

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association

Docket No. EL20-42

Motion To Dismiss of Public Citizen, Inc.

Public Citizen submits this *Motion to Dismiss*¹ the April 14, 2020 Petition for a Declaratory Order filed by the New England Ratepayers Association (NERA). The NERA Petition seeks to end more than 40 states' administration of *net metering*—a policy necessary to finance rooftop solar projects—and grant FERC sole jurisdiction to govern such programs through the Public Utility Regulatory Policy Act or Federal Power Act. Transferring management from states to FERC will significantly curtail the value of net metering payments. Diminishing the financial viability of rooftop solar appears to be the goal of NERA's petition. It is not hyperbole that should the Commission grant NERA's Petition, states will be stripped of their rightful authorities—long recognized and affirmed by FERC—and the feasibility of the rooftop solar market would be irreparably harmed.

Since NERA seeks a FERC decision to single-handedly disrupt a major component of U.S. electricity policy, it is reasonable as a matter of policy for the Commission to require basic information from NERA—for starters, describing how its members are impacted by the status quo net metering policy. But NERA's Petition literally contains no such information—the Petition does not even include an “About Us” section (a standard of FERC filings). Documents provided as Exhibit A by Public Citizen suggest that far from being a typical “ratepayer advocate” organization, NERA is actually structured as a trade association with only 15 members paying annual dues of up to \$20,000 representing 92% of the organization's revenue. NERA is falsely characterizing itself to distort the official record and conceal the motives of those financing this very expensive effort.²

¹ Per 18 CFR § 385.212.

² NERA paid \$30,060 to file their Petition (see NERA Petition, footnote 2). Typical ratepayer groups cannot afford that kind of extravagant filing fee.

NERA's concealment of basic operating information and membership from FERC is exploiting the Commission's *laissez-faire* filing standards in a way that will allow future dark-money organizations to abuse the Commission's petition process. The Commission's petition and public notice and comment procedures are designed to allow full and transparent public participation in the ratemaking process. NERA's misleading characterization of itself, combined with its refusal to identify basic information about its membership, threatens to hijack the public interest from the Commission's ratemaking process.

Therefore, as a matter of policy, the Commission must dismiss NERA's Petition.

About Public Citizen

Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers.³ We are active before FERC promoting just and reasonable rates, and supporting efforts for utilities to be accountable to the public interest. We accept contributions from neither corporations nor government. Unlike NERA, our financial details are located at our web site.⁴ Public Citizen intervened in this docket on April 16.

Public Citizen Motion to Dismiss

I. FERC Requires Every Party In This Proceeding—Except NERA—To Demonstrate “Sufficient Factual Detail” Of Their Interest In The Proceeding

Under 18 CFR §§ 385.214(a)(3) and (b)(2)(ii), any person wanting to intervene in this and other Commission proceedings “must file a motion to intervene”, which “state[s] the movant’s interest in sufficient factual detail to demonstrate that . . . [t]he movant has or represents an interest which may be directly affected by the outcome of the proceeding,” among other requirements. While thus far potentially hundreds of parties must disclose “sufficient factual detail” supporting their interest to become a party to this proceeding, NERA has provided no such detail: its petition is silent on detailing net metering’s impact on its members. As it currently stands, this proceeding

³ We are grateful for the *pro bono* assistance provided by Romany M. Webb, Hillary W. Aidun and Elijah Britain Turner of the Sabin Center for Climate Change Law at Columbia University.

⁴ www.citizen.org/about/annual-report/

consists of a two-tiered disclosure test: a basic one for intervenors, and zero disclosure for the Petitioner. This double-standard is unjust and unreasonable.

To conform with the Commission's regulations, our filing contains a section "About Public Citizen" which details our interest in this proceeding (our April 16 Motion to Intervene also included the required language detailing our interest in this docket). NERA's Petition contains no such section. As a matter of policy, the Commission should dismiss the Petition for failing to include any effort whatsoever to establish its members' interest in net metering programs.

II. The Commission Should Compel NERA To Disclose Its Interest In The Proceeding To Align With Similar Requirements Enforced By The U.S. Supreme Court And FERC's Sister Independent Regulatory Agencies

Federal Procedural Forms provide that parties to U.S. Supreme Court proceedings "must have an ongoing interest in the dispute" at issue, because this ensures "the case features concrete adverseness which sharpens the presentation of issues." The Forms further state that, "[t]o ensure a case remains fit for federal-court adjudication . . . , the parties must have the necessary personal stake not only at the outset of litigation, but throughout its course".⁵

The U.S. Securities and Exchange Commission obliges "[a]ny person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary" of the Commission, and that such petitions "shall include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule."⁶

At the U.S. Commodity Futures Trading Commission—where Public Citizen serves on two Federal Advisory Committees on energy markets and market risk—the Commission requires that "[a]ny person may file a petition with the Secretariat of the Commission . . . for the issuance, amendment or repeal of a rule of general application",

⁵ 2 Fed. Proc. Forms § 3:572.

⁶ 17 CFR § 201.192(a).

and that “[t]he petition shall . . . state the nature of the petitioner’s interest,” among other requirements.⁷

The Federal Communications Commission mandates that “[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation,” and that the petition “shall indicate how the interests of petitioner will be affected.”⁸

FERC is an outlier among its peers and the Supreme Court. As a matter of policy, the Commission must require NERA to detail its interest in net metering policies.

III. The NERA Petition Misrepresents Its Interests

NERA’s web site claims it represents “families”: “The New England Ratepayers Association (NERA) was established to give a larger voice for the families and businesses that are served by regulated utilities . . . It is time for an independent non-profit to be the voice of the people who pay the bills.”⁹ The NERA Petition goes further to suggest that its advocacy on net metering is focused on the plight of not just families, but low-income households. Attachment A of the NERA Petition is the Report of Ashley C. Brown. Section 4 of this Report is titled *Socially Regressive Effects of Full Net Metering* [FNM] and claims that “Some have, with considerable justification, concluded that FNM is Robin Hood in reverse. The heavy cross subsidies associated with FNM transfer wealth, in the aggregate, from lower income consumers to higher income ones.”¹⁰ Brown’s Conclusion begins: “The **inequities** and inefficiencies of existing FNM rates across the country are increasingly being recognized as both unjustifiable and unsustainable . . .” [emphasis added]¹¹ The NERA Petition itself argues that net metering’s “cost shifts are particularly inequitable, as they shift costs from wealthier customers to those who cannot afford large houses or businesses.”¹²

In a recent interview, NERA President Marc Brown emphasized his organization’s focus on low-income households: “Any legislator or regulator who

⁷ 17 CFR § 13.1.

⁸ 47 CFR § 1.401.

⁹ www.neratepayers.org/about/

¹⁰ Page 23, lines 6-8.

¹¹ Page 41, lines 6-7.

¹² NERA Petition, at page 43.

purports to care about low-income consumers should be supportive of our [FERC] petition.”¹³

In these assertions and interviews, NERA implies that its Petition is filed to protect low-income ratepayers.

But an examination of NERA’s filings with the Internal Revenue Service show that only 15 members—ten contributing \$20,000 annually, and five giving \$5,000—constituted 92% of NERA’s 2018 revenues of \$245,000. Low-income families cannot afford to make \$5,000 or \$20,000 annual contributions to ratepayer associations. Rather, NERA appears to be structured as a trade association, not a ratepayer protection group.

Exhibit A of Public Citizen’s filing is the 2018 Schedule B that NERA filed with the Internal Revenue Service. NERA and other similar not-for-profit organizations must disclose on a Schedule B the total number of contributions received that are \$5,000 and over. The 15 total contributors on NERA’s Schedule B are differentiated by two tiers of contribution amounts: ten gave \$20,000 and five gave \$5,000. These 15 contributions, totaling \$225,000, represent 92% of the organization’s total reported revenue of \$245,000.¹⁴ This two-tier membership structure is very common with corporate trade associations, where the larger dollar amount is assigned to a full membership (sometimes based on a company’s size or its willingness to obtain “VIP” status that the larger contribution amount conveys) and the smaller amount usually indicates an “associate member” level. Regardless, this Schedule B suggests that the New England Ratepayers Association does not advocate on behalf of low-income ratepayers, but rather on behalf of its (likely corporate) members that contributed \$20,000 and \$5,000.

¹³ Kim Riley, “New England Ratepayers Association files net metering petition with FERC,” *DailyEnergyInsider*, April 16, 2020, <https://dailyenergyinsider.com/featured/25122-new-england-ratepayers-association-files-net-metering-petition-with-ferc/>

¹⁴ Public Citizen reported NERA’s total 2018 revenue in Exhibit B of our *Motion to Intervene Out-of-Time, and Comment of Public Citizen, Inc*, Docket No. EL19-10, filed July 18, 2019.

It is important to note that at least 14 trade associations have intervened in this docket, and all publicly disclose their members on their web site or in FERC filings.¹⁵

In an earlier FERC proceeding involving a separate NERA petition, Public Citizen noted the danger of allowing an organization to masquerade as a “fake” ratepayer group in FERC proceedings:

Misleading FERC as to the true nature of an entity’s potential financial interest in a proceeding distorts the record, and falsely gives the impression that the claims and relief sought in the Petition are for the benefit of all ratepayers, rather than for the benefit of a small group of companies. NERA appears to be using a mask of ratepayer advocate to conceal the true financial interests behind the Petition. It is advantageous for a company to shield its advocacy under the cloak of a “ratepayer advocate” because classifying its lobbying and regulatory advocacy as a generic “ratepayer” has a far more effective connotation than lobbying as a corporation or through a corporate trade association. Allowing companies to be labeled as generic “ratepayers” for the purposes of advocacy allows a company to enjoy the benefits of having all of their advocacy appear to be coming from the interests of individual household or even small business consumers. Regulators and lawmakers may perceive advocacy on behalf of household consumers in fundamentally different ways than advocacy on behalf of a large corporation.¹⁶

IV. NERA Has An Affiliate That Appears To Provide Financial Support For Its Petition

On September 14, 2018, NERA President Marc Brown helped found the Ratepayers Legal Defense Fund, Inc.¹⁷—just a month and a half before NERA filed its first FERC Petition in Docket No. EL19-10. The new organization’s stated mission is to “Support education about and legal challenges to public policies that increase costs to utility ratepayers.” [emphasis added]¹⁸ Ratepayers Legal Defense Fund shares a phone number with Sununu Enterprises and Sununu Partners LLC, and additionally shares a business address with Sununu Holdings and a lobbying firm called Prospect Hill

¹⁵ Advanced Energy Economy, American Green Bank Consortium, American Public Power Assn, American Wind Energy Assn, Edison Electric Institute, Electric Power Supply Assn, Fuel Cell and Hydrogen Energy Assn, Iowa Solar Energy Trade Assn, Large Public Power Council, National Rural Electric Cooperative Assn, New England Power Generators Assn, New England Small Hydro Coalition, Solar Energy Business Assn of New England, Solar Energy Industries Assn.

¹⁶ *Motion to Intervene Out-of-Time, and Comment of Public Citizen, Inc.*, Docket No. EL19-10, July 18, 2019, page 2

¹⁷ <https://quickstart.sos.nh.gov/online/BusinessInquire/BusinessInformation?businessID=630977>

¹⁸ <https://quickstart.sos.nh.gov/online/BusinessInquire/FilingHistory?businessID=630977>

Strategies. Prospect Hill has represented two companies, BAE Systems and gun manufacturer Sig Sauer, that have been tied to NERA.¹⁹

As of 2018, the Ratepayers Legal Defense Fund reported no income or expenditures, which is plausible since it was founded in late 2018. But it is likely that the organization has raised money since 2018—possibly through a similar membership structure as NERA—and such revenues may be used to finance NERA’s Petition.

The Ratepayers Legal Defense Fund, Inc. further obscures the true financial interests behind the NERA Petition. As a matter of policy, the Commission must dismiss the Petition.

Conclusion

NERA’s Petition for a Declaratory Order seeks to dismantle a foundational component of U.S. energy policy. NERA’s Petition exploits the Commission’s hereto permissive filing standards, while actively concealing and misleading the Commission about the financial interests that NERA claims to represent. NERA’s pretense represents a hazard to the public interest. The Commission must dismiss the NERA Petition.

Respectfully submitted,

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¹⁹ www.energyandpolicy.org/new-england-ratepayers-association/

EXHIBIT A

Schedule B(Form 990, 990-EZ,
or 990-PF)Department of the Treasury
Internal Revenue Service**Schedule of Contributors**

▶ Attach to Form 990, Form 990-EZ, or Form 990-PF.
▶ Go to www.irs.gov/Form990 for the latest information.

OMB No. 1545-0047

2018

Name of the organization

New England Ratepayers Association

Employer identification number

46-2177879

Organization type (check one):

Filers of:**Section:**

Form 990 or 990-EZ

☒ 501(c)(4) (enter number) organization☐ 4947(a)(1) nonexempt charitable trust **not** treated as a private foundation☐ 527 political organization

Form 990-PF

☐ 501(c)(3) exempt private foundation☐ 4947(a)(1) nonexempt charitable trust treated as a private foundation☐ 501(c)(3) taxable private foundationCheck if your organization is covered by the **General Rule** or a **Special Rule**.**Note:** Only a section 501(c)(7), (8), or (10) organization can check boxes for both the General Rule and a Special Rule. See instructions.**General Rule**

- ☒ For an organization filing Form 990, 990-EZ, or 990-PF that received, during the year, contributions totaling \$5,000 or more (in money or property) from any one contributor. Complete Parts I and II. See instructions for determining a contributor's total contributions.

Special Rules

- ☐ For an organization described in section 501(c)(3) filing Form 990 or 990-EZ that met the 33 1/3% support test of the regulations under sections 509(a)(1) and 170(b)(1)(A)(vi), that checked Schedule A (Form 990 or 990-EZ), Part II, line 13, 16a, or 16b, and that received from any one contributor, during the year, total contributions of the greater of (1) \$5,000; or (2) 2% of the amount on (i) Form 990, Part VIII, line 1h; or (ii) Form 990-EZ, line 1. Complete Parts I and II.
- ☐ For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, total contributions of more than \$1,000 *exclusively* for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. Complete Parts I (entering "N/A" in column (b) instead of the contributor name and address), II, and III.
- ☐ For an organization described in section 501(c)(7), (8), or (10) filing Form 990 or 990-EZ that received from any one contributor, during the year, contributions *exclusively* for religious, charitable, etc., purposes, but no such contributions totaled more than \$1,000. If this box is checked, enter here the total contributions that were received during the year for an *exclusively* religious, charitable, etc., purpose. Don't complete any of the parts unless the **General Rule** applies to this organization because it received *nonexclusively* religious, charitable, etc., contributions totaling \$5,000 or more during the year ▶ \$ _____

Caution: An organization that isn't covered by the General Rule and/or the Special Rules doesn't file Schedule B (Form 990, 990-EZ, or 990-PF), but it **must** answer "No" on Part IV, line 2, of its Form 990; or check the box on line H of its Form 990-EZ or on its Form 990-PF, Part I, line 2, to certify that it doesn't meet the filing requirements of Schedule B (Form 990, 990-EZ, or 990-PF).

Name of organization

Employer identification number

New England Ratepayers Association

46-2177879

Part I Contributors (see instructions). Use duplicate copies of Part I if additional space is needed.

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
1		\$ 5,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
2		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
3		\$ 5,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
4		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
5		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
6		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)

Name of organization

Employer identification number

New England Ratepayers Association

46-2177879

Part I **Contributors** (see instructions). Use duplicate copies of Part I if additional space is needed.

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
7		\$ 5,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
8		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
9		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
10		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
11		\$ 5,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
12		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)

Name of organization

Employer identification number

New England Ratepayers Association

46-2177879

Part I **Contributors** (see instructions). Use duplicate copies of Part I if additional space is needed.

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions	(d) Type of contribution
13		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
14		\$ 20,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
15		\$ 5,000	Person <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
		\$	Person <input type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
		\$	Person <input type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)
		\$	Person <input type="checkbox"/> Payroll <input type="checkbox"/> Noncash <input type="checkbox"/> (Complete Part II for noncash contributions.)