholtm ex rel. Mich. Dep’t of Nat. Res. v. FERC*, 180 F.3d 278, 280 (D.C. Cir. 1999).

¹⁶ *Id.* at 280-81.

¹⁷ Request for Rehearing of DCR Transmission, L.L.C., filed July 21, 2025 at 2.

¹⁸ *DCR Transmission, L.L.C.*, ER23-2309-000 and ER23-2309-001, Order Of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge And Establishing Track II Procedural Time Standards, issued April 2, 2025 in. An erratum was issued on May 7, 2025, adding docket numbers ER24-1394-000 and ER24-1394-001.

scheduled prehearing conference for May 8, 2025 during which he expected a proposed schedule for, among other things, “Updated Direct Testimony,” “Answering Testimony,” and “Rebuttal Testimony.”¹⁹ As relevant to DCR Transmission’s misstatement regarding the burden of proof “shifting” as a result of the Interlocutory Order, on May 2, 2025 counsel for DCR Transmission sent an email to the Presiding Administrative Law Judge, copying the service list for the proceeding, with a proposed procedural schedule negotiated by the participating parties. That procedural schedule specifically indicated that the “DCRT Updated Direct Testimony” would occur first, followed by Intervenor Answering Testimony, and “DCRT Rebuttal Testimony.” Of course, rebuttal testimony is only available to the party with the burden of proof. That schedule unquestionably reflects a presumption, consistent with the Hearing Order and all parties’ handling of the case, including from DCR Transmission, that DCR Transmission would carry the burden of proof related to its rate filing.

At the prehearing conference on May 8, 2025, on his own initiative, the Presiding Administrative Law Judge “raised the issue of the appropriate statutory designation and assignment of burden of proof for this hearing.”²⁰ The Presiding Administrative Law Judge asked for briefing on the issue from the parties.²¹ Seizing on an unexpected opportunity, DCR Transmission for the first time did that which it had failed to do through a rehearing request related to the Hearing Order; DCR Transmission argued that

¹⁹ *DCR Transmission, L.L.C.*, Docket Nos. ER23-2309-000 et seq and ER24-1394-000 et seq., Order Scheduling Pre-Hearing Conference And Adopting Hearing Rules, issued April 16, 2025 at PP 3, 7.

²⁰ Interlocutory Order at P 5.

²¹ *Id.*

its June 2023 filing *should have been* treated as an initial rate that was set for hearing under Section 206. Specifically, DCR Transmission argued that “the burden of proof in these consolidated proceedings is on the Commission through Commission Trial Staff (“FERC Trial Staff”) and intervenors challenging the justness and reasonableness of DCRT’s tariff” because the matter should be treated as a Section 206 proceeding.²² DCR Transmission conceded however that the Hearing Order “did not expressly indicate that it was opening a FPA section 206 investigation or indicate that it was planning to issue a notice in the Federal Register to provide notice of its initiation of a separate FPA section 206 proceeding. . . . After issuing the DCRT Initial Hearing Order, the Commission did not issue a notice in the Federal Register indicating that it was opening an investigation pursuant to FPA section 206 based on the DCRT Initial Hearing Order.”²³ As such, DCR Transmission was on clear notice that the Hearing Order was not proceeding as an initial rate under Section 206 and that to the extent DCR Transmission was aggrieved by the Hearing Order, a request for rehearing was mandated.

For their part, multiple participating parties raised with the Presiding Administrative Law Judge that DCR Transmission had not sought rehearing and thus was prohibited from relitigating the jurisdictional determinations of the Hearing Order.²⁴ Nevertheless, the presiding Administrative Law Judge’s Order Confirming Bench Ruling, Permitting Interlocutory Appeal, and Transmitting Rule 715(b)(5)(i) Memorandum found

²² Brief Of DCR Transmission, L.L.C. For Determination Of Statutory Basis For The Hearing In These Consolidated Proceedings, filed May 15, 2025 in the captioned Dockets.

²³ *Id.* at 3.

²⁴ Interlocutory Appeal Order at P 19, fn 52, citing “CAISO Brief at 25-26; California Transmission Customers Brief at 11-12; ETCC Brief at 1-2.”

“DCRT’s Tariff Records are an initial rate. Based on that finding, *Middle South* and *SWEPCO*, which remain good law after four decades, require that the burden of proof fall on Trial Staff and the intervenors to demonstrate that DCRT’s filing is unjust and unreasonable under FPA section 206.²⁵ The Bench Ruling did what DCR Transmission had not sought though a required rehearing request, determine that the Commission had erred in not establishing the matter as a Section 206 proceeding in the Hearing Order because DCR Transmission’s rate filing was an initial rate that should proceed under Section 206.

In its Interlocutory Appeal Order the Commission found otherwise. First, the Interlocutory Appeal Order held that “[a]s a preliminary matter, the question of whether DCRT’s Tariff Records constitute an initial or changed rate was not an issue of fact that was set for hearing, and no party sought rehearing or clarification of the Commission’s determination in the Hearing Order to accept and suspend the proposed Tariff Records pursuant to FPA section 205, or the Commission’s authority to do so.”²⁶ The Commission further found

Moreover, the time for rehearing of any argument that the Commission erred in the Hearing Order has passed.
Accordingly, the Hearing Order is final as to that issue.²⁷

As noted above, the failure of a party to seek rehearing is jurisdictional and “neither the court nor the Commission retains **any form of jurisdictional discretion** to

²⁵ Order Confirming Bench Ruling, Permitting Interlocutory Appeal, and Transmitting Rule 715(b)(5)(i) Memorandum, 191 FERC ¶ 63,022 (2025) at P 15 (fn omitted)(Bench Ruling).

²⁶ Interlocutory Appeal Order at P 28.

²⁷ *Id.* (emphasis added)

ignore it.”²⁸ The Commission, correctly, found in the Interlocutory Appeal Order that DCR Transmission failure to seek rehearing of the Hearing Order barred it challenging the allocation of the burden of proof and likewise barred the Presiding Administrative Law Judge from changing that final order. The Interlocutory Appeal Order could have stopped there.

DCR Transmission sought rehearing of the Interlocutory Appeal Order, but not on the issue of whether the assignment of the burden of proof was a final order that DCR Transmission was prohibited from challenging by its failure to seek rehearing back in 2023. Instead, DCR Transmission’s Rehearing Request of the Interlocutory Appeal Order specified issues focused on the assertion that “Commission committed reversible error in finding that DCRT’s Initial Rate Filing is a change in rate and not an initial rate.”²⁹ That portion of the Interlocutory Appeal Order the Commission made clear that the Commission was merely clarifying what was already final, the basis for its original Hearing Order. In the same paragraph where it noted that the Hearing Order was final as to jurisdictional standard under which the case was proceeding, and thus final on the issue of burden of proof, the Commission noted “[w]e understand, however, that the Hearing Order was not explicit on whether DCRT’s proposed Tariff Records are a change in rate, and therefore *we clarify* that DCRT’s Tariff Records should be treated as changed rates.”³⁰

²⁸ *Granholm*, 180 F.3d at 280-81.

²⁹ DCR Transmission Rehearing Request at 6.

³⁰ Interlocutory Appeal Order at P 28.

DCR Transmission’s Rehearing request related solely to whether that “clarification” on which the final Hearing Order had been based was in error. Whether the Commission “clarified” its basis for the Hearing Order or not, the Hearing Order was final and neither a subsequent DCR Transmission rehearing request, nor the Commission on its own initiative (including the Presiding Administrative Law Judge) have the jurisdictional discretion to change it.³¹ That the Commission discussed the merits of the Presiding Administrative Law Judge’s uncertainty does not warrant an otherwise untimely rehearing request as to the merits of the final Hearing Order.³²

Notwithstanding that the Commission specifically found that the Hearing Order was final and not subject to challenge, in the Rehearing Order the Commission effectively granted rehearing of that final Hearing Order 853 days after it was issued, and 823 days after it was final without the statutorily required rehearing request. To make the Commission’s action statutorily and procedurally worse, if that is possible, the Rehearing Order makes it clear that the Commission does not believe it erred in the Hearing Order, it simply changed its mind as to how to handle a transmission revenue requirement for a not yet operational project.³³

³¹ *New Eng. Power Generators Ass'n v. FERC*, 879 F.3d 1192, 1198 (D.C. Cir. 2018) (noting that a request for clarification, without rehearing, was insufficient under the Federal Power Act to allow review of a final order.)

³² *Boston Gas Co. v. Federal Energy Regulatory Com.*, 575 F.2d 975, 980 (1st Cir. 1978) (“Petitioner failed to file a timely application for rehearing with the Commission. As a result of that failure it deserved no more than to have its application summarily dismissed. We believe petitioner received far more than it was entitled to when the Commission issued an order discussing its application on the merits. However, one gratuitous response does not require another.”)

³³ See Rehearing Order at P 17 (“we acknowledge the Commission has not been consistent on whether it has proceeded under section 205 or section 206 in addressing proposed TRRs for transmission projects that were not yet operational . . .”)

First, in the Rehearing Order the Commission identified its action in the Interlocutory Appeal Order as “the Commission granted the interlocutory appeal and clarified that the DCRT Tariff Records should be treated as a change in rate, *consistent with the Commission’s acceptance and suspension of DCRT’s Tariff Records, subject to refund, in the Hearing Order.*”³⁴ The Rehearing Order thus acknowledges that the Interlocutory Appeal Order was in no way inconsistent with the Hearing Order, and thus offered no opportunity for rehearing of an order that was final, at that time for more than 19 months. The Rehearing Order further reiterated that DCR Transmission’s rehearing request from the Interlocutory Appeal Order, for the first time, addresses the substance of whether the Commission in the Hearing Order should have found DCR Transmission’s June 2023 filing an initial rate and established a Section 206 proceeding.³⁵ The Rehearing Order does not, however, acknowledge the finding in the Interlocutory Appeal Order that the Hearing Order was final and not subject to revision.³⁶ Instead, the Rehearing Order merely recounted the reasons that the Commission provided in the gratuitous clarification for why it did what it did in the, then final, Hearing Order.³⁷

Notwithstanding the finality of the Hearing Order, the Rehearing Order purports authority under section 313(a) of the FPA allowing the Commission to “after reexamination of the record, [] find that DCRT’s Tariff Records constitute an initial rate. We also institute a proceeding under section 206 of the FPA to investigate whether DCRT’s Tariff Records are just and reasonable and not unduly discriminatory or

³⁴ Rehearing Order at P 8 (emphasis added).

³⁵ Rehearing Order at PP 9-13.

³⁶ Interlocutory Appeal Order at 28, Rehearing Order at 8.

³⁷ Rehearing Order at P 8.

preferential . . .”³⁸ To be clear, what the Commission claims authority to do under section 313(a) is to change a final order that is more than two years old for which no rehearing request was submitted. Section 313(a) offers the Commission no such ability. Because DCR Transmission did not seek rehearing of the Hearing Order, and the Interlocutory Appeal Order merely confirmed the Hearing Order’s allocation of the burden of proof, whether the Hearing Order should have treated DCR Transmission’s rate filing as an initial rate was not challengeable at the point of DCR Transmission’s rehearing request, and section 313(a) of the FPA provides the Commission no statutory authority to revisit the Hearing Order.

The Commission action in the Rehearing Order in changing the burden of proof from that established in a final Commission Hearing Order is unsupported in the law and should be immediately set aside.

B. The Administrative Procedure Act Prohibits The Commission’s Late Reimagining Of The Burden Of Proof

In addition to the Federal Power Act, the Commission must adhere to the Administrative Procedure Act. Section 554 of the Administrative Procedure Act provides important protections for participants in agency adjudicatory proceedings. Specifically, Section 554 requires that: “(b) Persons entitled to notice of an agency hearing shall be timely informed of: (2) the legal authority and jurisdiction under which the hearing is to be held.” Here, as fully discussed above, the Commission informed all participants in September 2023 that the matter would proceed under Section 205 with DCR Transmission bearing the burden of proof. The parties proceeded in the manner until the

³⁸ Rehearing Order at P 14.

ruling of the Presiding Administrative Law Judge on May 22, 2025 that he had concluded that DCR Transmission's June 2023 filing was an initial rate that should proceed under Section 206. On June 20, 2025, on Interlocutory Appeal, the Commission held "[w]e grant the interlocutory appeal and find that the Presiding Judge erred."³⁹ As noted above, the Commission went on to note that the Hearing Order was final and that the issue of whether DCR Transmission's tariff records were a changed rate or initial rate, and thus which parties' had the burden of proof, had not been set for hearing.⁴⁰ The parties proceeded for another seven months with DCR Transmission having the burden of proof as established in the Hearing Order.

Following the Interlocutory Appeal Order's confirmation that the burden of proof issue had not been challenged following the Hearing Order and was therefore final, the parties proceeded with DCR Transmission submitting updated initial testimony and rebuttal testimony. Further, the hearing started on January 13, 2026 and into the third witness had proceeded with DCR Transmission assuming the burden of proof. In the Rehearing Order, despite recognizing that "the Commission has not been consistent on whether it has proceeded under section 205 or section 206 in addressing proposed TRRs for transmission projects that were not yet operational" the Commission determined that the ongoing hearing should proceed under Section 206. The Administrative Procedure Act prohibits the Commission's flip flop during an active hearing.

As noted, Section 554 requires that hearing participants be "timely informed of" the law and jurisdiction under which an adjudication is proceeding. Waiting until a

³⁹ Interlocutory Appeal Order at P 26.

⁴⁰ Id. at P 28.

hearing is in its third week to change the burden of proof and set up a new proceeding that is to be consolidated with the ongoing hearing does not meet this statutory safeguard.⁴¹ In *Hatch v. Federal Energy Regulatory Commission*,⁴² the D.C. Circuit rejected precisely this type of Commission change in the proof standard late in an adjudication. There the Court applied 5 U.S.C. Sec. 554(b) in finding that when the Commission seeks to change the controlling standard and apply it retroactively it runs afoul of the APA.⁴³ The Commission's action in the Rehearing Order is particularly egregious in that in shifting the burden of proof is changed the refund standard on DCR transmission's rate proceeding. Section 206 carries a maximum 15-month refund period that given Commission delay in changing its approach on this case has already run. The intervenors and staff would have approached the case substantially differently had the Hearing Order established a Section 206 proceeding.

As a result of the late shift in burden of proof, the ongoing hearing has been put in abeyance to allow the Intervenors and Commission Trial Staff to submit rebuttal testimony. But as noted above, under the original procedural schedule implemented based on the burden of proof established by the final Hearing Order, DCR Transmission has already submitted rebuttal testimony. Allowing rebuttal testimony now for Commission Trail Staff and Intervenors does nothing to mitigate the fact that parties

⁴¹ It is unclear why the Rehearing Order was not issued until January 30, 2026 notwithstanding that the Section 206 Docket EL26-34 sits between dockets EL26-33 and EL26-35 that were December 2025 complaints. Given the fact that had the Commission issued the Rehearing Order in December 2025 it would have still been improper under both the Federal power Act and the Administrative Procedures Act, the delay is more a procedural curiosity than dispositive.

⁴² 654 F.2d 825, 835 (D.C. Cir. 1981).

⁴³ *Id.*

approach direct testimony way differently than answering testimony and rebuttal testimony filed after another party has been permitted what is now improper rebuttal testimony provides an unfair advantage to the party relieved of its burden of proof.

The Administrative Procedure Act prohibits the Commission from changing the burden of proof during an ongoing hearing. The Rehearing Order was improper and must be set aside.

IV. CONCLUSION

The Rehearing Order was improper and should be immediately set aside. The Hearing Order was final and not subject to revision. Section 313(a) of the FPA does not permit the Commission to modify a final order. Furthermore, the APA does not permit the Commission to change both the burden of proof and the ability to obtain refunds during an ongoing hearing. DCR Transmission did not seek rehearing of the Hearing Order. Any ramifications of that failure should be borne by DCR Transmission whether the Commission, in hindsight, believes a mistake on the allocation of the burden of proof was made or not.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this day, caused the foregoing Request for Rehearing of the Electricity Transmission Competition Coalition to be served upon each person designated on the official service list compiled by the Secretary in these proceeding.

Dated on this 2th day of March, 2026.

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