No. _____

In The
Supreme Court of the United States

OLD DOMINION ELECTRIC COOPERATIVE,
Petitioner,

v.

PJM INTERCONNECTION, LLC,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

THOMAS M. WOLF
Counsel of Record
JOSEPH M. RAINSBURY
MILES & STOCKBRIDGE P.C.
919 East Main Street, Suite 1100
Richmond, VA 23219
(804) 905-6900
jrainsbury@milesstockbridge.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1483

OLD DOMINION ELECTRIC COOPERATIVE,
Plaintiff – Appellant,

v.

PJM INTERCONNECTION, LLC,
Defendant – Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
M. Hannah Lauck, District Judge.
(3:19-cv-00233-MHL)

Argued: October 28, 2021 Decided: January 19, 2022

Before MOTZ, KING, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Motz and Judge Harris joined.

ARGUED: Joseph Michael Rainsbury, MILES & STOCKBRIDGE PC, Richmond, Virginia, for Appellant. Lucas M. Walker, MOLOLAMKEN, LLP, Washington, D.C., for Appellee. **ON BRIEF:** Thomas M. Wolf, MILES & STOCKBRIDGE PC, Richmond, Virginia, for Appellant. Robert M. Rolfe, Brian A. Wright, HUNTON ANDREWS KURTH LLP, Richmond, Virginia; Jeffrey A. Lamken, Washington, D.C., Jennifer E. Fischell, MOLOLAMKEN LLP, New York, New York, for Appellee.

KING, Circuit Judge:

In this appeal, plaintiff Old Dominion Electric Cooperative challenges the district court's dismissal of its state law claims seeking nearly $15 million in damages from defendant PJM Interconnection, LLC. Following a severe cold weather outbreak in January 2014, Old Dominion unsuccessfully sought to recover certain electricity generation costs from PJM in an administrative proceeding before the Federal Energy Regulatory Commission ("FERC"). Old Dominion subsequently instituted the underlying litigation in Virginia state court, pursuing four putative state law claims against PJM which seek the same relief unsuccessfully claimed before FERC.

PJM timely removed the state court proceedings to the Eastern District of Virginia, pursuant to 28 U.S.C. § 1441(a). PJM maintained therein that Old Dominion's complaint contests electricity transmission rates set forth in PJM's federally filed tariff and that the district court was vested with federal question jurisdiction under 28 U.S.C. § 1331. PJM promptly moved to dismiss the complaint for

failure to state a claim, while Old Dominion moved for a remand to state court.

On March 31, 2020, the district court denied Old Dominion's remand motion and dismissed each of its claims with prejudice. *See Old Dominion Elec. Coop. v. PJM Interconnection, LLC*, No. 3:19-cv-00233 (E.D. Va. Mar. 31, 2020), ECF No. 26 (the "Dismissal Opinion"). In so ruling, the court determined that, consistent with our 2004 decision in *Bryan v. BellSouth Communications, Inc.*, 377 F.3d 424 (4th Cir. 2004), Old Dominion's putative state law claims effectively challenge the terms of PJM's federal tariff. As such, and in accord with the principles enunciated by the Supreme Court in *Gunn v. Minton*, 568 U.S. 251 (2013), and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), the court ruled that the claims present a substantial federal question. In granting PJM's motion to dismiss, the court further resolved that the so-called "filed-rate doctrine" barred it from awarding damages on Old Dominion's claims. On appeal, Old Dominion maintains that PJM's tariff stands only as a defense to its putative state law claims and that the district court consequently lacked subject matter jurisdiction over those claims. As explained herein, Old Dominion's contentions are unpersuasive and are rejected. We therefore affirm the judgment of the district court.

I.

A.

Old Dominion is a nonprofit electric utility that serves customers in Virginia, Maryland, and Delaware. It generates and markets wholesale electric power, in part from the operation of three natural-gas-fired power plants in Virginia and Maryland. PJM, on the other hand, is not a utility but is instead a "regional transmission organization," an entity that operates the electrical grid in a defined geographic area and in accord with extensive regulatory oversight by FERC. PJM is charged with supervising the transmission of electricity in its market region, which consists of 13 states and the District of Columbia. In fulfilling that responsibility, PJM controls the transmission facilities owned by its member utilities — including Old Dominion. *See* 18 C.F.R. § 35.34(j), (k).

PJM's relationship with each of its member utilities is governed by FERC's regulatory framework. The Federal Power Act vests FERC with exclusive regulatory authority over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," directing FERC to ensure that all "rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy" be "just and reasonable." *See* 16 U.S.C. §§ 824(a), 824d(a). Accordingly, FERC requires regional transmission organizations like PJM to file schedules of proposed electricity transmission rates with the agency for its approval. Once authorized by

FERC, those rates are set forth in tariffs, which "[c]arry the force of federal law," in the same sense as ordinary federal regulations. *See Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004). Further, under the regulatory rule known as the "filed-rate doctrine," the transmission rates charged by utilities in association with the generation and sale of electric power may not be higher or lower than those set forth in FERC-approved tariffs. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 576 (1981).

PJM's FERC-approved tariffs include (1) its Open Access Transmission Tariff (the "PJM Tariff," or simply "the Tariff") and (2) its Amended and Restated Operating Agreement (the "Operating Agreement"). The PJM Tariff prescribes rules controlling PJM's management of the mid-Atlantic energy market and, as relevant in this appeal, fixes the price at which power generators may offer their energy production to PJM in standard electricity auctions — specifically at $1000 per megawatt-hour. *See* J.A. 127.[1] The Operating Agreement, to which participating utilities like Old Dominion subscribe, reflects the terms of the Tariff. The Operating Agreement further affords PJM expansive powers to take "measures appropriate to alleviate an Emergency, in order to preserve reliability" in the electric market, principally by calling on its member utilities "to start, shutdown, or change output levels of [their] generation units" at any time. *See Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1228 (D.C. Cir. 2018). As the relevant regulatory tariffs, the PJM Tariff and Operating Agreement together

[1] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

"conclusively and exclusively enumerate the rights and liabilities of the contracting parties." *See Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (internal quotation marks omitted). That is, all business that PJM conducts with electric utilities in its extensive market region must conform to the terms of its FERC-approved tariffs.

The standards established and imposed by the PJM Tariff and Operating Agreement became particularly significant during the January 2014 "polar vortex," a weather disturbance that brought uncharacteristically frigid temperatures to much of the eastern United States. *See* J.A. 25. The polar vortex prompted abrupt increases in consumer demand for electricity, which, in turn, required utilities and transmission organizations like Old Dominion and PJM to take swift actions to ensure that reliable supplies of power were available for use in heating homes and businesses. As temperatures plummeted, PJM directed its member utilities to prepare for increases in their electric generation output. With respect to Old Dominion, PJM issued specific instructions for the utility to purchase sufficient quantities of natural gas to begin operating its Virginia and Maryland power plants at full capacity. Old Dominion maintains that — at that time — PJM also represented to Old Dominion's agents that the company would "make [Old Dominion] whole for its fuel and other costs associated with purchasing the natural gas." *Id.* at 26; *see also* Br. of Appellant 5.

When PJM issued its directives to Old Dominion, the price of natural gas had spiked above its pre-polar vortex levels due to the weather-related strains on energy production resources. Once paired with

the costs of operating the Virginia and Maryland facilities, the heightened gas purchase price forced Old Dominion's net costs for electricity generation to approximately $1200 per megawatt-hour — well north of the $1000 maximum rate fixed by the PJM Tariff. In compliance with PJM's orders, Old Dominion nevertheless purchased the needed fuel at the inflated price. After it did so, however, PJM repeatedly cancelled its operation requests or scaled them back in duration because of overestimates of consumer demand for power. The weather-driven market conditions compelled Old Dominion to sell generation capacity to PJM at a substantial loss, and Old Dominion ultimately incurred an aggregate sum of $14,925,669.58 in costs that exceeded the rate that it could legally charge PJM under the Tariff. In the disputes that followed, neither party contested that those losses — sustained because Old Dominion's sales exceeded PJM's tariffed rate — were unrecoverable under the express terms of the Tariff.

B.

Old Dominion first sought relief from the excess incurred costs by way of a June 2014 administrative proceeding before FERC. *See Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207 (2015). Relying on its facility operation expenses and the excessive costs of natural gas purchased but not burned, the utility petitioned FERC for the full amount of its excess costs and damages — again, $14,925,669.58. Old Dominion did not dispute that its January sales to PJM fell within the scope of the Tariff and Operating Agreement provisions that control the entities' relationship. Indeed, Old Dominion "repeatedly

conceded" before FERC that the PJM Tariff "categorically precluded" the compensation it sought. *See Old Dominion*, 892 F.3d at 1231. Old Dominion nevertheless petitioned FERC for a retroactive waiver of the Tariff's rate-cap provisions, relying on equitable considerations and PJM's representations that it would "make [Old Dominion] whole" for the excessive costs it had incurred during the polar vortex emergency. *See* J.A. 26.

PJM intervened in the proceeding and, in consideration of its desire to fairly compensate Old Dominion, actually supported the utility's waiver request. FERC nevertheless denied relief, concluding that the filed-rate doctrine and the corresponding rule against retroactive ratemaking — a rule that prohibits the agency from adjusting tariffed rates retroactively absent limited and inapplicable exceptions — prohibited granting any waiver of the PJM Tariff's established rates. Old Dominion sought a rehearing of FERC's denial order, but FERC also denied that request. *See Old Dominion Elec. Coop.*, 154 FERC ¶ 61,155 (2016). FERC explained that the above-mentioned equitable concerns did not grant it any authority to waive the filed-rate doctrine and that doctrine's bar on compensating Old Dominion above the Tariff's $1000 rate cap. Additionally, the agency determined that no outside contract providing for recovery of the emergency-related losses had been made between the parties, and that, in any event, FERC-approved rates cannot be modified or superseded by way of informal private agreements.

Although appellate relief was sought by Old Dominion in 2018, the D.C. Circuit denied its petition for review of FERC's adverse decisions. In so

ruling, the court of appeals observed that the "emphatic rules against retroactively changing filed rates" disarmed Old Dominion's arguments supporting a waiver of the PJM Tariff's rate cap. *See Old Dominion*, 892 F.3d at 1231. The court also approved of FERC's determination that it lacked discretion to waive filed rates "for good cause or for any other equitable considerations." *Id.* at 1230. Although Old Dominion sought review in the Supreme Court of the adverse ruling by the court of appeals, the Court promptly denied its petition for a writ of certiorari. *See Old Dominion Elec. Coop. v. FERC*, 139 S. Ct. 794 (2019).[2]

C.

On January 5, 2017, Old Dominion filed this civil action against PJM in the Henrico County Circuit Court in Virginia.[3] In alleging a breach of several purported private contracts, the operative Amended

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[2] Old Dominion was not alone in its efforts to recover losses incurred during the polar vortex event. Other PJM member utilities were similarly faced with substantial excessive costs associated with PJM's emergency procedures that, under the terms of the PJM Tariff, were not compensable. Duke Energy, for example, sought a waiver of PJM's rate cap just as Old Dominion did. As in this case, FERC denied Duke's waiver request and the D.C. Circuit affirmed FERC's decision. *See Duke Energy Corp.*, 151 FERC ¶ 61,206 (2015); *Duke Energy Corp. v. FERC*, 892 F.3d 416 (D.C. Cir. 2018).

[3] Old Dominion's initial 2017 state court complaint in Henrico County was filed after the failure of the utility's administrative pursuits before FERC, but prior to the 2018 resolution of its appeal to the D.C. Circuit. The operative Amended Complaint was filed by Old Dominion in March 2019, shortly after the Supreme Court's denial of certiorari in the FERC litigation.

Complaint sets forth the same factual contentions at issue in the FERC proceedings, focusing on PJM's "failed assurances" that the company would "make [Old Dominion] whole for its fuel and other costs" incurred in connection with the polar vortex event. *See* J.A. 26. The Amended Complaint alleges four discrete claims against PJM, each purportedly grounded in state law: two claims for breach of contract, one for unjust enrichment, and another for negligent misrepresentation. Those claims are alleged in the alternative, with each asserting that it entitles Old Dominion to damages in the sum of $14,925,669.58 — the precise amount Old Dominion sought in petitioning FERC for a waiver of the PJM Tariff's rate cap. *See id.* at 30-33. The Amended Complaint refers to the applicable Tariff only once, to allege that Old Dominion and PJM "entered into a transaction that was outside of the requirements . . . set forth in any tariff or other regulated PJM policy or process." *Id.* at 29.

PJM removed Old Dominion's state court lawsuit to the Eastern District of Virginia in April 2019. By its Notice of Removal, PJM maintained that, as required by 28 U.S.C. § 1441(a), the litigation could have been initiated in federal court, namely on grounds of federal question jurisdiction. More specifically, PJM asserted that Old Dominion's state law tort and contract claims "arise under" federal law, as contemplated by 28 U.S.C. § 1331, because they (1) are completely preempted by federal law or, alternatively, (2) necessarily raise a substantial federal question by challenging the terms of an applicable federally filed tariff. PJM also moved to dismiss the entirety of the Amended Complaint for failure to state a claim, relying on the PJM Tariff

and contending that Old Dominion's demands for relief are barred by the filed-rate doctrine. Old Dominion opposed PJM's motion to dismiss and moved for a remand to the Virginia state court, insisting that its claims do not fall within the scope of federal question jurisdiction because their allegations are entirely confined to violations of state law.

By its Dismissal Opinion and Final Order of March 31, 2020, the district court denied Old Dominion's motion to remand and granted PJM's motion to dismiss the Amended Complaint. Addressing the question of subject matter jurisdiction, the Dismissal Opinion first explained that Old Dominion's four claims could "arise under" federal law in either of two ways: under the "complete preemption" doctrine, or otherwise under the "substantial federal question" doctrine. *See* Dismissal Opinion 13. Finding the former to be inapplicable, the court concluded that, by effectively challenging the terms of the FERC-filed PJM Tariff, Old Dominion's claims "necessarily raise" a substantial federal question. *Id.* at 27-28. Because it possessed subject matter jurisdiction over the claims, the court went on to conclude that the filed-rate doctrine proscribed it from awarding relief that would, in effect, alter the Tariff's rate cap as applied to Old Dominion. Accordingly, the court dismissed with prejudice each of the four claims alleged in the Amended Complaint.

In its Dismissal Opinion, the district court focused its analysis on our decision in *Bryan v. BellSouth Communications, Inc.*, 377 F.3d 424 (4th Cir. 2004), which concerned the removal to federal court of a putative state law claim in North Carolina

that challenged allegedly unfair telephone service rates charged by BellSouth. The rates charged by BellSouth and other telecommunications carriers were controlled by the Federal Communications Commission (the "FCC") through filed tariffs. We concluded in *Bryan* that the plaintiff's claim — which, by requesting damages, effectively sought a refund of some portion of BellSouth's service rate and thereby contested the terms of the carrier's federal tariff — necessarily presented a substantial question of federal law and ran afoul of the filed-rate doctrine. *See id.* at 430-32. We recognized in *Bryan* that, because federal tariffs "are the law, not mere contracts," suits that effectively challenge the substance of such tariffs "arise[] under federal law" and may be heard in federal court. *Id.* at 429-30.

The Dismissal Opinion deemed *Bryan* as controlling here, and further determined that exercising federal jurisdiction was appropriate under the Supreme Court's *Gunn-Grable* framework, which must be employed in assessing whether a claim rooted in state law nonetheless poses a "substantial federal question." *See Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005)). The district court thus ruled that, by demanding the same relief sought before FERC — relief unambiguously barred by the terms of the PJM Tariff — Old Dominion's claims necessarily raise a substantial federal question suitable for adjudication in federal court. Old Dominion has timely noted this appeal from the dismissal of its claims with prejudice, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo a district court's determination that it possessed subject matter jurisdiction over a plaintiff's claims. *See Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). PJM removed Old Dominion's state court proceedings to the district court pursuant to 28 U.S.C. § 1441(a), which requires that a state case "be fit for federal adjudication at the time the removal petition is filed." *See Moffitt v. Residential Funding Co.*, 604 F.3d 156, 159 (4th Cir. 2010) (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996)). PJM's Notice of Removal asserted that the district court possessed federal question jurisdiction over Old Dominion's claims alleged in the Amended Complaint under 28 U.S.C. § 1331, which affords the federal courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States."

In determining whether a claim "arises under" the laws of the United States, courts abide by the "well-pleaded complaint rule," assessing whether the plaintiff's cause of action — as stated on the face of the complaint — has some basis in federal law. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 807-08 (1986). The "vast majority" of such claims are those directly created by federal law, and a defense or counterclaim that raises a federal question is not an adequate basis for § 1331 jurisdiction. *See id.* at 808 (citing *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908)). It follows that, as a general proposition, the plaintiff is the "master of the complaint" and may keep his complaint out of federal court simply by "eschewing

claims based on federal law." *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). Under the corollary "artful pleading" doctrine, however, "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983); *see also Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir. 1986) ("[A] plaintiff may not defeat removal by clothing a federal claim in state garb, or, as it is said, by use of 'artful pleading.'").

Claims for relief that are rooted in state law, then, may nevertheless "arise under" federal law and fall within the scope of federal question jurisdiction in one of two narrow instances. First, under the "complete preemption" doctrine, federal jurisdiction is proper under § 1331 "when Congress 'so completely pre-empt[s] a particular area that any civil complaint raising th[e] select group of claims is necessarily federal in character.'" *See Pinney v. Nokia, Inc.*, 402 F.3d 430, 449 (4th Cir. 2005) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)). Second, federal question jurisdiction may be exercised "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *See Merrell Dow*, 478 U.S. at 808-09 (quoting *Franchise Tax Bd.*, 463 U.S. at 9). The "substantial federal question" doctrine, that is, operates to permit removal of a complaint from state court where "a plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law." *See Pinney*, 402 F.3d at 449. In these circumstances, because Old Dominion's claims pose a substantial question of federal law, we

need not decide whether the district court was vested with jurisdiction by way of complete preemption.[4]

Although the substantial federal question doctrine has long been recognized in the federal courts, the Supreme Court brought clarity to what it called an "unruly doctrine" through the *Gunn-Grable* framework.[5] *See Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005)). *Gunn-Grable* provides for a four-part test, explaining that

> federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily

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[4] We observe, however, that the complete preemption doctrine is most likely inapplicable in this situation. The Supreme Court has explained that it is "reluctant" to find that federal law provides the exclusive cause of action in an area that is federally regulated. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Indeed, in our 2005 decision in *Lontz v. Tharp*, we identified only three statutes to which the Court has applied the complete preemption doctrine — specifically, the Labor Management Relations Act, ERISA, and the National Bank Act. *See* 413 F.3d 435, 441 (4th Cir. 2005). Recognizing the doctrine's historically sparse application, the Seventh Circuit has ruled that the Federal Power Act — the very statute affording FERC the rate-regulation authority at issue in this case — does not completely preempt associated state law claims. *See Ne. Rural Elec. Membership Corp. v. Wabash Power Ass'n, Inc.*, 707 F.3d 883, 896 (7th Cir. 2013).

[5] In *Gunn*, the Court expounded on the state of the substantial federal question doctrine by noting that while "outlining the contours" of the rule did not involve "paint[ing] on a blank canvas . . . the canvas looks like one that Jackson Pollock got to first." *See Gunn v. Minton*, 568 U.S. 251, 258 (2013). Pollock, an abstract expressionist painter, was noted for his convoluted and chaotic works.

> raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.

Id. Since the Court's decision in *Gunn* in 2013, that four-part test has been the principal means for assessing whether resolution of a state law claim requires consideration of federal law, such that federal question jurisdiction is appropriate. *See, e.g.*, *Pressl v. Appalachian Power Co.*, 842 F.3d 299, 303 (4th Cir. 2016).

Several years before the Court's creation of the *Gunn-Grable* test, our decision in *Bryan* described the substantial federal question doctrine as follows:

> [W]hen, as here, state law creates the plaintiff's cause of action, the lower federal courts possess jurisdiction to hear "only those cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."

See 377 F.3d 424, 428-29 (4th Cir. 2004) (quoting *Franchise Tax Bd.*, 463 U.S. at 27-28). We ruled therein that a federally filed and approved regulatory tariff "carries the force of federal law" and that "a claim that seeks to alter the terms of the relationship . . . set forth in a filed tariff therefore presents a federal question." *Id.* at 429. In similar fashion, a claim seeking to have a court fix a special, reasonable tariffed rate unique to the plaintiff "effectively challenges" the relevant filed tariff in

contravention of the filed-rate doctrine and likewise raises a substantial federal question. *Id.* at 429-30. In such a situation, the filed-rate doctrine — which strictly directs that "the rate of the carrier duly filed is the only lawful charge," and bars the courts from permitting such inequity among ratepayers — compels a dismissal of the plaintiff's claim. *Id.* (quoting *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915)).

III.

On appeal, Old Dominion maintains that the district court did not possess federal question jurisdiction over its state law claims against PJM, and that the court's dismissal of those claims was accordingly erroneous. More specifically, Old Dominion contends that the PJM Tariff is merely a defense to its state claims, rather than being integral to the claims' demands for relief. In light of our *Bryan* decision and our application of the *Gunn-Grable* framework, however, we are satisfied that the district court possessed jurisdiction under the substantial federal question doctrine. Consistent with *Bryan*, the Dismissal Opinion correctly determined that Old Dominion's claims effectively challenge the terms of the PJM Tariff, and that, by extension, the filed-rate doctrine obliged the district court to dismiss the putative state claims in the Amended Complaint. We are satisfied that *Bryan* controls the resolution of this dispute because, as in that case, Old Dominion's asserted right to relief necessitates recourse to the Tariff that controls the utility's relationship with PJM, thereby presenting a substantial federal question.

Nor are we persuaded that *Bryan* has somehow been weakened or undermined by subsequent decisions of this Court, or by the Supreme Court's *Gunn-Grable* test. The Fourth Circuit decisions relied on by Old Dominion as having eroded *Bryan*'s rulings are entirely consistent with *Bryan*'s treatment of the substantial federal question doctrine.[6] The *Gunn-Grable* framework, meanwhile, is likewise consistent with *Bryan*'s standard, and our application of *Gunn-Grable* in this case counsels the same outcome as our application of *Bryan*. As such, we must affirm the district court's ruling that it possessed subject matter jurisdiction. Consistent therewith, we also affirm the court's dismissal with prejudice of Old Dominion's Amended Complaint and its four claims.

A.

1.

The crux of this appeal concerns the applicability of *Bryan* to the facts of this case and whether Old Dominion's claims may fairly be said to necessarily raise a substantial federal question. PJM deems

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[6] We also observe that, even if Old Dominion had identified Fourth Circuit decisions that conflict with *Bryan*, a panel of this Court cannot circumscribe or undermine an earlier panel decision, pursuant to *McMellon v. United States* and its progeny. *See* 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc or the Supreme Court."); *see also United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015); *Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021).

Bryan to be dispositive, while Old Dominion considers that decision to be watered down at best, if not impliedly overruled by the Supreme Court. As explained below, we agree with the district court that *Bryan* remains "binding case law," is factually comparable to this case, and compels the decision we reach today. *See* Dismissal Opinion 21.

The *Bryan* decision resolved a question concerning the removal to federal court of a North Carolina state law challenge to service rates charged by BellSouth, a major telecommunications firm later acquired by AT&T. Seeking to represent a class of BellSouth customers, plaintiff Bryan alleged that the carrier's "Federal Universal Service Charge," a fee assessed to recoup BellSouth's required payments to a federal telecommunications fund, was an excessive charge that contravened North Carolina's unfair trade practices law. *See* 377 F.3d 424, 426 (4th Cir. 2004). BellSouth removed the state court litigation to the Middle District of North Carolina, contending that Bryan's complaint necessarily raised federal legal questions. BellSouth explained that the fee contested by Bryan was definitively established alongside other service rates in its "Schedule of Charges," a tariff filed with and approved by the FCC. *Id.*

Following BellSouth's removal to federal court, plaintiff Bryan filed an amended complaint alleging three state law claims: (1) a claim alleging that BellSouth had engaged in unfair trade practices by failing to disclose how it calculated the service fee and that the fee was in excess of what was paid into the federal fund; (2) an unjust enrichment claim, maintaining that the fee was excessive and unlawful; and (3) a claim alleging a breach of the

covenant of good faith and fair dealing that stemmed from BellSouth's charging an excessive fee. The amended complaint generally sought damages in excess of $10,000 for each member of the putative class. Bryan moved for a remand to state court, while BellSouth moved to dismiss the amended complaint pursuant to the filed-rate doctrine. In disposing of those motions, the district court first determined that removal was proper because the plaintiff directly alleged that the amount of the federally tariffed fee was excessive. The court then dismissed Bryan's second and third claims, but remanded her first claim alleging unfair trade practices, ruling that the unfair trade practices claim did not present a federal question. BellSouth appealed the order remanding and denying dismissal of that claim, maintaining that it also challenged the FCC tariff and therefore arose under federal law.

On appeal, we vacated and remanded. Our decision concluded that the unfair trade practices claim "effectively challenge[d]" BellSouth's filed rate, that it therefore presented a federal question, and that the district court erred in remanding the claim and should have dismissed it under the filed-rate doctrine. *See Bryan*, 377 F.3d at 430. Relying on the Supreme Court's 1983 decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, we first explained that federal question jurisdiction will exist for a state law claim only where the plaintiff's complaint establishes that his right to relief "necessarily depends on resolution of a substantial question of federal law." *Id.* at 429 (quoting 463 U.S. 1, 28 (1983)). Recognizing that filed tariffs carry the force of federal law, we then resolved that any claim seeking to alter the terms of the relationship

between parties to a federally approved tariff necessarily presents a federal question. By the same token, we recognized that a claim for relief that would require a court to determine a reasonable tariffed rate specific to a plaintiff "effectively challenges" the terms of the tariff, again posing a substantial federal question. *Id.* at 430-31. That is so, we explained, because the filed-rate doctrine bars a court from awarding damages that would have the effect of altering the tariffed rate ordinarily paid by the plaintiff. And doing so would disturb the doctrine's dual aims of preventing discrimination among ratepayers and safeguarding the ratemaking authority of federal agencies.

Ultimately, we determined in our *Bryan* decision that, although the unfair trade practices claim underlying the appeal did not directly challenge BellSouth's tariffed rate, it had the legal effect of requesting a court to fix a reasonable rate particular to the plaintiff, thereby presenting a substantial federal question. Because that claim alleged that BellSouth's rate was deceptive and sought damages in that regard, we found that "the only plausible reading" of the claim was that plaintiff Bryan effectively sought a refund of some portion of BellSouth's tariffed fee. *See Bryan*, 377 F.3d at 432. As a result, awarding the requested damages would have violated the filed-rate doctrine. We therefore concluded that the district court possessed federal question jurisdiction over the North Carolina unfair trade practices claim and should have dismissed it.

2.

a.

Old Dominion's putative state law claims are of course facially different from the North Carolina claim at issue in *Bryan*, principally alleging the existence of an outside contract instead of unfair trade practices. That distinction aside, however, the utility's four claims in its Amended Complaint fit squarely within the map of our analysis in *Bryan*. In fact, although Old Dominion's claims present an "effective challenge" to the PJM Tariff, the claims pursued by Old Dominion set up an even more direct challenge to that tariff than was the situation in *Bryan*.[7]

The *Bryan* decision controls in this appeal because, as was the situation therein, the type of relief sought here is incontrovertibly barred by the governing regulatory tariff.[8] That is, determining

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[7] Old Dominion misreads the *Bryan* decision in part, observing that the amended complaint in that case "directly challenged a component of a FCC-filed tariff" and asserting that *Bryan* is inapposite for that reason. *See* Br. of Appellant 28, 30. But the claims presenting direct challenges to BellSouth's service fee — that BellSouth unjustly enriched itself and breached the covenant of good faith and fair dealing by charging an excessive fee — were not on appeal in *Bryan*. *See* 377 F.3d at 427 & n.4. Rather, plaintiff Bryan's unfair trade practices claim, which only "effectively challenge[d]" BellSouth's FCC tariff, was the claim we assessed in *Bryan* and is that which is relevant to this appeal. *Id.* at 430.

[8] We also observe that *Bryan*'s consideration of a telecommunications tariff approved by the FCC does not render that case distinguishable from this litigation, which involves a FERC-approved tariff. Public utility regulation, which extends

that the four putative state claims afford Old Dominion a right to relief in the first instance requires consideration and construction of the federal tariff that controls the entirety of Old Dominion's relationship with PJM. In *Bryan*, the refund sought by the plaintiff was barred and forbidden by BellSouth's FCC tariff. Here, the reimbursement for electricity generation costs sought by Old Dominion's Amended Complaint is similarly precluded by the PJM tariff. In both situations, the plaintiff seeks a special tariffed rate unique to it, which federal law plainly disallows. Because no court can award the damages that Old Dominion seeks without finding some way around the terms of the PJM Tariff, "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *See Bryan*, 377 F.3d at 430 (quoting *Franchise Tax Bd.*, 463 U.S. at 28).[9]

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to firms supplying electricity, gas, and the like, is "essentially the same form of regulation" as that relating to common carriers providing transportation or communications services. *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998).

[9] Old Dominion also claims on appeal that the district court ran afoul of the well-pleaded complaint rule by considering matters outside of the Amended Complaint — including the PJM Tariff, the Operating Agreement, and the FERC and D.C. Circuit proceedings — in its jurisdictional analysis. As the court explained in its Dismissal Opinion, however, it properly took notice of those matters in scrutinizing the nature of Old Dominion's removed claims. *See* Dismissal Opinion 2-3 nn. 3-4, 11 n.9 (explaining that a court is not confined to pleadings in ruling on a motion to remand). It is not the case that "the grounds for removal must appear on the face of the complaint, unaided by reference to other pleadings or the notice of

More specifically, a straightforward assessment of Old Dominion's various claims reveals that they seek to "alter the terms of the relationship" set forth in the federally filed PJM Tariff. *See Bryan*, 377 F.3d at 429. As we explained in *Bryan*, such an objective necessarily presents a federal question. Under both the Tariff and Operating Agreement, Old Dominion's relationship with PJM is structured such that when the utility sells its power generation capacity to PJM, it may not charge more than $1000 per megawatt-hour. The parties do not dispute here — nor did they in the proceedings before FERC and the D.C. Circuit — that the losses incurred from Old Dominion's generating electricity at a cost of roughly $1200 per megawatt-hour are not compensable under the PJM Tariff. In petitioning FERC for a waiver of the Tariff, Old Dominion alleged that it sustained $14,925,669.58 in losses — precisely the sum demanded in each of its four state law claims against PJM. There can be no good faith contention that the relief that Old Dominion now seeks is different in character than it was during the utility's administrative proceedings. The damages sought are for the costs incurred during the 2014 polar vortex —

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removal." *See* 14C Charles A. Wright et al., *Federal Practice & Procedure* § 3734 (rev. 4th ed. 2021). Rather, "in the context of possible federal-question jurisdiction," it is appropriate for the court to conduct an examination of the record as a whole "to reveal the true nature of the plaintiff's claim." *See id.*; *accord Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983) ("[I]t is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint."). The Dismissal Opinion astutely observed that both parties made repeated references to and relied on the PJM Tariff and the earlier administrative proceedings and appeals.

that is, costs "in connection with the transmission or sale of electric energy subject to the jurisdiction of [FERC]." *See* 16 U.S.C. § 824d(a). And as the district court observed, "the governing federal statute leaves scant room for [Old Dominion] to maneuver." *See* Dismissal Opinion 19. Simply put, federal law provides that Old Dominion cannot have what it asks for, and the utility is not entitled to "artfully plead" away the fact that its claims seek to alter the terms of its tariffed relationship with PJM, thereby presenting a federal question under *Bryan*.

By extension, awarding the relief that Old Dominion now seeks would require "entering a judgment that would serve to alter the rate paid by [the] plaintiff," as the damages demanded exceed the sum authorized by law under the PJM Tariff's rate cap. *See Bryan*, 377 F.3d at 429 (quoting *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004)). That is, Old Dominion requests a court to stand in the shoes of FERC and set a reasonable tariffed rate specifically for purposes of compensating it for its polar vortex-related losses. We made plain in our *Bryan* decision that such a maneuver promotes discrimination among ratepayers and impinges upon the ratemaking jurisdiction of federal agencies, in contravention of the filed-rate doctrine's simple mandate that "the rate of the carrier duly filed is the only lawful charge." *Id.* (quoting *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915)). *Bryan* explained that any claim "hav[ing] the effect of imposing different rates upon different customers" invokes the filed-rate doctrine, poses a substantial question of federal law under that doctrine, and must be dismissed pursuant thereto. *Id.* at 430. Again, *Bryan*

compels our conclusion that the district court possessed federal question jurisdiction and properly dismissed Old Dominion's putative state law claims as posing an "effective challenge" to the PJM Tariff.[10]

b.

Under *Bryan*, it is evident that the substance of each of Old Dominion's four claims necessarily invokes a substantial federal question.[11] The PJM

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[10] We expressed in *Bryan* that our rulings should not be taken to imply that the filed-rate doctrine is "conterminous with the scope of federal question jurisdiction." *See* 377 F.3d at 430 n.8. Rather, we clarified that in certain instances — as in this appeal — "the inquiries merge," *id.*, and as the district court characterized it here, "there is no daylight between the question of jurisdiction and dismissal in regard to claims that challenge federal tariffs," *see* Dismissal Opinion 28. Indeed, as the *Bryan* dissenter conceded, "claims requiring the court to second-guess the reasonableness of [an agency's rate] determination are properly said to require the court to resolve a substantial federal question." *See* 377 F.3d at 435 (Luttig, J., dissenting).

[11] Old Dominion correctly reminds us that the question of whether a state claim "necessarily" poses a federal question typically calls for consideration of whether the federal issue constitutes a "necessary element" of the claim. *See Pinney v. Nokia, Inc.*, 402 F.3d 430, 449 (4th Cir. 2005). The parties disputed before the district court whether Virginia or North Carolina law governs Old Dominion's claims. Technical construction of the elements of those claims is unnecessary, however, because *Bryan* directs that the nature of the claims and the damages they seek inherently poses a federal question. Nevertheless, it is apparent that weighing the merits of Old Dominion's tort and contract claims — under either Virginia or North Carolina law — would require resort to federal law. Put succinctly, the allegations set forth in each claim relate solely

Tariff, then, cannot be construed simply as a defense to the claims' allegations when the Tariff is vital to the relief that they seek. Old Dominion maintains that, if anything, the Tariff only extinguishes its right to relief. We find that characterization to be premature, however, as determining that the utility enjoys such a right in the first place requires consulting the terms of the Tariff.

Old Dominion roots its effort to cast the PJM Tariff as a preemptive affirmative defense in our decision in *Burrell v. Bayer Corp.*, 918 F.3d 372 (4th Cir. 2019). Those comparative efforts, however, are unavailing. The *Burrell* decision did not concern any dispute over a regulatory tariff, nor did it involve *Bryan*'s controlling principle that an effective challenge to a filed tariff poses a substantial federal question. *Burrell* involved a removal to federal court of state law negligence and product liability claims relating to a defective birth-control device. The district court ruled that it possessed federal question jurisdiction because the plaintiffs' complaint was "replete with" explicit allegations that the defendant had violated Food and Drug Administration ("FDA") regulations, thus "necessarily raising" substantial questions of federal law. *Id.* at 379. Having concluded that it retained jurisdiction over the plaintiffs' claims, the court granted the defendant's motion to dismiss on preemption grounds.

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to the relationship between the parties that is exclusively controlled by the PJM Tariff. *See Cahnmann*, 133 F.3d at 488 ("Any rights that the plaintiff has to complain about a breach of contract are rights granted to her by the original tariff . . . .").

We explained on appeal, however, that the statutory provision granting the FDA regulatory authority over the birth-control device contained a preemption provision barring state remedies for violations of common-law duties unless the alleged wrongs "parallel[ed] federal regulatory requirements." *See Burrell*, 918 F.3d at 377 (internal quotation marks omitted). Accordingly, the plaintiffs were obliged to plead the regulatory violations in order to fend off a preemption defense. We thus concluded that the only "federal questions" involved in *Burrell* operated as defenses to the plaintiffs' claims and that, because jurisdiction does not lie under 28 U.S.C. § 1331 simply because a federal defense is "anticipated in the plaintiff's complaint," the district court erred in failing to remand. *Id.* at 381.

Although *Burrell*'s resolution turned on an application of the substantial federal question doctrine, that decision bears little factual resemblance to the dispute now before us. The *Burrell* plaintiffs' right to the relief they sought could be established without any resort to federal law; it was only the case that, after such right was established, federal law posed the possibility of cutting off the plaintiffs' ability to recover. That is not the situation here. In this case, there is not merely a "lurking question of federal law in the form of the affirmative defense of preemption." *See Burrell*, 918 F.3d at 382 (internal quotation marks omitted). Instead, the federal law embodied in the PJM Tariff is part and parcel of each of Old Dominion's claims. The utility simply cannot prove that PJM owes it nearly $15 million "in connection with the transmission or sale of electric energy," *see*

16 U.S.C. § 824d(a), without "seek[ing] to alter the terms of the relationship . . . set forth in [PJM's] filed tariff," *see Bryan*, 377 F.3d at 429. In sum, Old Dominion's contention that the Tariff is merely a defense to its claims is without merit.

c.

In these circumstances, we are persuaded that the *Bryan* decision permits only one resolution of this appeal. The nature of Old Dominion's claims places them squarely within the scope of the PJM Tariff, such that the utility's right to relief is inextricably intertwined with federal law. Critically, that fact does not change by virtue of Old Dominion having artfully clothed its inherently federal claims "in state garb." *See Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir. 1986). Just as in *Bryan*, Old Dominion seeks with its putative state claims to alter the terms of its tariffed relationship with PJM, to be awarded a tariffed rate different from that enforced against other electric utilities, and ultimately to undermine FERC's statutory authority to ensure that all "rates and charges made . . . in connection with the transmission or sale of electric energy" be "just and reasonable." *See* 16 U.S.C. § 824d(a). Accordingly, each of Old Dominion's claims by necessity poses a substantial federal question, and the district court possessed subject matter jurisdiction.

B.

1.

Old Dominion alternatively asserts that, irrespective of how it may bear on this appeal, the *Bryan* decision "has not withstood the test of time." *See* Br. of Appellant 28. According to Old Dominion, *Bryan* lacks "continuing precedential force" in view of this Court's subsequent decisions and the Supreme Court's formulation of the *Gunn-Grable* standard. *See* Reply Br. of Appellant 29. With respect to our precedent, Old Dominion specifically maintains that we have weakened or eliminated *Bryan*'s "effective challenge" standard in explaining federal preemption defenses in *Burrell* and *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005), a predecessor to *Burrell* that similarly found that federal regulatory defenses to state law tort claims did not provide a district court federal question jurisdiction.

Old Dominion's arguments in this regard are unconvincing, as *Burrell* and *Pinney* are not inconsistent with *Bryan*. Those decisions bore no relation to *Bryan*'s assessment of veiled challenges to regulatory tariffs and did not question or undermine *Bryan*'s interpretation of the substantial federal question doctrine. Moreover, the PJM Tariff does not operate as a defense of the sort considered in *Burrell* and *Pinney*. And multiple decisions of our sister circuits are in accord with *Bryan*'s determination that challenges to federal tariffs present questions of federal law. *See, e.g.*, *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998); *Ne. Rural Elec. Membership Corp. v. Wabash Power Ass'n, Inc.*, 707

F.3d 883, 891-92, 893 n.5 (7th Cir. 2013); *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315-17 (11th Cir. 2004); *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998).

Moving beyond *Burrell* and *Pinney*, Old Dominion argues that the Supreme Court's decisions in *Gunn v. Minton*, 568 U.S. 251 (2013), and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), impliedly overruled *Bryan* by seeking to "refine" the "unruly" substantial federal question doctrine as it existed at the time of *Bryan*'s decision. *See* Reply Br. of Appellant 29 (quoting *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 182 (4th Cir. 2014)). We agree with the district court, however, that *Bryan*'s explicit standard "closely tracks the *Gunn-Grable* framework," and that the latter did no harm to the former. *See* Dismissal Opinion 15 n.11.

Gunn-Grable principally inquires whether a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial," reflecting the well-established standard of the substantial federal question doctrine. *See Gunn*, 568 U.S. at 258 (quoting *Grable*, 545 U.S. at 314). *Bryan*'s own characterization of that doctrine was drawn from the Supreme Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), which itself informed the Court's development of the *Gunn-Grable* test. *See Grable*, 545 U.S. at 312-14 (citing *Franchise Tax Board* in tracing the history of the "longstanding . . . variety of federal 'arising under' jurisdiction [that] will lie over state-law claims that implicate significant federal issues"). *Gunn-Grable* then counsels a further normative consideration, namely whether the state

claim at hand is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *See Gunn*, 568 U.S. at 258. That concern is also revealed in *Bryan*, however, as reflected in the rationale behind its "effective challenge" standard — that is, any lawsuit seeking to enforce or invalidate a federally filed tariff may appropriately be heard in the federal courts. In sum, *Bryan* and *Gunn-Grable* share a common foundation and spell out harmonious legal principles. As such, *Bryan* remains good law in our circuit.

2.

Although the district court grounded its jurisdictional determination in *Bryan*'s standard, it appropriately conducted an independent assessment of the *Gunn-Grable* framework. And we perceive no error in the court's explicit conclusion that the same result obtains when the Supreme Court's standard is applied to the facts here. The *Gunn-Grable* test provides that there is federal question jurisdiction over a state law claim where the claim presents a federal issue that is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court "without disrupting Congress's intended division of labor between state and federal courts." *See Gunn*, 568 U.S. at 258. Each of those four factors is readily established in this appeal.

As explained at length above, Old Dominion's putative state claims "necessarily raise" a federal issue by seeking relief made unavailable by a federally filed regulatory tariff. The utility's Amended Complaint explains that the requested

damages of $14,925,669.58 reflect costs incurred during Old Dominion's operations during the polar vortex in January 2014. Those costs are not compensable under the PJM Tariff's rate cap. By suing PJM for the expenses anyway, Old Dominion effectively challenges the enforceability of PJM's federal tariff and seeks to amend its terms.

The federal issue at hand is, of course, also "actually disputed" — the parties disagree whether the PJM Tariff precludes Old Dominion's ability to recover. With regard to whether the issue is adequately "substantial," the Supreme Court in *Gunn* explained that that inquiry looks to "the importance of the issue to the federal system as a whole" and "the broader significance of the . . . question for the Federal Government." *See* 568 U.S. at 260. Here, Old Dominion seeks to have a state court circumvent FERC's exclusive authority to regulate electric utilities and the interstate electricity transmission market, and we are satisfied that a maneuver of that nature poses an issue of "substantial" significance to the federal government.

Lastly, Old Dominion's claims may appropriately be resolved in federal court for much the same reason: they seek to obtain an excuse from strict compliance with federal regulatory rules. Such an endeavor is most appropriately pursued in the federal administrative setting, as previously pursued here. PJM's removal of Old Dominion's claims to federal court did not "disrupt[] Congress's intended division of labor between state and federal courts" in any way — if anything, the removal could best be said to have righted that intended division. *See Gunn*, 568 U.S. at 258. Accordingly, *Gunn-Grable* is not only compatible with our decision in *Bryan*, but

likewise directs that the district court possessed subject matter jurisdiction over Old Dominion's claims.

C.

In sum, *Bryan* and *Gunn-Grable* make it clear that Old Dominion's claims necessarily present a substantial question of federal law. In these circumstances, Old Dominion's claims make no bones about seeking relief precluded by the PJM Tariff, asking a state court to fix a reasonable tariffed rate applicable only to the utility's 2014 losses, and effectively challenging the terms and enforceability of the Tariff's rate cap. Given those efforts, the district court aptly recognized that the substantial federal question doctrine and the filed-rate doctrine work in tandem to render Old Dominion's claims nonviable. We decline Old Dominion's invitation to turn a blind eye to that reality, and instead resolve that the district court was properly vested with federal question jurisdiction and correctly dismissed Old Dominion's claims.

IV.

Pursuant to the foregoing, the judgment of the district court denying remand and dismissing Old Dominion's claims with prejudice is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:19cv233

Old Dominion Elec. Cooperative,
Plaintiff,

v.

PJM Interconnection, LLC,
Defendant.

MEMORANDUM OPINION

This matter comes before the Court on Plaintiff Old Dominion Electric Cooperative's ("ODEC") Motion to Remand, (ECF No. 13), and Defendant PJM Interconnection, LLC's ("PJM") Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6),[1] (ECF No. 3). PJM responded to the Motion to Remand, (ECF No. 20), and ODEC replied, (ECF No. 22). ODEC responded to the Motion to Dismiss, (ECF No. 15), and PJM replied, (ECF No. 21). The matter is ripe for disposition. The Court dispenses with oral argument because the materials before it adequately present the facts and legal contentions, and argument would not aid the decisional process. Because ODEC's claims raise a substantial federal question under the filed-rate doctrine, this Court has jurisdiction, meaning that it will deny ODEC's Motion to Remand and grant PJM's Motion to Dismiss.

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[1] Rule 12(b)(6) allows dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

I. Factual[2] and Procedural Background

This case arises from an unprecedented January 2014 weather event during which, as ODEC describes, the Mid-Atlantic region "experienced unique cold weather conditions known as 'the Polar Vortex Event' including record low temperatures across the United States." (Am. Compl. ¶ 15.) Circumstances caused by the Polar Vortex contributed "to a 2.9% drop in GDP." (*Id.* ¶ 16).

ODEC, a non-profit wholesale generation utility operating three facilities in Virginia and Maryland (known as Marsh Run, Louisa, and Rock Springs), brings four Virginia State law claims against PJM for damages stemming from the Polar Vortex of 2014. (Am. Compl. ¶¶ 1, 4.) PJM is a "regional transmission organization" that exercises "broad responsibility relating to the supply of wholesale electric power" throughout the thirteen states in the Mid-Atlantic region. (*Id.* ¶¶ 5, 7, 9.) PJM ensures that sufficient power "is available to meet customer demands" within its region. (*Id.* ¶ 8.) PJM exerts operational control over, but not ownership of, the transmission facilities belonging to its participating members. (*Id.*)

ODEC's spartan Amended Complaint perhaps artfully omits direct reference to the Federal Energy

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[2] For the purpose of the Rule 12(b)(6) Motions to Dismiss, the Court will accept the well-pleaded factual allegations in ODEC's Complaint as true, and draw all reasonable inferences in favor of ODEC. *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462, 467 (4th Cir. 2012) ("a court 'must accept as true all of the factual allegations contained in the complaint' and 'draw all reasonable inferences in favor of the plaintiff.'") (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)).

and Regulatory Commission ("FERC") or federal law, instead contending that it brings breach of contract and other state claims which stem from an agreement "outside of the requirements, restrictions, and protections set forth in any tariff[3] or other regulated PJM policy or process." (*Id.* ¶ 49.) Because ODEC's claim for relief mirrors those made in several other lawsuits — including some involving the very same parties — the Court describes the essential background of those suits which arose from the effect of the 2014 Polar Vortex on the wholesale electricity market in which ODEC and PJM participate.

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[3] While ODEC mentions the federal tariff only to say it does *not* pertain to its state breach of contract claims, as explained in detail later, FERC regulates the operation of a tariff that sets rates which can be charged in the wholesale electricity market in the Mid-Atlantic region (the "PJM Tariff"). The PJM Tariff — which governs the electricity purchasing relationship between ODEC and PJM (and others) — carries the force of federal law. *Bryan v. BellSouth Communs.*, 377 F.3d 424, 429 (4th Cir. 2004) (concluding that a federal tariff filed with and approved by a regulatory agency "carries the force of federal law"). That precept cannot be, and is not, controverted by either party.

ODEC seeks to pursue its Virginia state law action in state court. While PJM suggests in its briefing that the Court may take judicial notice of the federally-governed PJM Tariff and its terms, it seems questionable that the Court need take judicial notice of an agreement that bears the force of federal law. *See Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000); *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998); *United States v. Rivero*, 532 F.2d 450, 458 (5th Cir. 1976) ("[t]he law is a fact and the Court is presumed to know the law or find it"). To the extent it is required to do so, the Court takes judicial notice of the PJM Tariff.

A. ODEC and PJM's Relationship in the Mid-Atlantic Energy Market

Prior court decisions and other public records detail[4] the previous litigation between ODEC and

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[4] Again, although ODEC's Amended Complaint omits any reference to FERC or federal regulation of energy markets, the Court will consider two previous actions involving ODEC and PJM and their interaction during the Polar Vortex for their description of the Mid-Atlantic energy market: (1) FERC's ruling in *Old Dominion Elec. Coop.*, 151 F.E.R.C. ¶ 61,207 at 62,285 (F.E.R.C. June 9, 2015); and, (2) the United States Court of Appeals for the D.C. Circuit's decision in *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (2018).

While some courts suggest that a court should take judicial notice of previous court filings and rulings, *see Witthohn v. Fed. Ins. Co.*, 164 F. App'x 395, 397 (4th Cir. 2006) (allowing a court to take judicial notice of relevant records and holding that "the court's consideration of the prior judicial record did not convert Appellee's motion to dismiss into a motion for summary judgment"), it is not clear to this Court that it need take judicial notice here. The previous filings cited involve the same parties disputing the same events before other decision-making bodies.

In the numerous filings before this Court, both Parties refer to the PJM Tariff, the D.C. Circuit decision, and the FERC decision without challenging the authenticity of those documents or rulings. Neither party contests the facts describing the wholesale energy market; instead they repeatedly refer to them in briefing. Where the plaintiff "has actual notice of all the information in the movant's papers and has relied upon those documents in framing the complaint," other measures, such as converting the motion to dismiss into one for summary judgment, becomes unnecessary. *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

Nonetheless, to the extent the Court need take judicial notice of the related agency or court decisions, it does so here. *See White v. Keely*, 814 F.3d 883, 885 n.2 (7th Cir. 2016); *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 80203 (8th Cir. 2002)

PJM (and others) stemming from the 2014 Polar Vortex and its effects on the wholesale electricity market.

As described in these cases, and as established before this Court, the Federal Power Act ("FPA") and FERC govern the relationship between PJM and ODEC. The FPA requires FERC to ensure that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the Jurisdiction of the Commission . . . shall be just and reasonable." 16 U.S.C. § 824d(a). Pursuant to the FPA and FERC's rule-making authority, regional transmission organizations, such as PJM, file tariff rates for approval with FERC. *ODEC*, 892 F.3d at 1227.

Importantly, the rates actually charged may not exceed those filed with FERC (which, in regulatory terms, is characterized as the "filed-rate doctrine"). Here, PJM filed, and FERC approved the PJM Tariff. *Id*. at 1228. The PJM Tariff enumerates the terms and conditions regarding PJM's responsibilities and the structure of the energy market system in the Mid-Atlantic. *Id*. ODEC, as a generating utility, subscribes to the PJM Operating Agreement which reflects the terms of the 5 PJM Tariff. *Id*.

(concluding that "courts may rely on matters within the public record" in deciding motions on pleadings when recounting, for purposes of a Rule 12(b)(6) motion, previous related cases — including criminal cases assessing the same conduct at bar); *Cortec*, 949 F.2d at 48 (determining that a court may consider documents such as affidavits or matters of public record at the motion to dismiss stage where, as here, both parties had notice of their contents and the documents are integral to the complaint).

The sale of electricity on the PJM market generally occurs through three types of competitive auctions. *Id*. at 1227. In same day auctions, generating utilities, such as ODEC, "bid to provide the immediate delivery of electricity needed to slake sudden spikes in demand." *Id*. In "next day" or "day ahead" auctions, generating utilities bid to satisfy short term demand. *Id*. at 1227-28. And in a capacity auctions, generating utilities make longer term bids which bind them to provide energy at a certain price in the future. *Id*. at 1227. These competitive auctions, governed by federal law, set a cap on the prices at which generators such as ODEC may offer production to PJM. *Id*. at 1228. The PJM Tariff then capped prices in the next day or day-ahead market at $1000 per megawatt-hour. (*See* Rolphe Decl., PJM Tariff § 1.10.1A(d)(viii), ECF No. 3-2); *see also ODEC*, 892 F.3d at 1228.

The PJM Operating Agreement specifies that PJM may take "measures appropriate to alleviate an Emergency, in order to preserve reliability" in the Mid-Atlantic electrical market. (Rolphe Decl., PJM Operating Agreement § 1.6.2(vii), ECF No. 3-1.) Pursuant to that authority, PJM may direct generators "to start, shutdown, or change output levels of generations units." (*Id*. ¶ 1.7.20(b).) Generation capacity resources are contractually obligated "to offer all of those units' available generation capacity into PJM's daily market, and to generate electricity whenever called upon by Old Dominion Elec. Coop. v. PJM Interconnection, LLC Civil Action No. 3:19cv233 (E.D. Va. Mar. 31, 2020) PJM." *ODEC*, 892 F.3d at 1227. With this overview in mind, the Court turns to the facts of this case.

B. Factual Background

The facts of this case are not in dispute. (*See* PJM Mot. Dismiss 7-11; ODEC Opp. Mot. Dismiss 2-6, ECF No. 15). In January 2014, an extraordinary Polar Vortex brought record-low temperatures to the Mid-Atlantic region, draining energy production resources. (Am. Compl ¶ 15.) Due to the weather conditions, the price of natural gas temporarily increased sharply. Indeed, ODEC alleges that "[b]oth PJM and ODEC knew at the time . . . that the price of natural gas was 3,330 percent higher than it had been before the Polar Vortex event was forecast and began." (*Id.* ¶ 45.)

PJM found it necessary "to undertake extraordinary measures to ensure the supply of sufficient power generation resources" in order to maintain system reliability. (*Id.* ¶ 17.) ODEC alleges that, during this time, PJM induced them "to enter into binding commitments to purchase natural gas to run its units" by "promising to make ODEC whole for its fuel and other costs associated with purchasing the natural gas." (*Id.* ¶ 18.)

Specifically, on January 7, 2014, PJM contacted ODEC's agents in North Carolina and requested that ODEC run the Rock Springs combustion turbine facility. (*Id.* ¶ 23.) After ODEC purchased gas to run those units, PJM later cancelled its request. (*Id.* ¶ 24.) Similarly, on January 22, 2014, PJM requested that ODEC run several of the Louisa and Marsh Run combustion turbine units. (*Id.* ¶ 27.) After ODEC purchased gas to run those units, PJM cancelled the request to run the Louisa units, and cut short the hours for the Marsh Run units. (*Id.* ¶¶ 29, 32.) This cycle repeated itself three times until January 28,

2014. (*See id.* ¶¶ 34, 37, 41.) PJM would request that ODEC operate various combustion units, and then would either cancel or significantly scale back its request. ODEC alleges that throughout these communications, PJM promised in recorded conversations "that if ODEC procured the gas necessary to run the units then PJM would pay ODEC for the costs it incurred to procure the gas and ready the units." (*Id.* ¶ 44.) Because they purchased gas priced at emergency levels (1) at PJM's direction and (2) based on a promise to make ODEC whole, ODEC alleges that PJM's breach of its oral contract caused ODEC $14,925,669.58 in damages. (*Id.* ¶ 57.)

ODEC submits that the public policy consequences of this case are staggering. It contends that "[i]f PJM does not fulfill its promises . . . then PJM will have no credibility or effective authority to make any future promises under similarly extraordinary circumstances to prevent sudden, widespread, and potentially catastrophic failure of power systems throughout the Mid-Atlantic region." (*Id.* ¶ 22.)

C. Prior Actions and Procedural History

ODEC first sought recompense through the regulatory process. In a June 2014 administrative proceeding before FERC, ODEC unsuccessfully sought relief from FERC for the "natural gas-related costs" it "incurred as a result of its efforts to meet PJM's commitment of ODEC's Generation Capacity Resources during the cold weather events of January 2014." *ODEC*, 151 F.E.R.C. ¶ 61,207 at 62285. In

that case, ODEC sought reimbursement for costs incurred during the Polar Vortex, including:

> (1) actual costs greater than $1,000/megawatt-hour (MWh) incurred for running units according to PJM dispatch instructions on January 23, 2014; (2) costs incurred for natural gas purchased but not burned for units PJM committed but did not dispatch (ODEC characterizes this as a canceled dispatch); and (3) costs incurred for natural gas purchased but not burned due to PJM's curtailment of a dispatch period.

Id. Before FERC, ODEC did not dispute that "natural gas cost recovery is not currently allowed by the PJM [Tariff] or Operating Agreement," *id.* at 62293, but argued that, given the lack of flexibility in the PJM Tariff rate and considering equitable principles, FERC should grant a retroactive waiver of the $1000 MWh filed rate. Altogether, ODEC sought a "retroactive waiver . . . [of the PJM Tariff controlled rate cap] totaling $14,925,669.58 incurred prior to the date on which it made its waiver filing." *Id.* The monetary demand before FERC matches the damages sought in this case to the penny.

Before FERC, PJM actively supported a waiver for ODEC's claim to relief in recognition of the extraordinary circumstances facing the wholesale energy market during the 2014 Polar Vortex. *Id.* at 62289. Despite PJM's intervention, FERC denied relief. FERC concluded "that the filed-rate[5] doctrine

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[5] The "filed-rate doctrine mandates that the rate of the carrier duly filed is the only lawful charge." *Bryan*, 377 F.3d at 429 (internal quotation marks omitted). The Supreme Court of the

and the rule against retroactive ratemaking[6] preclude[d] granting ODEC's waiver request." *Id.* at 62293. Notwithstanding this decision, in a related case, FERC issued a contemporaneous order that "finding that PJM's . . . Operating Agreement may be unjust, unreasonable, unduly discriminatory or preferential."[7] *Id.* at 62294.

United States has established that the filed-rate doctrine forbids a federally regulated seller of energy on the interstate market from charging rates higher than those filed with FERC. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 573 (1981). The filed-rate doctrine, alongside the rule against retroactive ratemaking, "operate as a nearly impenetrable shield for consumers, ensuring rate predictability and preventing . . . extortionate pricing." *ODEC*, 892 F.3d at 1230-31 (internal citations omitted) (noting that the Supreme Court explained in its *Arkansas Louisiana Gas Company* decision that not even FERC had authority to contravene the prospective application of rates).

As explained later, the filed-rate doctrine compels this Court's findings that it possesses jurisdiction over, and must dismiss, the case at bar.

[6] "[T]he rule against retroactive ratemaking 'prohibits the Commission from adjusting current rates [retroactively] to make up for a utility's over-or under-collection in prior periods.'" *ODEC*, 892 F.3d at 1227 (quotations and citations omitted) (noting that, as here, neither of the two "limited" exceptions to this otherwise categorical prohibition applies).

[7] Indeed, FERC Commissioner Philip D. Moeller dissented, arguing in equitable terms that ODEC "acted in good faith to preserve system reliability during a time of extraordinary system stress and deserve[s] appropriate compensation." *ODEC*, 151 F.E.R.C. ¶ 61,207, 62294. Noting the particularly hard impact on ratepayers, the dissent observed that "PJM is the only regional transmission organization that does not allow market participants to submit day-ahead offers that vary by hour to update their offers in real time." *Id.* While urging PJM to implement tariff changes allowing "generators in PJM . . . to

FERC denied ODEC's request for rehearing. *ODEC*, 154 F.E.R.C. ¶ 61,155 (F.E.R.C. Mar. 1, 2016). In denying the request for a rehearing, FERC found that "equitable considerations do not bestow upon the commission the authority to waive the filed-rate doctrine," (*id.* ¶ 17), and that the "extraordinary circumstances" during the 2014 Polar Vortex did not give ratepayers the required notice of the rate change, (*id.* ¶ 23). FERC affirmed the Commission's prior finding that ODEC's request is barred by the filed-rate doctrine and the rule against retroactive ratemaking. (*Id.* ¶ 26.)

ODEC then filed an appeal in the D.C. Circuit. *ODEC*, 892 F.3d 1223. ODEC conceded that "the filed [PJM] Tariff categorically precluded its compensation for losses caused by the rate cap" but sought relief "entirely on [the] grounds of fairness and equity." *Id.* at 1230-31. The D.C. Circuit, like FERC, denied relief. Judge Millett, writing for the panel, found that the "filed-rate doctrine and the rule against retroactive rate-making leave the Commission no discretion to waive the operation of a filed-rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations." *Id.* at 1230. ODEC appealed, and the Supreme Court denied certiorari. *Old Dominion Elec. Coop. v. FERC*, 139 S. Ct. 794 (2019).

On January 5, 2017, ODEC filed a Complaint against PJM in the Circuit Court for the County of

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recover legitimate, actual fuel costs incurred to ensure that they can provide service during emergency conditions," *id.* at 62295, the dissent expressed full support for "the Commission's action to remedy any defects in PJM's current market construct that do not provide adequate supply offer flexibility, in order to prevent the circumstances faced by ODEC from recurring." *Id.*

Henrico, Virginia (the "Henrico County Circuit Court"). (*See* ODEC Mem. Opp. Mot. Dismiss 5, ECF No. 15.) ODEC never served PJM with that Complaint, and on January 3, 2018, ODEC exercised its right to take a non-suit pursuant to Virginia Code § 8.01-380. (*Id.*) Nearly six months after non-suiting the case, on June 5, 2018, ODEC refiled the lawsuit against PJM in Henrico County Circuit Court. (*Id.*) On February 22, 2019, ODEC filed the operative Amended Complaint which brings four claims against PJM: two claims for breach of contract, a claim for unjust enrichment, and a claim for negligent misrepresentation.

On April 3, 2019, PJM removed the case to this Court, claiming federal question jurisdiction. One week later, PJM filed the Motion to Dismiss. ODEC responded, and PJM replied. ODEC then filed the Motion to Remand, arguing that its Amended Complaint did not invoke federal jurisdiction because its claims arose only under state law and did not raise a substantial federal question. PJM responded, and ODEC replied. The Court now turns to the pending motions.

II. Removal Jurisdiction and Remand

Under 28 U.S.C. § 1441(a),[8] a defendant may remove a civil action to a federal district court if the

[8] Section 1441(a) provides, in pertinent part:

> [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a)

plaintiff could have originally brought the action in federal court. 28 U.S.C. § 1441(a). Section 1446 delineates the procedure for removal. *See* 28 U.S.C. §§ 1446(a), (d). The state court loses jurisdiction upon the removal of an action to federal court. 28 U.S.C. § 1446(d) ("[T]he State court shall proceed no further unless and until the case is remanded."). The removability of a case "depends upon the state of the pleadings and the record at the time of the application for removal. . . ." *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 216 (1906); *see also Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939) ("the right to remove . . . [is] determined according to the plaintiffs' pleading at the time of the petition for removal."). Under 28 U.S.C. § 1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

"The party seeking removal bears the initial burden of establishing federal jurisdiction." *Abraham v. Cracker Barrel Old Country Store, Inc.*, No. 3:11cv182, 2011 WL 1790168, at *3 (E.D. Va. May 9, 2011) (citing *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994)). No presumption favoring the existence of federal subject matter jurisdiction exists because federal courts have limited, not general, jurisdiction. *Id.* (citing *Pinkley Inc. v. City of Frederick*, 191 F.3d 394, 399 (4th Cir. 1999)). In deference to federalism concerns, courts must strictly construe removal jurisdiction. *Id.* (citing *Mulcahey*, 29 F.3d at 151). "If federal jurisdiction is doubtful, a remand is necessary." *Id.* (quoting *Mulcahey*, 29 F.3d at 151).[9]

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[9] When assessing jurisdiction under removal and related motions to remand, the Court may consider matters outside the

III. Standard of Review: Rule 12(b)(6)

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990)). To survive Rule 12(b) (6) scrutiny, a complaint must contain sufficient factual information to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."). Mere labels and conclusions declaring that the plaintiff is entitled to relief are not enough. *Twombly*, 550 U.S. at 555. Thus, "naked assertions of wrongdoing necessitate some factual enhancement within the complaint to cross the line between possibility and plausibility of entitlement to relief." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (internal quotation marks omitted).

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pleadings. *See Romano v. Kazacos*, 609 F.3d 512, 521 (2d Cir. 2010) (stating that a court may look behind a complaint when jurisdiction (such as a motion to remand) is at issue); *Indeck Maine Energy, L.L.C. v. ISO New England Inc.*, 167 F. Supp. 2d 675 (D. De. 2001) (deciding a telecommunications tariff case in part by considering affidavits and documents filed in support of and in opposition to the motions to remand, and to dismiss under 12(b)(6)); *Maryland v. Exxon Mobil Corp.*, 352 F. Supp. 3d 435, 466 (D. Md. 2018) (considering materials outside the pleadings on a motion to remand which "are essential to the jurisdictional analysis").

A complaint achieves facial plausibility when the facts contained therein support a reasonable inference that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 556; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This analysis is context-specific and requires "the reviewing court to draw on its judicial experience and common sense." *Francis*, 588 F.3d at 193. The Court must assume all well-pleaded factual allegations to be true and determine whether, viewed in the light most favorable to the plaintiff, they "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 676- 79; *see also Kensington*, 684 F.3d at 467 (finding that the court in deciding a Rule 12(b)(6) motion to dismiss "must accept as true all of the factual allegations contained in the complaint' and 'draw all reasonable inferences in favor of the plaintiff'" (quoting *Kolon Indus., Inc.*, 637 F.3d at 440)). This principle applies only to factual allegations, however, and "a court considering a motion to dismiss can choose to begin by identifying the pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679.

"Although a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013) (quoting *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011)).

IV. Analysis: Motion to Remand and Motion to Dismiss

The Court has jurisdiction over this case because the Amended Complaint raises a substantial federal question by challenging a federal tariff with the force of federal law. For the same reasons the Court possesses jurisdiction, and because the Amended Complaint would contravene FERC's authority to set a reasonable rate for the provision of natural gas, this Court must dismiss ODEC's claims.

A. Legal Standard: Complete Preemption and Federal Question Jurisdiction

Where state law gives rise to a plaintiff's cause of action, federal courts only possess jurisdiction to hear those "cases in which a well-pleaded complaint establishes that the plaintiff's right to relief depends on resolution of a substantial question of federal law." *Bryan*, 377 F.3d at 424 (internal quotation marks omitted). Generally, the plaintiff, as "master of the claim," may "avoid federal jurisdiction by exclusive reliance on state law" when drafting their complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Despite this, federal question jurisdiction may exist over state law claims under certain narrow exceptions, such as the complete preemption and substantial federal question doctrines.[10]

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[10] As a corollary to the complete preemption and substantial federal question doctrines, the Fourth Circuit has recognized the "artful pleading" doctrine. *See Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986) (finding a plaintiff cannot "bootstrap jurisdiction simply by the use of artful pleading") *overruled on other grounds*, *Sheridan v. United States*, 487 U.S.

The Court now reviews the Complete Preemption and Substantial Federal Question doctrines, ultimately applying the substantial federal question doctrine to the claims before it.

1. The Complete Preemption Doctrine

Under the complete preemption doctrine, federal question jurisdiction exists "when Congress 'so completely pre-empts a particular area that any civil complaint raising the select group of claims is necessarily federal in character.'" *Pinney v. Nokia, Inc.*, 402 F.3d 430, 449 (4th Cir. 2005) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)). Complete preemption occurs only where "Congress has clearly manifested an intent to make causes of action removable to federal court." *Metro. Life*, 481 U.S. at 67-68 (internal quotation marks omitted). Because of these stringent parameters, the Supreme Court has found that complete preemption only exists in three circumstances: (1) claims under the Labor Management Relations Act brought by a labor union against an employer; (2) Employment

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392 (1988). Under this doctrine, "[a] plaintiff cannot avoid federal court simply by omitting to plead a necessary federal question in the complaint; in such a case the necessary federal question will be deemed to be alleged in the complaint." *Venezuela v. Massimo Zanetti Bev. USA, Inc.*, 525 F. Supp. 2d 781, 785 (E.D. Va. 2007) (internal citations omitted).

At base, the artful pleading doctrine provides that a "plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983); *see also Marcus*, 138 F.3d at 55 ("[a] plaintiff may not defeat removal by clothing a federal claim in state garb, or, as it is said, by the use of artful pleading" (internal quotation marks omitted)).

Retirement and Insurance Security Act ("ERISA") cases brought by a beneficiary; and, (3) certain Indian land grant cases. *Marcus*, 138 F.3d at 54 (internal citations omitted).

Complete preemption differs from field preemption. Complete preemption applies "when the preemptive force of a federal statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim." *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 421 n.4 (3rd Cir. 2016) (internal quotation marks omitted); *see also*, *Pinney*, 402 F.3d at 449. Field preemption, on the other hand, occurs where "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *Pinney*, 402 F.3d at 449 (internal quotation marks omitted). Field preemption merely serves as a defense to a state law claim, does not affect subject matter jurisdiction, and "does not authorize removal to federal court." *Id.* (internal quotation marks omitted).

2. The Substantial Federal Question Doctrine

The substantial federal question doctrine permits removal of a state law claim where "plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law." *Pinney*, 402 F.3d at 449 (citing *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986)).

The Supreme Court has recently "brought greater clarity to what it describes as a traditionally

'unruly [substantial federal question] doctrine,' emphasizing its 'slim contours.'" *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 182 (4th Cir. 2014). Under the *Gunn-Grable* framework[11] for reviewing the existence of a substantial federal question, a federal court has jurisdiction over state law claims when the "federal issue must be '(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.'" *Pressl v. Appalachian Power Co.*, 842 F.3d 299, 303 (4th Cir. 2016) (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)); *see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-14 (2005). The "mere presence of a federal issue" does not suffice to grant jurisdiction, nor does "a defense that raises a federal question." *Merrell Dow*, 478 U.S. at 808, 813.

Relevant here, in a case evaluating the removal of a North Carolina complaint seeking damages solely under state law for charges imposed by BellSouth that a consumer deemed unfair, the Fourth Circuit found substantial federal question

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[11] Despite the Supreme Court's later clarification, the Fourth Circuit previously utilized a similar standard with the same effect. For instance, the Fourth Circuit's decision in *Bryan* predated the crystallization of the *Gunn-Grable* framework, finding substantial federal question jurisdiction in "only those cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Bryan*, 377 F.3d at 429 (internal quotation marks omitted). The standard used in *Bryan* thus closely tracks the *Gunn-Grable* framework. The Court applies both tests here, finding substantial federal question jurisdiction under both *Gunn-Grable* and the Fourth Circuit's approach in *Bryan*.

jurisdiction where a state law claim would "seek[] to alter the terms of the relationship . . . set forth in a filed tariff." *Bryan*, 377 F.3d at 429; *see also NASDAQ OMX Grp., Inc. v. UBS, Sec., LLC*, 770 F.3d 1010, 1010 (2d Cir. 2014) (finding jurisdiction where state law "claims necessarily raised disputed and substantial issues of federal securities law concerning an initial public offering"). The Fourth Circuit did so because the rates a carrier such as BellSouth could charge were governed by the FCC through a tariff.[12] *Bryan*, 377 F.3d at 426. The Fourth Circuit opined that federal tariffs "are the law, not mere contracts" and suits to "enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law . . . arise[] under federal law." *Bryan*, 377 F.3d at 429 (internal quotation marks omitted).

B. The Court Has Jurisdiction Because ODEC's Challenge to a Federally Approved Tariff Constitutes a Substantial Federal Question

The Amended Complaint challenges a tariff that bears the force of federal law. Such a challenge raises a substantial federal question, which federal courts may resolve. Because that challenge would require the Court to determine a reasonable rate for natural gas, the Court will dismiss ODEC's claims pursuant to the filed-rate doctrine.

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[12] Energy regulation and telecommunications regulation are "essentially the same form of regulation, the term 'common carrier' being generally used of firms providing transportation or communications and 'public utility' of firms providing electricity or gas." *Cahnmann*, 133 F.3d at 487.

1. Legal Standard: Federal Tariffs and the Filed-Rate doctrine

Two related principles guide this Court's analysis. First, it is well established that a tariff filed with a regulatory agency carries the full force of federal law. *See Bryan*, 377 F.3d at 429 (citing *Cahnmann*, 133 F.3d at 488). Any state law claim that "effectively challenges" the tariff rate raises a substantial federal question in that it seeks to invalidate federal law. *Bryan*, 377 F.3d at 430.

Second, the "filed-rate doctrine" mandates that "the rate of the carrier duly filed is the only lawful charge." *Id.* at 429 (quoting *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998)). The Supreme Court has established that the filed-rate doctrine forbids a federally regulated seller of energy on the interstate market from charging rates higher than those filed with FERC. *See Ark. La. Gas*, 453 U.S. at 573. The filed-rate doctrine serves "to prevent discrimination among consumers and to preserve the rate-making authority of federal agencies." *Bryan*, 377 F.3d at 429; *see also Hill v. BellSouth Telcomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004) ("[t]he purpose of the nondiscrimination principle underlying the filed-rate doctrine is to ensure that all . . . customers are charged the same rate for their service"). This ensures rate predictability and prevents extortionate pricing.[13] *ODEC*, 892 F.3d at 1230 (citations omitted).

The filed-rate doctrine also ensures that claims affecting a tariff rate are nonjusticiable. Even where

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[13] The corollary rule against retroactive ratemaking serves essentially the same purposes. *See ODEC*, 892 F.3d at 1227 (quotations and citations omitted).

a legal challenge does not explicitly attack the filed rate, the reviewing court must dismiss the claim if an award of damages would "effectively impose a rate different from that dictated by the tariff." *Bryan*, 377 F.3d at 430 (citing *Hill*, 364 F.3d at 1317). The effect, not the form, of the suit controls. If a claim requires a court to set a "reasonable rate," in contravention of FERC's exclusive authority, the Court must dismiss the claim. *Id*. at 430.

2. Federal Question Jurisdiction Exists Because ODEC's State Law Claims Effectively Challenge the PJM Tariff

Under these principles, this Court may assert jurisdiction if ODEC's state law claims "effectively challenge[]" the rates in the PJM Tariff. *Bryan*, 377 F.3d at 430. ODEC's state law claims have precisely that effect. First, for the reasons stated below, ODEC's state law claims fall within the subject matter of the PJM Tariff, which outlines the contractual relationship between the Parties. Second, fulfillment of ODEC's claims would violate the filed-rate doctrine, as granting damages would undermine (1) FERC's authority to set a reasonable rate; and, (2) discriminate between consumers. As a result, the Court must dismiss ODEC's claims.

a. ODEC's Claims Fall Within the Relationship Between ODE and PJM Arising Under Federal Law

As a threshold matter, ODEC's claims fall within "the terms of the relationship" between ODEC and PJM as articulated under federal law. *Bryan*, 377

F.3d at 429. At the time of the 2014 Polar Vortex, the PJM Tariff capped the prices at which ODEC and other generators could offer their capacity at $1000 per megawatt hour. (*See* PJM Tariff § 1.10.1A(d)(viii)). Because FERC approved the PJM Tariff, that rate held the force of federal law. ODEC, as a generator capacity resource, was required to "respond to [PJM's] directives to start, shutdown or change output levels of [its] generation units." *Id.* §1.7.20(b). As ODEC concedes, had it failed to respond to PJM's directives, it would have been forced to declare a "forced outage" and would have been subject to monetary penalties, again, arising under federal law. *Id.* ¶ 1.9.4.

The promises made by PJM, then, did not represent independent contractual terms: they were part and parcel of the relationship and the responsibilities delegated to the Parties under federal law. The PJM Tariff set the $1000 per megawatt hour rate that ODEC now claims inadequate to compensate it for its losses. The PJM Tariff defined the relationship between the Parties in regard to the interstate provision of electricity. And it set the penalties that ODEC would incur should it fail to live up to its obligations. The instant suit thus falls squarely within the federally defined relationship between ODEC and PJM. And because the instant suit "seeks to alter the terms of th[at] relationship . . . set forth in a filed tariff," this Court possesses subject matter jurisdiction. *Bryan*, 377 F.3d at 429.

ODEC appears to allege that in this circumstance its provision of natural gas to PJM — and the costs associated with such an action — can

fall outside the scope of the PJM Tariff. But under the plain language of 16 U.S.C. § 824d, the payments ODEC seeks to recover are for costs made "in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission." 16 U.S.C. § 824d. In accordance with federal statute, all such charges must "be just and reasonable" and any charge "that is not just and reasonable is hereby declared to be unlawful." *Id.* Under its plain language, the governing federal statute leaves scant room for ODEC to maneuver. Absent FERC's blessing, any transmission or sale of electric energy is unlawful. *See Ne. Rural Elec. Mbrshp. Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 887 (7th Cir. 2013) ("[o]nce a rate is accepted, however, the parties to the rate filing are bound to the terms of the filed rate and may not change them without giving notice and making a new filing with FERC"). A party may assert a state law claim for breach of contract, but only where that contract "and breach of that contract . . . both predate the federal tariff." *Id.* at 892. Otherwise, allowing parties — bound by a federal tariff — to bargain for gas outside the tariff rate would undermine FERC's authority to set a reasonable rate for all market 20 participants.

While ODEC's Amended Complaint studiously avoids any mention of federal law, a "plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd.*, 463 U.S. at 22. And even a cursory reading of ODEC's artfully pleaded claims reveal their inherently federal nature. First, the Amended Complaint explains that "to ensure reliability in the PJM Region during the [2014] Polar Vortex, PJM

induced ODEC to enter into binding commitments to purchase natural gas." (Am. Compl. ¶ 18.) PJM took measures "to ensure reliability" pursuant to its responsibilities under federal law. (*Id.*) Federal regulations enumerated the measures PJM was entitled to enact. And ODEC's actions in response to PJM's request were also governed by federal regulation. Second, ODEC seeks "damages in the amount of $14,925,669.58"—exactly the same sum it sought before FERC and the D.C. Circuit. (*Id.* ¶ 57.) ODEC sought a waiver from a federal tariff to recover the identical amount of monetary damages in this case, indicating that the damages it seeks arise under the same federal law: the PJM Tariff which capped ODEC's cost recovery at the filed rate of $1000 per megawatt hour.

The conclusion that ODEC's claims arise out of the PJM Tariff and Operating Agreement are borne out by the case law evaluating similar questions. As the United States Court of Appeals for the Second Circuit has stated in the context of the telecommunications market, "tariffs conclusively and exclusively enumerate the rights and liabilities of the contracting parties." *Marcus*, 138 F.3d at 56 (internal quotation marks omitted); *see also*, *Northeastern*, 707 F.3d at 893 n.5 ("In most cases challenging filed rates, a federal court will have jurisdiction . . . a federal regulation forms the basis of the contractual relationship, so any claim necessarily arises under federal law"). Here, ODEC's claims manifestly implicate the governing terms of the PJM Tariff; terms that carry the force of federal law. As a result, ODEC's seeks to alter a federal tariff, and this Court has jurisdiction.

b. ODEC's Claims "Effectively Challenge" the PJM Tariff Rate and Violate the Filed-Rate Doctrine

Because ODEC's claims for damages arise under and implicate the PJM Tariff, binding case law teaches us that those claims "effectively challenge[]" the rate set by FERC and run afoul of the filed-rate doctrine. *Bryan*, 377 F.3d at 430.

The purpose of the filed-rate doctrine "is twofold: to prevent discrimination among consumers and to preserve the rate-making authority of federal agencies." *Bryan*, 377 F.3d at 429. ODEC's state law claims would undermine both goals. First, the award of damages to ODEC would have the effect of discriminating between utility generators under the PJM Tariff. As noted above, ODEC is only one of many energy generation utilities that subscribe to the PJM Tariff. For example, Duke Energy (another PJM-contracted generation utility) similarly sought a waiver before FERC for costs incurred during the 2014 Polar Vortex. FERC denied that waiver application, and the D.C. Circuit affirmed that denial. *See Duke Energy Corp. v. PJM Interconnection, L.L.C.*, 151 F.E.R.C. P61.206, 62281 (F.E.R.C. June 9, 2015); *Duke Energy Corp., et. al, v. FERC*, 892 F.3d 416, 422 (D.C. Cir. 2018). Therefore, awarding damages to ODEC here would lead to different rates paid among utility generators. ODEC would pay one rate, while Duke Energy would pay another. As the Fourth Circuit stated in *Bryan*, "an award of damages to the customer-plaintiff would, effectively, change the rate paid by the customer to one below the filed-rate paid by other customers." 377 F.3d at 429 (quoting *Hill*, 364 F.3d at 1316).

Second, awarding damages to ODEC would contravene the rate-making authority of federal authorities and functionally require this Court to set a reasonable rate. As the Supreme Court has stated, "[i]t would undermine the congressional scheme of uniform rate regulation to allow a . . . court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act." *Ark. La. Gas Co.*, 453 U.S. at 579. By imposing a roughly fifteen-million-dollar penalty on PJM, the Court would alter FERC's judgment concerning the provision of natural gas and retroactively alter the filed-rate paid during the month of January 2014. Such retroactive ratemaking is forbidden, even by FERC. *See id.* at 578 ("[FERC] itself has no power to alter a rate retroactively").

Indeed, despite addressing cases in different procedural contexts and under different theories of recovery, every administrative agency or court to address ODEC's claims—and other similar cases arising out of the 2014 Polar Vortex—have found that the filed-rate doctrine bars the type of equitable relief ODEC seeks here. For instance, as noted above, Duke Energy sought a waiver under the PJM Tariff itself before FERC for additional costs incurred during the 2014 Polar Vortex. FERC initially determined that the "relief sought by Duke is prohibited by the filed-rate doctrine and rule against retroactive ratemaking" and denied the request for a waiver. *Duke Energy*, 151 F.E.R.C. ¶ 61,206, 62281. The D.C. Circuit affirmed that denial based on filed-rate principles. *Duke Energy*, 892 F.3d at 416.

Similarly, in ODEC's earlier regulatory request for relief from the PJM Tariff, FERC denied ODEC's

request for an equitable waiver of the tariff rate, dubbing it "a classic example of a violation of the filed-rate doctrine and the prohibition of retroactive ratemaking." *ODEC*, 154 F.E.R.C. ¶ 61,155 at ¶ 9. The D.C. Circuit, again, affirmed. *ODEC*, 892 F.3d at 1226. Accordingly, this Court must conclude that ODEC now attempts to obtain relief by "clothing [its] federal claim in state garb" meaning that the same outcome results. *Marcus*, 138 F.3d at 55 (internal quotation marks omitted). The Court follows the sound reasoning of FERC and the D.C. Circuit to find that ODEC's claims for relief arise under a federal tariff and that awarding damages would violate the filed-rate doctrine.

c. ODEC Cannot Place Its Economic Relationship with PJM During the 2014 Polar Vortex Outside the Bounds of the PJM Tariff or the Filed-Rate Doctrine

ODEC challenges the application of *Bryan* to the case at bar while appealing to equitable concerns and contending that it merely brings state law claims. ODEC also cites out-of-circuit decisions which it argues are relevant and support its position. For the reasons articulated below, the Court finds these arguments unavailing.

First, ODEC attempts to differentiate the Fourth Circuit's decision in *Bryan* because the plaintiff in *Bryan* explicitly sought a "refund" of the tariff. *Bryan*, 377 F.3d at 430. Here, in contrast, ODEC suggests that it "does not challenge or allege that the filed rate or any aspect of the Operating Agreement or Tariff is unjust or unreasonable." (Mem. Supp.

Mot. Remand. 15, ECF No. 14.) But that argument does not square with a plain reading of *Bryan*. In *Bryan*, the district court had maintained jurisdiction over and resolved all claims directly attacking the tariff. *See Bryan*, 377 F.3d at 427. The district court, however, remanded to state court a solitary claim for "failure to make certain disclosures" regarding the tariff rate in a manner constituting "unfair or deceptive acts or practices" under North Carolina law. *Id*. at 430. The district court concluded that, fairly read, the unfair trade practices claim did not *directly* challenge the tariff rate, but merely claimed that the carrier's method of collecting the tariff violated state law. *See id*. at 427-28.

The Fourth Circuit reversed remand, finding that subject matter jurisdiction existed. *See id*. at 432. While the *Bryan* court recognized that many federal courts had determined that "any award of damages . . . no matter how calculated, would violate the filed-rate doctrine," the court found it unnecessary to reach that question. *Id*. at 431.[14] Because the plaintiff had not separated damages resulting from the tariff itself and the allegedly

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[14] In *Bryan*, the Fourth Circuit referred to two cases cited in this opinion: the Second Circuit's decision in *Marcus v. AT&T Corporation* and the United States Court of Appeals for the Eleventh Circuit's decision in *Hill v. BellSouth Communications, Inc*. *See* 138 F.3d at 55; 364 F.3d at 1316. In both cases, the courts of appeals confronted virtually identical scenarios to the instant case. A plaintiff sought to bring a state law claim related to, but not directly challenging, a federal tariff. And in both cases, the Second Circuit and Eleventh Circuit found that (1) federal courts had substantial federal question jurisdiction; and, (2) the state law claims for damages challenged the tariff and required the court to impermissibly set a reasonable rate. *See id*.

unfair trade practices carried out by the defendant, the court determined that the complaint "nowhere purports to seek any form of damages other than a refund of some portion of the [tariff]." *Id*. The Fourth Circuit thus found jurisdiction and dismissed on the grounds that the plaintiff's suit sought damages in contravention of federal law. *See id*. at 432.

While ODEC does not explicitly seek a "refund" of the PJM Tariff, its claims, fairly read, seek additional payments not provided for in the PJM Tariff. Like the claims in *Bryan*, ODEC's claims for damages, even though they do not facially challenge the tariff, "would effectively impose a rate different from that dictated" by the FERC-approved tariff and are accordingly invalid. *Id*. at 430. Whether ODEC presents the identical amount in damages it seeks here as a refund or additional payments makes no discernible difference: both are of equal effect and both are equally forbidden.[15]

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[15] The subsequent history of the *Bryan* case offers support for this conclusion. After the Fourth Circuit's ruling, the plaintiff amended her complaint in state court to omit any reference to the federal tariff, and pressed only her claims for unfair trade practices. Three years later, the parties were again before the Fourth Circuit. *See Bryan v. BellSouth Communs., Inc.*, 492 F.3d 231 (4th Cir. 2007) ("*Bryan II*"). Despite the plaintiff's amendments, the *Bryan II* court found that the state law claim still possessed the "legal effect of challenging or seeking to change the terms of [a] tariff." *Id*. at 237. Thus, even where federal law was not mentioned, and the state law claims did not challenge the tariff rate itself, the Fourth Circuit found federal jurisdiction which required dismissal under the filed-rate doctrine.

As in *Bryan II*, ODEC altered its pleading in state court so as to omit any mention of federal law. But the form of the reimbursement — whether a waiver from FERC or damages in an equitable claim — cannot affect the Court's finding that a

Similarly, the nature of the state law claims do not alter the Court's analysis. While ODEC's claims for breach of contract, unjust enrichment, and negligent misrepresentation invoke different common-law theories of recovery, each involves conduct inherently related to the PJM Tariff. Because ODEC's success on these counts would effectively alter the tariff rate during the period in question, the Court may exert jurisdiction, and for the same reasons, dismiss the Amended Complaint.

Second, although ODEC asserts that it does not seek to "challenge a federal tariff," the cases it cites as support run counter to that argument. (Mem. Supp. Mot. Remand 15.) For example, ODEC relies on the United States Court of Appeals for the Seventh Circuit's decision in *Northeastern* for the conclusion that federal jurisdiction does not exist when state law claims "do not challenge a filed tariff." (*Id.*) In that case, the plaintiff sought a declaratory judgment that defendant had breached a *1977 contract* "by taking action *in 2004* that had the effect of transferring regulation of [the defendant's] rates" from a state regulatory agency to FERC. *Northeastern*, 707 F.3d at 886 (emphasis added). The Seventh Circuit found that federal question jurisdiction did not exist because "the complaint alleges a contract and breach of that contract that both predate the federal tariff." *Id*. at 892. Because the plaintiff did not challenge the rate on file with FERC but merely questioned the defendant's legal right to enter into a relationship with FERC under state law, the Seventh Circuit concluded that in such circumstances there could be no federal jurisdiction.

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transfer of money from PJM to ODEC would violate the filed-rate doctrine.

This case presents an altogether different scenario, and one that the *Northeastern* court foresaw. The Seventh Circuit indicated that the result there would be different if the complaint "alleged wrongdoing . . . based on conduct that occurred *after a* federal tariff was submitted for regulation." *Id.* (emphasis added). This comment makes plain that the Seventh Circuit's analysis turned on the fact that the 1977 contract at issue *predated* the 2004 the federal tariff. Here, the PJM Tariff was in full effect long before PJM and ODEC allegedly entered into an oral contract. Furthermore, the *Northeastern* court recognized that had the plaintiff "brought this action *as a suit for damages* or to enjoin the rate it pays under the filed tariff, the action would be barred by the filed-rate doctrine." *Id.* at 887 (emphasis added). Such a suit, in the Seventh Circuit's view, would impermissibly "alter the rate [the plaintiff] paid for electricity under the FERC tariff." *Id.* at 888. Here, of course, ODEC does not seek a declaratory judgment, but seeks damages. Thus, under any reading of *Northeastern*, federal question jurisdiction exists in this case.

Third, and finally, to the extent that ODEC appeals to equitable considerations, the Court, even if inclined to do so, cannot allow those arguments to prevail. As the Supreme Court has stated in the context of the filed-rate doctrine, "when a court is called upon to decide whether state and federal laws are in conflict, the fact that the state law has been violated does not affect the analysis." *Ark. La. Gas Co.*, 453 U.S. at 584. ODEC may very well bring meritorious claims under state law. But the merits of

those claims are not at issue.[16] ODEC's allegations effectively challenge federal law, and would require this Court to second-guess the binding judgment of a regulatory agency. "No appeal to equitable principles can justify this usurpation of federal authority." *Id.*

As part and parcel of its finding that ODEC's lawsuit improperly challenges a federal tariff, the Court concludes that it possesses jurisdiction under the *Gunn-Grable* framework. Under that framework, in order to determine whether the Amended Complaint raises a substantial federal question, this Court must ascertain whether ODEC's claims present a federal question which is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Appalachian Power Co.*, 842 F.3d at 303 (internal quotation marks omitted).

This case necessarily raises a challenge to a federal tariff that bears the force of federal law. Both Parties dispute the applicability of the PJM Tariff to the conduct at issue here—the sale of natural gas during the 2014 Polar Vortex. And that question, which implicates the structure and reliability of the Mid-Atlantic energy grid, is substantial. Finally, as evinced by the Fourth Circuit's decision in *Bryan*, that question is capable of resolution in this Court

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[16] As one court has noted, adherence to the filed-rate doctrine "is undeniably strict, and it obviously may work hardship in some cases" such as the case at bar. *Marcus*, 138 F.3d at 59. But the filed-rate "embodies the policy which has been adopted by Congress . . . to prevent unjust discrimination" and must be applied regardless of equitable reasons for departing from the filed-rate. *Id.* (internal quotation marks omitted).

without disrupting the federal-state balance Congress created.

This does not surprise. Courts have recognized that, "[i]n most cases challenging filed rates, a federal court will have jurisdiction . . . a federal regulation forms the basis of the contractual relationship, so any claim [like one here] necessarily arises under federal law." *Northeastern*, 707 F.3d at 893 n.5. That holds true here. While ODEC contends that the Amended Complaint "does not challenge or allege that the filed rate or any aspect of the Operating Agreement or Tariff is unjust or unreasonable," the inherently federal gist of the Amended Complaint speaks volumes. (Mem. Supp. Mot. Remand. 15.) The Court does not foreclose the possibility that somehow, in rare circumstances, parties bound under a federal tariff might be able to bring state law claims that do not implicate the tariff rate.[17] This, however, is not that case. ODEC's state law claims for breach of contract, unjust enrichment, and negligent misrepresentation clearly arise under, implicate, and challenge provisions of the PJM Tariff, approved by FERC. Because those state law claims "effectively challenge[]" federal law and all four prongs of the *Gunn-Grable* framework are met, they violate the filed-rate doctrine. *See Bryan*, 377 F.3d at 430. This Court has subject matter jurisdiction.

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[17] As the Second Circuit noted in *Marcus*, "there is no complete preemption without a clear statement to that effect from Congress." 138 F.3d at 55. While "federal law may dominate the consideration of most claims" relating to federal energy tariffs, "only Congress can say that federal law dominates the form of these claims as well." *Id*.

V. Conclusion

Because ODEC's claims effectively challenge a federal tariff and would require this Court to set a reasonable rate, and because these claims satisfy all factors of the *Gunn-Grable* test, the Court must dismiss the case. As the Fourth Circuit noted in *Bryan*, there is no daylight between the question of jurisdiction and dismissal in regard to claims that challenge federal tariffs. *See* 377 F.3d at 432. An action seeking to "alter" a federal rate presents a federal question. *Id.* And because any attempts to effectively alter that rate challenges federal law, "that claim must be dismissed pursuant to the filed-rate doctrine." *Id.*; *see also*, *Hill*, 364 F.3d at 1317 (finding that the district court should have both asserted jurisdiction and dismissed the complaint where plaintiff's "claims implicate[d] the filed-rate doctrine"). In light of, and consistent with, that binding precedent, the Court will dismiss ODEC's state law claims, and this action.

For the foregoing reasons, the Court will deny ODEC's Motion to Remand, and will grant PJM's Motion to Dismiss the Amended Complaint.

An appropriate order shall issue.

/s/
M. Hannah Lauck
United States District Judge
Date: 3/31/20
Richmond, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 3:19-cv-00233-MHL

Removed from Circuit Court for the
County of Henrico, Case No. CL18-3486

OLD DOMINION ELECTRIC COOPERATIVE,
Plaintiff,
v.

PJM INTERCONNECTION, L.L.C.,
Defendant.

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1331, 1441(a), and 1446, Defendant PJM Interconnection L.L.C. ("PJM"), by counsel, hereby removes the above-captioned action from the Circuit Court for the County of Henrico, Virginia, to this Court. As explained below, this Court has federal-question jurisdiction over this action under § 1331 because all of the claims in the amended complaint are federal in nature, arise under federal law, necessarily raise substantial and disputed questions of federal law, and/or have been entirely supplanted by federal law. Even if only some of the claims were federal, this Court would have supplemental jurisdiction because every claim arises from a common nucleus of operative facts. 28 U.S.C. § 1367.

I. PROCEDURAL COMPLIANCE

1. This action was pending before the Circuit Court for the County of Henrico, Virginia, case number CL18-3486. This action is appropriately removed to this Court as the United States District Court for the district and division embracing the place where the original action was filed. *See* 28 U.S.C. § 1446(a).

2. Old Dominion Electric Cooperative ("ODEC") served the amended complaint on PJM on March 15, 2019. No other pleading or summons in this action had previously been served on PJM. Accordingly, this Notice is timely filed within thirty days after the date on which PJM received an initial pleading in this action. *See* 28 U.S.C. § 1446(b)(1). PJM has not yet answered or otherwise responded to the complaint. Nor has the time to do so expired.

3. Pursuant to 28 U.S.C. § 1446(a), PJM has attached as **Exhibit A** a copy of "all process, pleadings, and orders served upon" it so far in this action — namely, the amended complaint. Copies of all other documents filed on the state-court docket, though not served on PJM, are attached as **Exhibit B**.

4. A copy of this Notice and written notification of its filing will be served on all parties of record promptly and will be contemporaneously filed with the Clerk of the Circuit Court for the County of Henrico. *See* 28 U.S.C. § 1446(d).

II. BACKGROUND

5. In the 1990s, the Federal Energy Regulatory Commission ("FERC") exercised its exclusive

authority over the sale and transmission of wholesale power to encourage the restructuring of electricity markets. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1361-65 (D.C. Cir. 2004) (Roberts, J.). Under that new structure, the electricity "grid" that transmits wholesale power is operated on a non-discriminatory basis by regional transmission organizations ("RTOs") created by the owners of transmission lines. *Id.* at 1364.

6. PJM is the "regional transmission organization and independent system operator" for the "PJM Region," which "encompasses all or parts of thirteen states in the Mid-Atlantic region of the United States, including Virginia, and the District of Columbia." Am. Compl. ¶¶ 5, 9.[1] As such, PJM "has broad responsibility relating to the supply of wholesale electric power throughout the PJM Region," including "ensuring that at all times sufficient electric power is available to meet customer demands." *Id.* ¶¶ 7, 8. PJM "exercises operational control over . . . the electrical transmission facilities belonging to its participating members." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018) ("*ODEC III* "), *cert. denied* 139 S. Ct. 794 (2019). It also "operates both energy and capacity markets." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 472 (4th Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). "The energy market is essentially a real-time market that enables PJM to buy and sell electricity to distributors for delivery within the next hour or 24 hours." *Id.* "The capacity market is a forward-looking market" that ensures electricity can

[1] For purposes of this Notice, PJM assumes but does not admit the truth of the amended complaint's factual allegations.

be made available for purchase when needed "in the future." *Id.*

7. ODEC is a "wholesale energy generation and transmission utility aggregation cooperative" that "supplies wholesale electric power" to its members. Am. Compl. ¶¶ 1, 2. ODEC alleges that it has agents in North Carolina and that those agents coordinated with PJM regarding the delivery of wholesale electricity outside of that State, including in Virginia. *See, e.g.*, *id.* ¶¶ 6, 12, 23. Those activities relating to the interstate provision of wholesale electricity form the basis of this action.

8. PJM's role as an RTO and ODEC's role as a utility are defined by the Federal Power Act and FERC rules and regulations. Pursuant to those rules and regulations, PJM has filed and FERC has approved the PJM Open Access Transmission Tariff (the "Tariff") and PJM Operating Agreement, which provide the terms and conditions governing PJM's interconnection and energy-market system. *See ODEC III*, 892 F.3d at 1227; *see also* 16 U.S.C. § 824a(a); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292-93 (2016).

9. The Tariff and Operating Agreement carry the force of federal regulations. *See Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004) ("*Bryan I* "), *cert. denied* 543 U.S. 1187 (2005); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839, *amended on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004). They also define "the entire contractual relation" between PJM and its members, including ODEC, as to the provision of wholesale electricity. *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 489 (7th Cir. 1998), *cert. denied* 524 U.S. 952 (1998). The Tariff and Operating Agreement thus

"'*conclusively and exclusively* enumerate the rights and liabilities of the contracting parties.' " *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998); *see Indeck Maine Energy, L.L.C. v. ISO New England Inc.*, 167 F. Supp. 2d 675, 687-90 (D. Del. 2001) (noting "the similarity between telephone and utility regulation" and applying *Cahnmann* and *Marcus* in the FERC utility-regulation context).

10. Pursuant to the Tariff and Operating Agreement, PJM works with generators and public load-serving utilities, including ODEC, to ensure the market can "meet customer demands" for electricity. Am. Compl. ¶ 8. Utilities bid to meet that demand through competitive auctions. *ODEC III*, 892 F.3d at 1227. Those auctions are governed by federal law, including the Tariff. For example, the Tariff sets a cap on the prices at which generators may offer their capacity to PJM in the energy market. *See id.* at 1228.

11. Some utilities are "generation capacity resources." *ODEC III*, 892 F.3d at 1227. Capacity is the capability to provide electricity when needed, rather than the electricity itself. Under the Tariff and Operating Agreement, generation capacity resources must "generate electricity whenever called upon by PJM." *Id.* During the period relevant here, ODEC's facilities were generation capacity resources. *Id.* For that reason, ODEC alleges that, if it were not able to deliver energy when requested by PJM, it would be "deemed to . . . experience[ ] a forced outage and would . . . incur[ ] a monetary penalty" under the Tariff. Am. Compl. ¶ 50.

12. In January 2014, there was a "Polar Vortex Event" in the areas of the country where PJM and ODEC operate. Am. Compl. ¶ 15. Extreme cold

caused demand for electricity to spike. *Id.* ¶¶ 15, 17. Exercising its responsibility under the Tariff and FERC regulations to "maintain [system] reliability," PJM took steps to "ensure the supply of sufficient power generation resources" to meet the increased demand. *Id.* ¶ 17; *see generally* 18 C.F.R. § 35.34. The amended complaint alleges that PJM, among other things, requested that certain ODEC generation units be available to generate electricity at various times, *see* Am. Compl. ¶¶ 23, 27, 34, 37, 41, consistent with those units' obligations as generation capacity resources to supply energy when called upon by PJM. ODEC alleges that in doing so PJM "induced" it to "purchase natural gas to run its units." *Id.* ¶ 18. ODEC alleges that it "agreed, complied with PJM's requests, and incurred significant costs" to prepare its units. *Id.* ¶ 19.

13. The amended complaint alleges that demand ultimately was not as high as anticipated. Consequently, ODEC alleges, PJM did not dispatch (*i.e.*, direct to operate) some of ODEC's units, while other units were dispatched for shorter periods than originally projected. Am. Compl. ¶¶ 25, 29, 32, 39, 42. ODEC alleges it "incurred operational and fuel costs" as a result. *Id.* ¶¶ 26, 30, 33, 36, 40, 43. ODEC also allegedly "incurred operational and fuel costs" for generation units that ran as scheduled. *Id.* ¶¶ 34-36. Some of those costs were allegedly due to an increase in the market price of natural gas to "3,330 percent higher than it had been before the Polar Vortex Event." *Id.* ¶ 45.

14. In June 2014, ODEC sought relief from FERC for the "natural gas-related costs that ODEC states it incurred as a result of its efforts to meet PJM's commitment of ODEC's Generation Capacity

Resources during the cold weather events of January 2014." *Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207, at 62285 (June 9, 2015) ("*ODEC I* "), *reh'g denied* 154 FERC ¶ 61,155 (Mar. 1, 2016) ("*ODEC II*"). ODEC could not recover those costs, however, unless FERC granted it "a waiver of certain provisions of PJM's [Tariff] and Operating Agreement" that precluded PJM from paying ODEC. *Id.*

15. Before FERC, ODEC identified three "categories of costs" for which it sought reimbursement: "(1) actual costs greater than [the Tariff's cap on rates] incurred for running units according to PJM dispatch instructions . . . ; (2) costs incurred for natural gas purchased but not burned for units PJM committed but did not dispatch . . . ; and (3) costs incurred for natural gas purchased but not burned due to PJM's curtailment of a dispatch period." *ODEC I*, 151 FERC ¶ 61,207, at 62285. ODEC based its requests for relief on the argument that it was acting at PJM's request, following its instructions and assurances with the understanding that it would be "made whole" afterwards. *Id.*

16. FERC denied relief and denied rehearing, concluding that it could not grant ODEC's requested waiver: Federal law, it held, bars retroactively changing Tariff-set rates, as would be required to pay ODEC. *See ODEC I*, 151 FERC ¶ 61,207, at 62294; *ODEC II*, 154 FERC ¶ 61,155. In so ruling, FERC noted that "there was no contract between ODEC and PJM providing for ODEC's recovery of the costs at issue," and that PJM's "generally applicable tariffs" could not in any event be modified "through a bilateral contract with a single generator" or any other "informal, private agreement." *ODEC*

II, 154 FERC ¶ 61,155, para. 22. The D.C. Circuit denied ODEC's petition for review, agreeing with FERC that granting ODEC's request would violate federal law. *ODEC III*, 892 F.3d at 1230-31. The Supreme Court denied ODEC's petition for certiorari on January 7, 2019. 139 S. Ct. 794 (2019).

17. ODEC commenced this action in the Circuit Court for the County of Henrico, Virginia, on June 5, 2018, but it served no pleading on PJM. On February 22, 2019, ODEC filed a motion to file an amended complaint, which the court granted by order on February 27, 2019. Neither the motion nor the order was served on PJM. On March 15, 2019, ODEC served the amended complaint on PJM.

18. The amended complaint asserts four claims, all based on a common nucleus of operative facts (indeed, the same facts alleged in ODEC's FERC petition). The amended complaint alleges that "PJM induced ODEC to enter into binding commitments to purchase natural gas to run its units" by "promising to make ODEC whole for its fuel and other costs associated with purchasing the natural gas." Am. Compl. ¶ 18. Based on that alleged promise and breach thereof, ODEC asserts purported state-law causes of action for breach of contract, breach of several separate contracts, unjust enrichment, and negligent misrepresentation. *Id.* ¶¶ 53-76. ODEC seeks $14,925,669.58 in damages—the same sum it previously sought in its failed FERC petition. *Compare id.* at 12 *with ODEC I*, 151 FERC ¶ 61,207 at 62285.

III. GROUNDS FOR REMOVAL

19. Removal is proper under 28 U.S.C. § 1441 because this civil action "aris[es] under the . . . laws . . . of the United States," 28 U.S.C. §1331—namely, the Federal Power Act, the Tariff, the Operating Agreement, and related federal doctrines. *See Bryan I*, 377 F.3d at 429 ("[A] filed tariff carries the force of federal law."). Those federal authorities govern "the terms of the relationship" between ODEC and PJM, and each of ODEC's claims seeks to enforce, challenge, and/or alter those terms. *Id.* at 429. The principle "that suits to enforce or invalidate tariffs arise under federal law is beyond dispute." *Id.* at 429 n.6. "A claim that seeks to alter the terms of [a] relationship . . . set forth in a filed tariff therefore presents a federal question." *Id.* at 429; *see Jacquet v. Dominion Transmission, Inc.*, No. CIV.A. 2:05-0548, 2010 WL 5487248, at *8-10 (S.D.W. Va. Dec. 30, 2010) (removal proper where complaint challenged FERC-approved tariffs); *Indeck Maine Energy*, 167 F. Supp. 2d at 690 (removal proper where a complaint "present[s] a challenge to a federally-approved tariff [approved under the Federal Power Act] in the guise of a state contractual claim").

20. The amended complaint also arises under federal law because it demands payment from PJM for wholesale electricity products at payment levels different from those set forth by the Tariff. Such a demand seeks "to alter [a] rate" set by the Tariff and to recover "damages that would effectively impose a rate different from that dictated by the tariff," both of which present federal questions. *Bryan I*, 377 F.3d at 430, 432; *see also Bryan v. BellSouth Commc'ns,*

Inc., 492 F.3d 231, 237-38 (4th Cir. 2007) ("*Bryan II*"), *cert. denied* 552 U.S. 1097 (2008) (*Bryan I* rested on "the *legal effect* of challenging or seeking to change the terms of [a] tariff" and held "the nature of the damages sought . . . was key"). Indeed, ODEC seeks to recover as damages precisely the same sum ($14,925,669.58) FERC held it could *not* recover in light of the Tariff. *See* Am. Compl. 12; *ODEC I*, 151 FERC ¶ 61,207 at 62285.

21. ODEC's assertion that the agreements it alleges were "outside the scope of " and "outside of the requirements, restrictions and protections set forth in any tariff or other regulated PJM policy or process" does not deprive this Court of jurisdiction. Am. Compl. ¶¶ 48-49. FERC has exclusive regulatory authority over the sale of wholesale electricity products, including capacity and auxiliary services. 16 U.S.C. § 824(b)(1); *see Hughes*, 136 S. Ct. at 1292. As a matter of law, the FERC-approved Tariff and Operating Agreement define the "entire contractual relation" between PJM and its utilities, including ODEC, as to the provision of wholesale electricity. *Cahnmann*, 133 F.3d at 489; *see Marcus*, 138 F.3d at 56; *Indeck Maine Energy*, 167 F. Supp. 2d at 690. ODEC's attempt at "artful pleading" does not change that its claims necessarily arise under, and are inextricably intertwined with, the Federal Power Act, the Tariff, the Operating Agreement, and related doctrines. *Indeck Main Energy*, 167 F. Supp. 2d at 685 (citing 14B Wright, Miller & Cooper, Federal Practice and Procedure § 3722 at 436 (3d ed. 1998)). Each claim, moreover, necessarily raises substantial and disputed questions of federal law and has been entirely supplanted by federal law. ODEC may not avoid federal-question jurisdiction or

removal by dressing its federal claims in state-law clothing. *See, e.g.*, *Bryan I*, 377 F.3d at 432; *Marcus*, 138 F.3d at 55; *Jacquet*, 2010 WL 5487248, at *10; *Indeck Maine Energy*, 167 F. Supp. 2d at 690.

22. Each claim necessarily presents the question whether ODEC is entitled to compensation or indemnification for relying on PJM's alleged instructions in the course of its duties under the Federal Power Act and the Tariff and the Operating Agreement, which carry "the force of federal law." *Bryan I*, 377 F.3d at 429. The claims thus "require recourse to federal law" and arise under it. *Burrell v. Bayer Corp.*, --- F.3d. ----, No. 17-1715, 2019 WL 1186722, at *6 (4th Cir. Mar. 14, 2019). ODEC's purported contract claims are premised on the theory that the promises allegedly exchanged with PJM created "binding commitments" regarding the provision of and payment for electricity products in a wholesale market. *See, e.g.*, Am. Compl. ¶ 18. Those commitments cannot be assessed or enforced without reference to the Tariff and Operating Agreement, which " '*conclusively and exclusively* enumerate the rights and liabilities of the contracting parties.' " *Marcus*, 138 F.3d at 56; *see also Cahnmann*, 133 F.3d at 488-89; *Indeck Maine Energy*, 167 F. Supp. 2d at 690. ODEC's contract claims are thus removable. *See Bryan I*, 377 F.3d at 431; *Indeck Maine Energy*, 167 F. Supp. 2d at 690.

23. The Tariff and Operating Agreement also control when and how PJM may give directives to ODEC, as well as if and when ODEC may be indemnified for costs incurred as a result of following those directives. *See Duke Energy Corp.*, 151 FERC ¶ 61,206, at 62279-80 (June 9, 2015), *petition for review denied*, *Duke Energy Corp. v. FERC*, 892 F.3d

416, 422 (D.C. Cir. 2018). They are necessary to ODEC's claims because ODEC can obtain the relief sought in the amended complaint only under the Tariff and Operating Agreement—*i.e.*, under federal law. *See Bryan I*, 377 F.3d at 431.

24. ODEC's request for payment, moreover, constitutes "an action seeking to alter" or to challenge as unfair the maximum rates permitted by the Tariff. *Bryan I*, 377 F.3d at 432; *see Bryan II*, 492 F.3d at 237-38. ODEC's unjust-enrichment claim also amounts to a challenge to the fairness of the terms of the Tariff and Operating Agreement that dictated the result of ODEC's failed FERC Petition. Such challenges necessarily raise federal questions. *See Bryan I*, 377 F.3d at 432; *see also* 16 U.S.C. § 824e; *Duke Energy Corp.*, 151 FERC ¶ 61,206, at 62268.

25. The federal issues underlying ODEC's claims are substantial, disputed, and may be entertained in a federal forum "without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004). A federal question is "substantial" when it is important "'to the federal system as a whole.'" *Burrell*, 2019 WL 1186722, at *4. ODEC itself acknowledges that the resolution of its claims could have "staggering" "practical and public policy implications" because of their interaction with the "electric power systems throughout the Mid-Atlantic region." Am. Compl. ¶ 22. Those systems are governed and controlled by federal law, making the resolution of the related federal-law issues substantial. The Federal Power

Act, *e.g.*, 16 U.S.C. §§ 824, 824a, 825p, also shows that the required "reference to [and] interpretation of federal law" in this case—including as to the Tariff and Operating Agreement—raises substantial federal questions. *Hendricks v. Dynegy Power Mktg., Inc.*, 160 F. Supp. 2d 1155, 1161 (S.D. Cal. 2001); *see also Franklin v. City of Alexandria*, No. CIV.A. 07-1011, 2007 WL 3023941, at *2 (W.D. La. Sept. 17, 2007); *N.Y. State Elec. & Gas Corp. v. N.Y. Indep. Sys. Operator, Inc.*, No. CIV.00-CV- 1526HGMGJD, 2001 WL 34084006, at *6 (N.D.N.Y. Jan. 19, 2001).

26. The substantial federal questions necessarily raised by the amended complaint are "'actually disputed.'" *Burrell*, 2019 WL 1186722, at *4. ODEC's position that it is entitled to compensation and indemnification for the costs it seeks is contrary to PJM's (and FERC's, and the D.C. Circuit's) interpretation of the Tariff, Operating Agreement, Federal Power Act, and related federal doctrines.

27. Congress has assigned the entire wholesale energy space to the federal system and specifically provided for exclusive federal jurisdiction. *See* 16 U.S.C. §§ 824(b), 825p. It is therefore appropriate for federal courts to resolve the federal questions presented here. *See Grable*, 545 U.S. at 319-20.

28. Congress has also foreclosed state-law remedies for claims like ODEC's in favor of exclusive federal ones. The claims here should have been brought in federal court—and in substance were, on review of a FERC ruling refusing to authorize a departure from the Tariff. *See ODEC III*, 892 F.3d at 1226. The claims necessarily implicate and arise from federal regulations regarding the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate

commerce," areas that Congress removed from state regulation. 16 U.S.C. § 824(b). The Federal Power Act provides numerous and exclusive methods through which parties like ODEC may seek to enforce, challenge, or be excused from the Federal Power Act, Tariff, and/or Operating Agreement. *See, e.g.*, 16 U.S.C. §§ 824(b), 824d(a), 824d(d), 824e(a), 825*l*, 825p. Permitting this action to proceed under state law would "usurp [FERC's] authority to determine what rate is reasonable." *Bryan I*, 377 F.3d at 430. ODEC cannot circumvent the Federal Power Act's exclusive methodology for rate changes, including the very system for requesting waivers that ODEC has already employed, by asserting state-law claims. *See* 16 U.S.C. § 824d(d). Federal law provides ODEC's exclusive remedies, leaving no room for state analogues.

29. To the extent that ODEC's claims seek "to enforce [a] liability or duty created by" the Federal Power Act, the Tariff, or the Operating Agreement, the claims arise under federal law and exclusively within federal jurisdiction, providing grounds for removal. 16 U.S.C. § 825p; *see Hendricks*, 160 F. Supp. 2d at 1161 (holding that removal is proper where claims "fall[ ] within the express terms of a statute granting . . . exclusive jurisdiction over the subject matter of the claim").

30. Finally, in the event that this Court later finds that some but not all of the claims arise under federal law pursuant to § 1331, this Court has supplemental jurisdiction over any non-federal claim because every claim in the amended complaint shares a common nucleus of operative facts. 28 U.S.C. § 1367.

IV. CONCLUSION

31. This action is hereby removed from the Circuit Court for the County of Henrico, Virginia, case number CL18-3486, to the United States District Court for the Eastern District of Virginia, Richmond Division.

Dated: April 3, 2019

/s/ Robert M. Rolfe
Robert M. Rolfe (VSB #15779)
Brian A. Wright (VSB #82827)
HUNTON ANDREWS KURTH LLP
951 E. Byrd Street
Riverfront Plaza, East Tower
Richmond, Virginia 23219
Tel: (804) 788-8200
Fax: (804) 788-8218
rrolfe@huntonak.com
wrightb@huntonak.com
Counsel for PJM Interconnection, LLC

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF HENRICO

Case No. CL18-3486

OLD DOMINION ELECTRIC COOPERATIVE,
Plaintiff,

v.

PJM INTERCONNECTION L.L.C.,

Serve: The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, Delaware 19801

Defendant.

AMENDED COMPLAINT

The Plaintiff, Old Dominion Electric Cooperative ("ODEC"), states the following as its Complaint:

THE PARTIES

1. ODEC is a not-for-profit wholesale energy generation and transmission utility aggregation cooperative organized and operated under the Virginia electric cooperative act set forth as Chapter 9.1 of Title 56 of the Virginia Code. It is wholly owned by eleven not-for-profit member electric distribution cooperatives: A&N Electric Cooperative, BARC Electric Cooperative, Choptank Electric

Cooperative, Community Electric Cooperative, Delaware Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative and Southside Electric Cooperative (the "Member Cooperatives").

2. ODEC supplies wholesale electric power to its Member Cooperatives on a long-term, all-requirements basis. The Member Cooperatives in turn provide retail electric power to the member consumers ("Member Consumers") who are served by and own each Member Cooperative. Collectively, ODEC's Member Cooperatives serve approximately 580,000 retail electric meters, representing a total population of approximately 1.4 million people.

3. ODEC is owned 100% by the Member Cooperatives. The Member Cooperatives are owned 100% by their Member Consumers. Neither ODEC nor the Member Cooperatives have any investor shareholders.

4. ODEC owns and operates three combustion turbine facilities, including the Rock Springs Generation Facility ("Rock Springs"), the Louisa Power Station ("Louisa") and the Marsh Run Power Station ("Marsh Run").

5. PJM Interconnection, L.L.C. ("PJM") is a regional transmission organization and independent system operator.

6. The Alliance for Cooperative Energy Services Power Marketing, LLC ("ACES") is and was at all times the relevant agent for ODEC and known by PJM to be so. At the time of the events described below, ACES' representatives were located in North Carolina.

7. PJM has broad responsibility relating to the supply of wholesale electric power throughout the PJM Region.

8. One of PJM's critical responsibilities is ensuring that at all times sufficient electric power is available to meet customer demands in the PJM Region ("Load").

9. The "PJM Region" encompasses all or parts of thirteen states in the Mid-Atlantic region of the United States, including Virginia, and the District of Columbia.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the Defendant, PJM, pursuant to Va. Code § 8.01-328.1.

11. By its actions described herein, P JM purposefully avails itself of the privilege of conducting activities within Virginia, thus invoking the benefits and protections of Virginia's laws; reaches into Virginia to initiate business; deliberately engages in significant and long-term business activities in Virginia; and has in-person contact with residents of Virginia regarding its business in Virginia.

12. ODEC's claims arise out of activities occurring in and directed at Virginia, because, among other things, performance of contractual duties occurred in Virginia.

13. ODEC has its principle place of business at 4201 Dominion Boulevard, Glen Allen, Virginia 23060, and resides in Henrico County, Virginia.

14. Venue is proper in the Henrico County pursuant to Va. Code § 8.01-262 because there exists a practical nexus to this forum, including, but not

limited to, the following: (i) fact witnesses are located in Henrico County; (ii) ODEC's principal office from which it regularly and systematically conducts business activities is located in Henrico County; and (iii) PJM regularly conducts substantial business activity in Henrico County.

FACTS

The January 2014 Polar Vortex

15. During January 2014, the PJM Region was among those portions of the United States that experienced unique cold weather conditions known as the "Polar Vortex Event." Temperatures fell to unprecedented levels, and low temperature records were broken across the United States.

16. The Polar Vortex Event played a significant role in the US Economy contributing to a 2.9% drop in GDP. More than a dozen deaths were attributed to the cold wave in the United States.

17. During the Polar Vortex Event, PJM was forced to undertake extraordinary measures to ensure the supply of sufficient power generation resources to meet Load requirements and maintain reliability.

PJM's Failed Assurances to ODEC

18. Among other measures to ensure reliability in the PJM Region during the Polar Vortex, PJM induced ODEC to enter into binding commitments to purchase natural gas to run its units under circumstances that ODEC would not have run or been obliged to run those units. PJM induced this

action by ODEC by promising to make ODEC whole for its fuel and other costs associated with purchasing the natural gas.

19. ODEC agreed, complied with PJM's requests, and incurred significant costs, in reliance on PJM's promises.

20. PJM did not make ODEC whole for its costs, notwithstanding demand, and the outstanding amounts due and owing from PJM total, after mitigation, $14,925,669.58.

21. If PJM does not fulfill its promises to pay ODEC's costs, then those costs will be paid by ODEC's Member Cooperatives who in turn must collect them from their Member Consumers.

22. If PJM does not fulfill its promises to pay ODEC's costs, then PJM will have no credibility or effective authority to make any future promises under similarly extraordinary circumstances to prevent sudden, widespread, and potentially catastrophic failure of electric power systems throughout the Mid-Atlantic region. The adverse practical and public policy implications for public safety are staggering.

23. On January 7, 2014, PJM contacted ACES and requested that ODEC run Rock Springs Units 1 and 2 on January 7, 2014, starting at 6:00 p.m. and until 10:00 a.m. on January 8.

24. In accordance with the parties' agreement and in reliance on PJM's assurances, ODEC purchased gas to run Rock Springs Units 1 and 2 for the requested hours.

25. PJM later cancelled its request that ODEC run Rock Springs Units 1 and 2.

26. ODEC incurred operational and fuel costs for Rock Springs Units 1 and 2 at the request of PJM for

which ODEC has not been paid totaling, after mitigation, $1,783,036.92.

27. On January 22, 2014, PJM dispatch contacted ACES and requested that ODEC run Louisa Units 1 through Sand Marsh Run Units 1 through 3 on January 23, 2014, starting at 5:00 a.m. and until 10:00 a.m. and then starting at 4:00 p.m. and until 9:00 p.m.

28. In accordance with the parties' agreement and in reliance on PJM's assurances, ODEC purchased gas to run Louisa Units 1 through 5 for the requested hours.

29. PJM later cancelled its request that ODEC run Louisa Units I through 5.

30. ODEC incurred operational and fuel costs for Louisa Units 1 through 5 at the request of PJM for which ODEC has not been paid totaling, after mitigation, $3,481,385.04.

31. In accordance with the parties' agreement and in reliance on PJM's assurances, ODEC purchased gas to run Marsh Run Units 1 through 3 for the requested hours.

32. PJM later cut short the requested hours for ODEC's running Marsh Run Units I through 3.

33. ODEC incurred operational and fuel costs for Marsh Run Units 1 through 3 at the request of PJM for which ODEC has not been paid totaling, after mitigation. $971,185.08.

34. On January 22,2014, PJM contacted ACES and requested that ODEC run Rock Springs Units 1 and 2 on January 23, 2014, starting at 10:00 a.m. and until 10:00 p.m.

35. In accordance with the parties' agreement and in reliance on PJM's assurances, ODEC

purchased gas to run Rock Springs Units 1 and 2 for the requested hours.

36. ODEC incurred operational and fuel costs for Rock Springs Units 1 and 2 at the request of PJM for which ODEC has not been paid totaling, after mitigation, $2,098,713.80.

37. On January 27, 2014, PJM contacted ACES and requested that ODEC run Rock Springs Units 1 and 2 on January 28, starting at 10:00 a.m. and until 10:00 a.m. on January 29.

38.In accordance with the parties' agreement and in reliance on PJM's assurances, ODEC purchased gas to run Rock Springs Units 1 and 2 for the requested hours.

39. PJM later cancelled its request that ODEC run Rock Springs Units 1 and 2.

40. ODEC incurred operational and fuel costs for Rock Springs Units l and 2 at the request of PJM for which ODEC has not been paid totaling, after mitigation, $6,529,372.70.

41. On January 27, 2014, PJM contacted ACES and requested that ODEC run Louisa Units 1, 2 and 3 on January 28, starting at 5:30 a.m. and until 10:00 a.m.

42. PJM later cut short the requested hours for ODEC's running Louisa Units 1, 2 and 3.

43. ODEC incurred operational and fuel costs for Louisa Units I through 3 at the request of PJM for which ODEC has not been paid totaling, after mitigation, $61,976.04.

44. Throughout the communications related to the events described abov, ACES, on behalf of ODEC, confirmed orally (which was tape recorded), and in writing PJM's promises that if ODEC procured lhe gas necessary to run the units then

PJM would pay ODEC for the costs it incurred to procure the gas and ready the units.

45. Throughout the communications related to the events described above, ACES and PJM had specific discussions regarding the fuel and operational costs that caused ACES and PJM to have a reasonably certain understanding of the terms of their agreement that was definite and certain, or capable of being made so, including specific facts regarding the costs that ODEC would incur to perform the agreement in reliance on PJM's assurances. Both PJM and ODEC knew at the time of these discussions that the price of natural gas was 3,330 percent higher than it had been before the Polar Vortex Event was forecast and began.

46. When ODEC made a request for reimbursement in accordance with the procedures PJM requested, PJM confirmed that payment would be made. Only later did PJM deny payment to ODEC.

47. Had PJM not agreed and promised to pay ODEC for its costs incurred to procure the necessary natural gas in accordance with PJM's requests, ODEC would not have agreed to incur, and would not have incurred, the costs for which it seeks reimbursement in this action.

48. The agreements, understandings, promises and assurances described herein were made outside the scope of any tariff or other regulated PJM policy or process.

49. Based on the extreme nature of the circumstances, ODEC and PJM, expressly and by their actions, entered into a transaction that was outside of the requirements, restrictions and

protections set forth in any tariff or other regulated PJM policy or process.

50. Had ODEC not agreed to PJM's request to procure gas in advance (which it reasonably did), ODEC could have waited to attempt to procure gas if and when PJM physically dispatched the units in the real-time market. It was possible (a) that PJM may not have physically dispatched the units; (b) that, if PJM physically dispatched the units, ODEC could have procured gas at a lower price at that later time; (c) that, if PJM physically dispatched the units, ODEC could have used oil to run the Louisa and Marsh Run units; and (d) that, if PJM physically dispatched the units, ODEC could have been unable to deliver the requested energy due to its inability to procure the necessary natural gas, in which case ODEC would have been deemed to have experienced a forced outage and would have incurred a monetary penalty. ODEC was aware at all relevant times that the approximate size of such penalty would have been far less than the actual costs ODEC would incur and did incur. It was more important to PJM to ensure the reliability of electrical service in the PJM Region during the Polar Vortex Event than to avoid paying for higher priced gas or to risk unreliability of the electrical service.

51. Accordingly, ODEC and PJM agreed, among other things, that ODEC would give up its option of waiting to procure gas if and when PJM physically dispatched the units, in exchange for PJM's promise to make ODEC whole for the gas ODEC prospectively procured.

52. The costs which PJM induced ODEC to incur, if not reimbursed as promised, will be imposed on

the Member Cooperatives and, ultimately, on their Member Consumers.

COUNT I: BREACH OF CONTRACT

53. ODEC restates and incorporates all of the allegations set forth above.

54. By their actions described above, PJM and ODEC formed a valid, legally enforceable, express contract.

55. The terms of the contract between ODEC and PJM were reasonably certain, definite, and complete.

56. PJM has materially breached the contract by failing to pay ODEC the amounts owed.

57. PJM's breach has caused ODEC outstanding damages totaling $14,925,669.58.

COUNT II: BREACH OF CONTRACT-SEPARATE CONTRACTS

58. ODEC restates and incorporates all of the allegations set forth above in paragraphs 1 through 52.

59. ODEC brings this Count II: Breach of Contract-Separate Contracts in the alternative.

60. By their actions described above, PJM and ODEC formed several separate, valid, legally enforceable, express contracts. The several separate express contracts include, without limitation: (i) PJM's January 7, 2014 request, and ODEC's agreement, that ODEC run Rock Springs Units 1 and 2 on January 7, 2014, starting at 6:00 p.m. and until 10:00 a.m. on January 8, 2014; (ii) PJM's January 22, 2014 request, and ODEC's agreement, that ODEC run Louisa Units 1 through 5 and Marsh

Run Units 1 through 3 on January 23, 2014, starting at 5:00 a.m. and until 10:00 a.m. and then starting at 4:00 p.m. and until 9:00 p.m.; (iii) PJM's January 22, 2014 request, and ODEC's agreement, that ODEC run Rock Springs Units 1 and 2 on January 23, 2014, starting at 10:00 a.m. and until 10:00 p.m.; (iv) PJM's January 27, 2014 request, and ODEC's agreement, that ODEC run Rock Springs Units 1 and 2 on January 28, starting at 10:00 a.m. and until 10:00 a.m. on January 29; and (v) PJM's January 27, 2014 request, and ODEC's agreement, that ODEC run Louisa Units 1, 2 and 3 on January 28, starting at 5:30 a.m. and until 10:00 a.m.

61. The terms of the contracts between ODEC and PJM were reasonably certain, definite, and complete.

62. PJM has materially breached each of the contracts by failing to pay ODEC the amounts owed.

63. PJM's breaches have caused ODEC outstanding damages totaling $14,925,669.58.

COUNT III: UNJUST ENRICHMENT

64. ODEC restates and incorporates all of the allegations set forth above in paragraphs 1 through 52.

65. ODEC brings this Count III: Unjust Enrichment in the alternative.

66. By its actions described above, ODEC conferred a measurable benefit and valuable service on PJM, which PJM consciously accepted with full knowledge of the benefit for which PJM should have expected to pay ODEC, and for which there was an expectation of payment. The service was not conferred officiously or gratuitously.

67. PJM retained the benefit without paying for its value, under such circumstances as to make it inequitable for PJM to retain the benefit without the payment of its value, to the detriment of ODEC, the Member Cooperatives, and the Member Consumers.

68. ODEC is entitled to be paid by PJM for the value of the service provided, in an amount to be determined at trial but not less than $14,925,669.58.

COUNT IV:
NEGLIGENT MISREPRESENTATION

69. ODEC restates and incorporates all of the allegations set forth above in paragraphs 1 through 52.

70. ODEC brings this Count IV: Negligent Misrepresentation in the alternative.

71. By its actions described above, ODEC justifiably relied to its detriment on PJM's representations made to ODEC's agent, ACES, that it would pay ODEC its costs incurred in procuring the gas and making the units available to run as requested.

72. PJM intended that ODEC would act upon PJM's representations and knew that ODEC was relying on PJM's representations, which were erroneous and caused loss or injury to ODEC.

73. Such false representations by PJM were made negligently and without reasonable care.

74. PJM owed ODEC a duty of reasonable care, given the nature of the parties' relationship and the attendant circumstances, but PJM's informing ODEC that it would pay ODEC was information prepared without reasonable care.

75. Had PJM not misrepresented to ODEC that it would pay ODEC its substantial costs incurred, ODEC would not have incurred the $14,925,669.58 in costs claimed in this action. ODEC relied on PJM's misrepresentations, and such reliance damaged ODEC.

76. PJM's negligent representation has caused ODEC damages totaling $14,925,669.58.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, Old Dominion Electric Cooperative, respectfully requests that the Court enter an Order awarding the following relief:

1. On Count I: Breach of Contract, judgment in favor of Old Dominion Electric Cooperative and against PJM Interconnection, L.L.C.;

2. In the alternative, on Count H: Breach of Contract-Separate Contracts, judgment in favor of Old Dominion Electric Cooperative and against PJM Interconnection, L.L.C.;

3. In the alternative, on Count III: Unjust Enrichment, judgment in favor of Old Dominion Electric Cooperative and against PJM Interconnection, L.L.C.;

4. In the alternative, on Count IV: Negligent Misrepresentation, judgment in favor of Old Dominion Electric Cooperative and against PJM Interconnection, L.L.C.;

5. An award of damages in the amount of $14,925,669.58;

6. Pre- and Post-judgment interest on all amounts awarded;

7. Old Dominion Electric Cooperative's costs; and

8. Such other relief as the Court deems appropriate.

TRIAL BY JURY DEMANDED

Dated: February 22, 2019

OLD DOMINION ELECTRIC COOPERATIVE

/s/ C. Mitch Burton, Jr.

James Patrick Guy II (VSB Mo. 31362)
Andrew K. Clark (VSB No. 45269)
C. Mitch Burton Jr. (VSB No. 80190)
LECLAIRRYAN, PLLC
919 E. Main Street, 24th Floor
Richmond, Virginia 23219
Telephone: (804) 545-1514
Facsimile: (804) 270-4715
james.guy@leclairryan.com
andrew.clark@leclairryan.com
mitch.burton@leclairryan.com

Attorneys for Old Dominion Electric Cooperative