'Why change?' Monopoly and competition in the southeastern U.S. electricity system

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Abstract (200 words)

While much of the U.S. electricity system moved to deregulated markets in the late 1990s, states in the southeastern U.S.—home to the nation's largest, most valuable, and most polluting utilities—chose to retain regulated monopolies. In this paper, we draw on interviews with regulators, environmental organizations, lobbyists, and utility executives to examine how utilities in the southeastern U.S. have maintained their position as monopolies in the face of calls for competition in the 1990s and again in the 2020s. We ground our inquiry in geographical political economy, with attention to the role that law plays in balancing monopoly and competition in electricity provision and capitalism more broadly. Our research suggests that the cultural political economy of energy regulation in the southeast has played a central role in enabling electric utilities to maintain their monopoly position, with utilities using their relationships with regulators to parlay their monopoly preference into narratives of monopoly-as-consumer-protection. We therefore offer insights regarding long-debated mechanisms of regulatory capture, highlighting how the structure of public utility law creates opportunities for political and personal relationships to overpower general ideological commitments to competition. These findings demonstrate *how* law is deployed as a mediating tool of capitalist relations.

Keywords: Monopoly, competition, energy, electricity, regulatory capture

Introduction

In March 2020, as the world began to shut down from the COVID-19 pandemic, we sat in the office of a long-time state electricity regulator in the southeastern U.S. We were interested in why states in the region had opted to retain traditionally regulated electricity systems during the late 1990s rather than joining much of the U.S. in deregulating their electricity markets. The answer, we discovered, was wrapped up in the convoluted electricity politics of the southern U.S. Our interviewee—a sitting commissioner charged with regulating one of the largest regulated monopoly corporations in the world—confidently claimed that the "least regulation is the best regulation." Yet the same commissioner, a self-described "for-profit person," once worried that attending presentations about deregulating the electricity industry in the late 1990s might "poison my mind." And though he spoke freely about "stealing" best regulatory practices from other states, he noted in reference to the deregulation experiences in California that "when you know what's in the snake pit, you don't stick your head in."

After spending 2018–2021 conducting interviews with current or former public service commissioners, environmental organizations, industrial lobbyists, and utility executives about why the southeast remains traditionally regulated, our conclusion was similar to one that political economists as varied as Adam Smith, Karl Marx, and David Harvey have come to: being pro-business and especially for-profit does not necessarily mean being pro-competition (Christophers 2020). Indeed, despite electric utilities' historic and contemporary claims about the virtues of free enterprise and for-profit industries (Harrison 2017), most would prefer to remain as regulated monopolies. Electric utilities apparently enjoy, in Harvey's (2015, 140) words, "the

certainties, the quiet life and the possibility of leisurely and cautious changes" that come along with the guaranteed profits of monopoly.

The widespread electricity industry deregulation during the late 1990s was a shift away from what we call traditional utility regulation. Under traditional regulation, a state commission oversees the rates and practices of vertically integrated utilities that control all aspects of electricity generation, transmission, distribution, and retailing within their monopoly service territories. The shift that occurred in much of the U.S. electricity system was towards what scholars interchangeably refer to as 'deregulation' or 'restructuring'[i] (Borenstein and Bushnell 2000)—an arrangement in which utilities and/or independent generators bid to sell electricity into centralized wholesale markets. While restructured electricity markets in the U.S. have been the subject of intense criticism and are not free from the exercise of monopoly power (Borenstein and Bushnell 2015; Welton 2021), they have to varying degrees introduced forms of competition that have facilitated firm entry, exit, and technological change (Gifford, Larson, and Lunt 2017).

States that restructured typically did so in the face of utility resistance. Nevertheless, in most of the country, the zeal for reform and competition overpowered utility objections. In the U.S. South, the story is different: market reform has been a political non-starter, practically dead upon arrival—even as the region has witnessed substantial utility mismanagement and poor decision-making in recent decades.

This paper interrogates the regional dynamics that have made the southeast repudiate markets. More specifically, we are interested in *how* utilities in the southeastern U.S. have been able to

maintain their position as traditionally regulated monopolies. This question has received surprisingly little attention, as most scholars have turned their attention to marketized regions in recent years. Yet fully one-third of the country remains traditionally regulated in ways that produce a unique set of political constraints and possibilities for consumer welfare and the clean energy transition.

What makes the preference for monopoly amongst southern regulators and utilities perplexing is that it does not fit neatly into any single conservative political economic ideology. It is certainly not neoliberal, as that movement was at the center of the push for deregulation. One potential parallel could be the 'Law and Economics' movement associated with Robert Bork, who supported monopoly and vertical integration so long as consumers did not pay higher prices (Bork 2021). Yet monopoly obtained by state regulation – rather than private monopoly obtained by competitive means – was anathema to Bork and his followers, as it represented a state-sponsored infringement on competitive market processes (Trebing 1976). Indeed, proponents of the Law and Economics movement were themselves ardent supporters of the U.S. wave of electricity deregulation.

The ideological inconsistency of Southern regulators and politicians—pro-market and pro-utility regulation at the same time—points to the need for a richer, more complex explanation, which we aim to supply here. We ground our inquiry in critical geographical political economy and are especially interested in the roles that overlapping and contestatory forms of monopoly and competition play in the political economy of U.S. electricity provisioning. Christophers (2016a) theorizes that capitalism, as a political-economic system, requires a balance to be maintained: too

much competition cuts into profits and can therefore be ruinous to capitalist firms, while too much monopoly can lead to excessive profits at the expense of capital as a whole. Law often plays the key intermediating role between these two poles, with Christophers (2016a) demonstrating how antitrust and intellectual property law have been deployed over time to maintain the competition-monopoly balance. In contrast, while acknowledging the importance of law in striking this balance, Jessop (2016, 2545) urges further examination of how some "imaginaries and paradigms come to be selected in a particular conjunction" and ultimately translated—or, in our case, *not* translated—into laws, judicial decisions, and/or state interventions.

Our analysis builds from Christophers and Jessop but adds an important theoretical dimension that stems from our empirical focus on electricity. As Christophers (2016a) would suggest, law is essential to the story of enduring energy monopoly in the southeast. But neither antitrust nor intellectual property law has featured centrally; instead, it is the field of public utility law that has been critical in legitimizing monopoly electric utilities in the region (Bonbright 1961). Our focus on public utility law illuminates different things. Whereas Christophers draws out the temporal dynamism and contingency of antitrust and intellectual property law, our conceptualization of public utility law as a mediating force in capitalism highlights the *relational* nature of energy lawmaking.

Public utility law has been described as akin to a long-term contractual arrangement, involving a limited set of repeat players with deep financial and political investment in the outcomes, whereas these outcomes often have limited public salience (Priest 1993). These long-term

arrangements, in turn, contribute to an oft-observed critique of public utility regulation: its tendency toward regulatory capture. Yet nearly a century after scholarly conversations began about the possibility of regulatees bending public utility regulation to their own ends (Gray 1940), there remains a lack of clarity about the means of capture, extent of capture, results of capture, and best responses to capture—prompting recent calls for "better theory and better empirics" on "the mechanisms through which special interests influence policy" (Lancieri and Zingales 2021). Our research offers much-needed empirical and methodological richness to these debates, tying them to the broader conversation about the cultural forces at play in "law's practical materialization" (Christophers 2016a, 13).

As we explain, understanding how relationships are often central to balancing competition and monopoly in the energy sector – via the relational forum that is public utility law – opens up new possibilities for reform, even as it reinforces the difficulties of changing an entrenched system like the US Southeast's electricity grid. Our research reveals that utilities have used the apparent stability of public utility law's regulation of utility rates and practices as a powerful talking point against the introduction of competition. The legitimizing role of public utility law, in turn, raises provocative questions—in the vein of Jessop (2016)—as to why ostensibly 'free market' state officials would feel such affinity toward, and protectiveness of, regional electric utilities.

Our research suggests that the *cultural* political economy of energy regulation in the southeast has played a central role in maintaining regulated monopolies. There is a demonstrable 'coziness' (in the words of one interviewee) between regulators and regulatees in the region. Yet the story is not a simple tale of regulatory capture, with regulators acting against the public

interest to forward industry's agenda for their related personal gains (Stigler 1971). The legislators and regulators that we interviewed genuinely believed they were doing the right thing for the region in rejecting marketization—in terms of affordability, grid reliability, and industrial policy. That is partly because electricity executives—frequently through personal relationships with regulators and legislators (Kwak 2013)—have successfully parlayed their preference for the stability of regulated monopoly into a regional narrative of regulated monopoly-as-consumer-protection that has left few advocates for change. But this narrative only works because of durable—although not always directly articulated—regulatory commitments to public utility law as encoding economic justice concerns, rather than merely serving as a tool for mimicking the results of competition under natural monopoly characteristics (Boyd 2018).

In what follows, we build our argument by examining two time periods of critical importance: the time surrounding the major restructuring movement during the late 1990s and early 2000s, and a recent renewed interest in deregulation in the southeastern U.S. In the past few years, gross mismanagement of nuclear projects has ruptured longstanding trust between policymakers and utilities in some southeastern states. As we describe, this relational rupture has been a key driver of a reexamination of the merits of competition in the region. Interestingly, this latest battle pits utilities against environmental and renewable energy advocates who believe that greater competition in the southeastern U.S. will facilitate more renewable energy integration. But even with this new set of advocates, understaffed and underinvested state institutions and long-ingrained power relations have limited pro-competitive reforms in the Southeast, suggesting the durability of southern energy regulatory culture.

Methods

Our analysis focuses on the states of North Carolina, South Carolina, Georgia, and Florida. These states' investor-owned utilities are some of the largest and most influential in the U.S. (see Table 1). Duke Energy has grown from its initial base in central North and South Carolina by acquiring smaller utilities in the southeast, as well as additional subsidiaries in the midwestern U.S. It is now one of the largest utilities in the U.S. in terms of customers served and, as of 2020, had the highest total carbon emissions of any utility in the U.S. The second most polluting utility is the Southern Company, a Georgia-based utility holding company that includes Georgia Power, Alabama Power, and Mississippi Power in its portfolio. The southeast is also home to the most valuable utility in the U.S. in terms of market capitalization, Florida-based NextEra Energy. The final large investor-owned utility in the states we focus on is Virginia-based Dominion Energy, which acquired South Carolina-based SCANA, the parent company of South Carolina Electric and Gas, in 2018 (Energy Information Administration 2021; M.J. Bradley & Associates 2021).

[Table 1 about here]

Between 2018 and 2021 we conducted twenty semi-structured interviews (Dunn 2003) with current and former high-ranking stakeholders in the southeastern U.S. electricity industry. We gained access to this group by using professional and university contacts, and initially targeted retired stakeholders in the hopes that this group would be more forthright in their answers. Subsequent participants were identified using a mix of snowball and purposive sampling. As shown in Table 2, our interviewees included utility executives, former regulators, legislators,

industrial lobbyists, and environmental advocates in each of the case study states—each of whom was an active participant in either historic or contemporary conversations around deregulating (or in some cases, both). This composition allowed us to engage with a representative mix of stakeholders that were pushing for deregulation (e.g., environmental groups and industrial lobbyists) and those that sought to maintain the status quo (e.g., utility executives and their regulatory and legislative allies).

[Table 2 about here]

Interviews were recorded, but in keeping with recommendations for interviewing elites (W. S. Harvey 2011), interviewees were granted anonymity. Interviews were initially conducted in-person, but after the start of the COVID-19 pandemic were conducted via videoconferencing software. Occasionally, some of our questions on sensitive topics prompted interviewees to ask to stop the recording before answering. In these situations, interviewees allowed us to continue taking handwritten notes. As the excerpts from our interviews demonstrate, most participants were extremely forthright about their experiences and decisions.

All interviews were transcribed and coded in Dedoose using a flexible coding scheme (Deterding and Waters 2021). Flexible coding involves creating thematic codes that identify when an interviewee is discussing a particular topic (i.e., utilities' views on deregulation; arguments in favor of monopoly) and analytic codes that link interview excerpts with theoretical and conceptual points of interest (i.e., regulatory capture; unique Southern politics). The

development of analytic codes was aided by the creation of short memos in which we sought to relate interview data to key theories and concepts.

Our interviews are supplemented by a range of archival data, including articles from regional newspapers that helped guide our interviews and ensure that we covered key moments in the restructuring movement (for more detail see (Harrison and Welton 2021)). We also collected and analyzed regulatory filings made by utilities and intervenors both in anticipation of our interviews and also as a result of key moments mentioned by interview participants. Finally, we draw on white papers and other policy documents related to new and ongoing efforts to restructure southern electricity markets starting in the late 2010s.

Electricity and Monopoly

Monopoly and public utility regulation

The U.S. South has long been characterized by distinctive patterns of uneven development, most notably in the persistent racialized poverty that is a remnant of plantation agriculture (Woods 1998) and a 20th century industrial recruitment strategy that prioritized non-union and low wage labor (Tomaskovic-Devey and Roscigno 1997). Investor-owned electric utilities were a crucial part of this recruitment strategy. Eager to build up their customer base, utilities often worked hand-in-hand with state actors and used the promise of low electricity rates to lure branch plants away from northern industrial centers. By the middle of the 20th century, electric utilities had

developed large customer bases and a powerful lobbying apparatus that allowed them to become some of the most influential political actors in southern states (Harrison 2017).

Investor-owned utilities across the U.S. used this power to secure for themselves a comfortable existence under state public utility laws. However, the philosophical origins of public utility law stretch beyond simply granting monopoly priveleges to private enterprises and using regulation to replicate the results of competition (i.e., low price, reliable service). Public utility law has roots in the common law duty to serve (historically ascribed to innkeepers and ferries) and in the related idea that the operation of some businesses is integral to the public interest. These businesses have long been required to take all comers and to charge a 'just price'—requirements that have been translated into a central concern on the part of U.S. utility regulators for ensuring 'just and reasonable' rates (Boyd 2018). These fundamental justifications for public utility law have co-existed, at times uneasily, alongside a dominant 20th century justification for public utility regulation grounded in "natural monopoly," or the theory that electricity is a market with increasing returns to scale, in which a single firm is preferable (Mosca 2008).

The belief that electricity was best provided by monopolies was a constant through much of the 20th century. Electric utilities—whether publicly or privately owned—were granted exclusive franchises and therefore did not compete for their customers. For investor-owned utilities, this meant that their business model was guided by what Hirsh (1999, 1) terms the "utility consensus": in exchange for an exclusive right to sell electricity, utilities would pass along the 'benefits of monopoly' to their customers by providing good service and low-cost electricity. The core method of constraining these monopoly enterprises became state public utility

regulation, under which a state commission would regulate electricity rates to allow utilities no more than a reasonable return on invested capital.

However, as in other parts of the U.S. economy, the regulation of the electricity system came under scrutiny during the 1980s. As Boyd (2018, 727) recounts, the deregulation movement started as a largely ideological project predicated on "the widespread embrace of markets, combined with a sustained critique of economic regulation." The partial success of public utility deregulation was rooted, Boyd continues, in convincing consumers that there was more danger in "the pathologies of regulation and rent-seeking by regulated firms" than in "the vagaries of the market."

Importantly, these critiques of *regulated* monopolies should not be read as critiques against monopoly. Indeed, influential economists from the Austrian and Chicago Schools saw little wrong with monopoly, so long as those monopolies were gained in contestable markets (Mosca 2008). It is therefore on the issue of *regulated* markets, rather than simply monopoly, that the ideological critiques of of the electricity sector came to a head.

Despite the broad calls for deregulation in the electricity sector, initial analysis by neoclassical economists pointed to significant challenges. Even the so-called architects of deregulation Paul Joskow and Richard Schmalensee (1983) initially provided only a tepid endorsement of moving away from regulated electricity markets (Özden-Schilling 2021; Phillips 1984). It was only with technological advances in the late 1980s (i.e., efficient natural gas turbines able to out-compete other aging sources of electricity) that a shift towards competitive production and distribution in

the previously monopolized electricity system seemed possible (Hirsh 1999; Özden-Schilling 2021). To facilitate competition, some states required utilities to sell off portions of their electricity generation portfolio—leaving monopoly companies in charge of only transmission and distribution to customers. At the same time, many regions created independent entities, interchangeably called an independent system operator (ISO) or regional transmission operator (RTO), to operate the regional transmission grid and a series of wholesale electricity markets, into which electricity generators bid to sell power to utilities (Boyd and Carlson 2016). In these regions, utility monopoly arrangements have been ruptured by legislative and regulatory interventions. Conversely, those investor-owned utilities that remain as vertically integrated monopolies do so not because of their success in a contestible market (a feat many orthodox economists would be fine with), but rather because state-level political decisions have allowed them to do so.

The political economy of energy transitions

The arc of electricity deregulation traced above fits nicely into Christophers's theory of how law can variously dampen and heighten competitive forces in order to maintain a balance between competition and monopoly. Missing, however, is a deeper understanding of why public utility law did *not* shift in the southeast—why, in Jessop's terminology (2016, 2545), the "imaginary and paradigm" of deregulation remained anathema to the otherwise free-market-oriented southeastern states. We use this query as a starting point for our analysis, which provides crucial cultural context for the persistence of utility monopoly in the southeastern U.S.

We also draw from political economic scholarship on energy transitions to guide our analysis (Baker, Newell, and Phillips 2014; Bridge and Gailing 2020; Christophers 2021; Knuth 2018). However, in contrast to much political economic analysis, our primary focus here is on the realm of market construction—or lack thereof—rather than the forces of production (Christophers 2014). While scholars in the legal and orthodox economics traditions have been active in examining, designing, and critiquing of electricity markets (Borenstein and Bushnell 2015; Welton 2021), there has been limited critical social science analysis of how electricity markets are produced (for some exceptions see Breslau 2013; Özden-Schilling 2021; Boyd 2018). Despite the relative dearth of scholarship on markets of all kinds in the political economic tradition (Christophers 2014), the design of electricity markets is crucial to informing what types of power plants are built, how they are operated, and if and when they cease operation (Granovetter and McGuire 1998; Harrison 2013; Harrison 2020; Howell 2011; Yakubovich, Granovetter, and Mcguire 2005).

We build our analysis from the recognition that market creation—monopoly, competitive, or some version in between—is a highly political process. Various actors have differing, context-specific levels of influence over market design. Over time, though, markets tend to be durable and rarely deconstruct, in large part because they are protected by capitalist firms that attempt to optimize their own operations to achieve maximum profitability. As such, part of our analysis here is an examination of what portions of capital (in our case, investor-owned utilities) *do* when threats to accumulation occur (Christophers 2015). This leads us to the question of how monopoly electricity markets in the southeastern U.S. have been able to resist the widespread movement to deregulation.

This framing of the inquiry inevitably raises the question of why utilities were *unable* to withstand deregulatory pressures in other parts of the U.S. As we discuss elsewhere (Harrison and Welton 2021) when asked this question several of our interviewees pointed to a confluence of factors that differentiate the southeast: (1) deliberately underfunded regulatory regimes; (2) a smaller and less powerful industrial base; and (3) the existence of tight social networks between utility executives, regulators, and legislators. Other studies have identified additional factors present during successful deregulation in the northeastern U.S.: persistently high energy prices, well-organized consumer and environmental advocacy groups, and the support of labor unions that saw the potential for new power plant construction under restructuring (Hsu 2022). Many other parts of the electricity grid in U.S. also already operated as power pools, which in many cases were the forerunners of regional wholesale electricity markets and provided a level of comfort with inter-state and inter-utility electricity trading (Isser 2015). As we show in what follows, few of these factors were influential in the discussions over deregulation in the U.S. South.

The political economy of electricity deregulation in the U.S. South

The power buyers

The story of electricity deregulation in the U.S. mirrors the broader deregulatory movement that began in the 1970s in industries including airlines, telephone, natural gas, and trucking (Kearney and Merrill 1998). As with other regulated industries, electricity in the U.S. was dominated by

vertically integrated, investor-owned corporations that controlled the supply, transmission, and delivery of electricity within their monopoly service territories (Hirsh 1999).

This began to change around 1990. Shifts in natural gas generation technologies allowed plants to be built more cheaply, which made competition in electricity appealing to many large electricity purchasers. Congress passed the Energy Policy Act of 1992, which empowered the FERC to force utilities to transmit power produced by competitors on fair terms (Hirsh 1999; Watkiss and Smith 1992). The FERC then issued additional orders to enhance competition, including Order 2000, which asked utilities to join 'Regional Transmission Organizations' (RTOs)—not-for-profit entities that would independently manage the transmission grid and run markets for the sale of electricity and related products. The FERC's decision to make RTO membership voluntary was based partly on federalist politics—that is, not wanting to upset state co-regulators in this space—and partly on open jurisdictional questions regarding whether the agency could legally require utilities to join RTOs (FERC 1999; Office of the Federal Register 1996a; Office of the Federal Register 1996b). Many states also undertook substantial deregulatory initiatives during this time period, including requiring utilities to divest or spin off their generation assets and pursuing 'retail' competition. This latter reform allowed independent retail companies to compete to provide power to consumers and, importantly, also allowed industrial customers to source their own power (Spence 2008).

These widespread reforms hit a wall, however, in the southeastern U.S. Our interviews revealed several important dynamics that shaped this resistance. First, many of the smaller investor-owned electric utilities, such as Carolina Power & Light and South Carolina Electric & Gas, feared that

they would be acquired as deregulation brought further consolidation in the industry. Their concern was that larger utilities would be able to operate in multiple markets while maintaining operational efficiencies, making them easy takeover targets. Correspondingly, larger utilities were more confident about deregulation. As one former industrial lobbyist told us, Duke Energy "thought they might win if it got to an open market, they might swallow up [the smaller South Carolina-based utility] South Carolina Electric & Gas… They didn't talk about it openly, but privately they were pretty confident." Duke Energy subsequently did take over and merge with several utilities—but continued to resist deregulation within its home territory.

Utilities opposed deregulation for a simple reason: they recognized that they would be losing a good financial deal. Under the so-called utility consensus, public utility regulation provided utilities an essentially guaranteed return on their investment, typically at profit rates exceeding 10%. While the upside for profitability was limited, the downside risk was practically non-existent. Utilities were considered safe stocks and found easy access to additional investment to drive growth. When we asked one former regulator why utilities wanted to remain regulated, he argued quite simply, "Why change?" He then noted that utilities "were getting good [return on equity] and their stock prices were good, the investors were putting money in them."

If utilities and regulators were generally happy with the existing situation, who was pushing deregulation? Nationally, the deregulation debate was pushed forward by two entities: large industrial buyers of electricity and Enron. At its peak, Enron established itself as a powerful opponent of traditional utilities with strong influence in the federal government (McLean and Elkind 2004). Enron, of course, stood to profit from deregulation primarily through energy

trading. By the middle part of the 1990s, the company had built a sizable trading operation and trading platform around the recently deregulated natural gas industry and was seeking to do the same in electricity. However, Enron's overtures were not welcomed by many legislative and regulatory actors in the U.S. South. Although the company funded considerable political activism in southern states, the groups it sponsored found limited success, in large part due to the countervailing power of investor-owned utilities (Harrison and Welton 2021).

Enron also found few deregulatory allies in southern states, where large industrial customers were not particularly wedded to deregulation. As one industrial lobbyist told us, "we were sort of the guys out there throwing spears at the utility companies to try to get them to . . . get their rates lower." One way to do this, he continued, was "to threaten them with deregulation." However, industrial consumers were less interested in deregulation *as such*, noting that if their *threats* to push for deregulation got them lower rates in the next negotiation, they were satisfied. Rural electric cooperatives and municipal power systems were additional constituencies that might have benefitted from access to deregulated wholesale electricity markets. Yet cooperatives and municipal systems were unwilling to cross utilities. They feared that if they supported deregulation and it failed, utilities would punish them in future wholesale power purchase negotiations. As a result, as one former regulator told us directly, although the coops "were very politically strong . . . they didn't want [deregulation]."

In short, investor-owned utilities in southern states had the most to lose from deregulation, and their opponents were not willing to risk long-standing relationships to push it forward. As one environmental advocate intimately involved with discussions around deregulation told us, "the

political power of the utilities is what has kept the Southeast in monopoly control." This view was supported by a state utility commissioner who put it clearly: "If you are running for a major political office in [State X], there's no way in the world you alienate the utilities in [State X]; no way, no way, no how." So if utilities had managed to marginalize their opponents, on whom did they exercise their power? We turn in the next section to the decisionmakers on deregulation: utility commissioners and legislators.

The decisionmakers

In southern states, the ultimate decision makers on deregulation were state legislative bodies. However, the terms of the deregulation debate were often shaped by public utility commissioners tasked with writing reports and making recommendations on the costs and benefits of deregulation. This dynamic mirrors a broader systemic pattern in southern utility regulation, wherein utilities maintain close ties both with the legislature, which shapes public utility law, and the commission, which implements it. One theme that stood out during our conversations with former state utility regulators was that in their assessments of deregulation, regulators tended to conflate the interests of the investor-owned utility that they were charged with regulating with the interests of the particular state that they represented. This exchange with a former regulator is indicative of this dynamic and therefore worth quoting at length:

> Authors: Why do you think a traditionally regulated monopoly is best for [State X]?

> Regulator: Because the state has control. That's why, the state would have control from generation, to the transmission, to the distribution. You go to deregulation and you got to join a [regional transmission organization]. And the utilities convinced us, right or wrong, that you give up jurisdiction over the transmission system. They also convinced us, and I say they convinced us because I don't remember any independent study, that if you turn the transmission system over to the federal government, you lose protection of your native load because FERC looks at us as a nation. And what's good for the nation . . . this is the thought process, I'm not saying it's true.

We want to highlight two aspects of this quote. The first is that the *state* is viewed as having control, and not the investor-owned utility that owns and receives guaranteed profits from their monopoly control of the electricity generation, transmission, and distribution systems. For utility regulators, control was often linked with discussions around 'native load,' that is, electricity demand from customers in the regulator's home state. Multiple regulators we talked with argued that deregulation would allow northern states to 'steal'—not purchase nor compete with—cheap power from the South. As the same regulator quoted above would later say, "in [State X], we want to look out for [State X] . . . We didn't want some plant in [a northern state] getting served at the expense, and with our power, of a local plant." This view was also put forward by a former utility executive, who described southern regulators' thought process as "so you want to come back here and steal my power . . . you know, I don't see anything that is in it for me, as a representative of these states."

The second aspect of the above quote worth highlighting is that the beliefs and the thought process of regulators were powerfully shaped and informed by the utility. Utilities had effectively brought regulators (and legislators, as we will describe briefly) under their sway. As one former regulator described to us, the process of selecting regulators in many states was "very partisan and political, but also . . . most of the people who are coming in there, about three-quarters of them, are former legislators . . . who are kind of on the gravy train to the retirement home. Or . . . they are building favor for the next big [political] leap. So, they are never going to alienate the utilities." And yet, regulators still convinced themselves that they were acting in the public interest—the *state* interest—in preserving monopoly. If this was capture, it was a particular relational, cultural type of capture in which regulators and utilities co-constructed a narrative of monopoly as consumer protection (Kwak 2013). This narrative was distinctly at odds with many southern regulators' general free-market orientation, but during interviews they either failed to recognize this tension or explained it away on the grounds that electricity is simply different.

Although regulators had persuasive power in deregulation debates, it was ultimately state legislatures' decision. In most states, however, the investor-owned utility is the largest political donor and a constant presence in the legislature (Energy and Policy Institute 2022). One lobbyist for industrial customers was forthright about the challenges he faced in getting legislators to defy utilities and support deregulation. He also noted the difficulty many legislators had in comprehending how deregulation would even work. Describing a key subcommittee, he recounted: "they were almost embarrassing as to how inept they all were . . . this old country guy, a strawberry farmer . . . [but] that's kind of who [this state] is, I mean, I joke about it some,

but I mean . . . [it] sort of accurately represents the people of [this state]. And that is who was making the decision." In another account, a former regulator reminisced about a long-closed nightclub near the legislative chamber where key relationships and decisions were forged. As he recalled, "the lobbyists, they'd bring the liquor in, you had to buy the beer . . . And then, the [regulatory] commissioners had a band that played there. I mean, that's how they got elected. We had three commissioners in the band, and a staff member." This forthright assessment of the relevant decision makers sets the stage for understanding how the decision to retain monopoly in the southeastern U.S. was made.

Making the decision

The early years of the deregulation debate were largely defined by intensive backroom (and barroom) lobbying by utilities to fend off the approaches of Enron-backed groups and large industrial electricity buyers. After the introduction of several model bills into state legislatures, most states opted to commission studies on the potential impacts of deregulation.[ii] These studies were, more than anything, a perfunctory delay tactic. In every state that we examined, these studies came to the same conclusion: deregulation of the electricity system would bring minimal benefits to the citizens of each state.

An interview with a former regulator charged with authoring one such study brought this charade into focus. The regulator recounted being told by the speaker of the state legislature that he did not "want anybody to see your report until I do." The regulator then described a closed door meeting he had with the speaker at an exclusive private dinner club where the speaker "opened [the report] to the end [and] said 'Well, I guess that means we don't do it.' He closed it. They

still had some hearings and acted like they were looking at it", but in the former regulator's mind, the decision not to deregulate had already been made.

Southern utilities also made only minimal efforts to comply with FERC directives to consider forming or joining organized wholesale markets (FERC 1999). In North and South Carolina, a regional wholesale entity called Grid South was nominally established, but the effort quickly withered. When we asked why southern utilities made so little effort to comply with FERC's deregulatory initiative, one interviewee stated, "I imagine they just thought . . . they could get away with it." The tactic eventually worked: by the mid-2000s, the federal politics of electricity deregulation had changed and the FERC decided not to force states to join regional markets. Grid South quietly disentegrated: as the same informant told us, utilities decided to "give it a quick burial and never talk about it again."

Thus far, our analysis has focused on the southeast's reaction to the deregulatory wave that swept the U.S. during the 1990s. To return to Christophers' (2016a) frame, this period evidences a pronounced effort on the part of utilities to retain regulated monopoly status in the face of competitive pressure. Our account shows how this effort depended upon concerted lobbying efforts and rhetoric that tied the fate of the region to the fate of its monopoly utilities—efforts rendered successful by the deeply relational nature of public utility law. In the next section, we examine the durability of this account under the changes that have roiled the electricity sector since this time.

The new push for markets

Changing political economy

In the years following the withering of the deregulatory movement, electric utilities in the southeastern U.S. were part of numerous mergers and acquisitions. Regulated utilities like Duke Energy and the Southern Company also made aggressive entry into newly restructured parts of the country, with decidedly mixed results. After more than a decade of attempting to profit from wholesale markets outside of the southeast, in recent years most of the traditionally regulated utilities in the region have sold off their deregulated assets and redoubled their focus on their regulated monopoly territories (Harrison 2020). One exception is Florida-based NextEra Energy, a regulated utility that has also invested heavily in renewable energy in restructured markets. However, a vast majority of NextEra's generation assets located in deregulated markets are contracted, meaning they have long-term revenue certainty that reduces their exposure to volatile prices in electricity markets.

In recent years, a series of crises and scandals combined with public and corporate desire for more renewable energy has produced a new political economy of electricity in the southeast. Multiple stakeholders have criticized southeastern utilities' persistent hostility renewable energy, energy efficiency, and innovations in rate design (Thoyre 2021). Our conversations with former regulators and utility executives made clear just how reluctant utilities are to alter their time-tested formula. One former executive suggested that the internal dynamics of investor-owned utilities are often to blame. The key question in these organizations, he said, is "[W]hen I sit at the CEO's table, which of us sits beside the CEO? . . . Thirty years ago it was the nuclear guy,

because shit, that is where all the money was invested in planning; before that it was coal. Now the natural gas guy is moving up."

As Table 3 shows, this description aptly captures the state of southern utility investments. Since 2001—the year in which deregulation was largely rejected across the southeast—the generation sources of southern utilities have remained almost entirely comprised of fossil fuels and nuclear. As shown in Table 3, utilities' ownership of of natural gas generation has grown significantly, while growth in non-hydro renewables has, on the whole, been slow. Contrast this with the rest of the U.S., where combined wind and solar power generation has grown to comprise 10% of all electricity generated in 2020 (Energy Information Administration 2021). When asked why southern utilities were willing to bet big on natural gas, but reluctant to follow other regions' lead into increased renewable energy investment, many interviewees regurgitated a classic talking point of the utility industry: the intermittency of renewable energy sources makes them unreliable. For example, one former regulator explained: "if you do have a winter peak,[iii] solar does you no good. So, for every megawatt of solar you have, you have to have a traditional megawatt. Now, that sounds like I've been sold on that by the utilities and that's right. I have been sold on it." Another echoed these concerns and their source: "I've heard so much testimony about the actual impact of the sun [in State X]. For some reason, there is a theory that we're not a solar advantageous site in the state of [X]."

[Table 3 about here]

When pressed on why southeastern utilities are so concerned about this feature of renewables—even at low levels of penetration—as compared to those in other regions, one respondent, after a long pause, simply observed, "[utilities] are in the business of attracting and deploying capital at scale." In other words, utilities prefer the earnings that come with large capital investments that they alone excel at pursuing—as compared to the small, modular, competitive nature of renewable energy projects. Another interviewee, conjecturing as to why Florida had so little solar, explained that solar "should be in the state" as the peninsula's only "local resource," but "the fact that the utilities have kept it out . . . shows how the political and economic power of these utilities really works against change."

This pronounced resistance to change is now sparking a renewed call for competition in the southeastern electricity sector. Two recent occurrences have helped fuel the flames. The first is a series scandals surrounding substantial cost overruns during the expansion of nuclear power plants in Georgia and South Carolina. In both cases, state legislatures took the unprecedented step of passing laws—under heavy utility influence—that allowed the major power companies to charge customers for power plants that were under construction and not yet operational. Utilities were also guaranteed cost recovery *even* in the case of project abandonment, so long as the decision to abandon was "prudent" at the time it was made. And finally, utilities could—and did, with great frequency—appeal to public service commissions to raise electricity rates to cover construction cost overruns. With what was essentially a blank check in hand, the major utilities in South Carolina (SCANA) and Georgia (Georgia Power) embarked on a plan in 2009 to add nuclear generators to existing plants (Post and Courier 2022).

Problems in this approach were almost immediately apparent. Like so many U.S nuclear plants before, the projects were plagued by costly construction delays. By 2017, $9 billion had been spent on the South Carolina plant—nearly the initial $9.8 billion initial budget—but the plant was only 40% complete. It would take an estimated $16 billion in additional funds to complete. Given this stark reality, SCANA canceled further construction—leaving South Carolina ratepayers on the hook for the abandoned facility that would never generate a single kilowatt of electricity. After numerous lawsuits surfaced gross project mismanagement, SCANA was eventually bought at a discounted price by Virginia-based Dominion Energy. In Georgia, the Southern Company has persisted with their expansion of the Plant Vogtle nuclear facility despite facing similar construction delays and billions in cost overruns. The plant is currently scheduled to be completed in late 2023 (Post and Courier 2022), but at a price tag more than double initial estimates.

These scandals have drawn unwanted attention to both utilities' problematic relationships with their respective state legislatures. At the same time, renewable energy has started to gain more of a foothold in the region, despite utility resistance. Spurred by a strong renewable portfolio standard and favorable rules for project developers, North Carolina became second in the nation in installed solar during the 2010s. However, this was no thanks to Duke Energy: solar's growth to 7% of total electricity generation in North Carolina in 2020 (Energy Information Administration 2021) was due almost entirely to third-party installations, whose output Duke was required to purchase. As solar prices have continued to decline rapidly, Georgia, South Carolina, and especially Florida have also increased their solar penetration, largely via third party solar developers. Yet—as Christophers might predict—utilities are starting to pivot from

pure opposition to reasserting monopoly control: after Florida passed a law giving its utilities generous incentives to pursue solar development, the state eventually surpassed North Carolina to become the state with the third most installed solar in the U.S. as of 2021[iv] (Energy Information Administration 2021). Duke Energy, too, backed reforms in solar procurement rules in 2017 that gave it more of an ownership stake in solar energy (though with the result that solar's growth in the state has since slowed) (Solar Energy Industries Association 2022).

Southeastern state public utility commissions are beginning to more carefully scrutinize utilities' plans with respect to renewables—particularly after the nuclear scandals provoked changes in the composition of some commissions. No longer comprised almost exclusively of barroom buddies, many commissions have in recent years proven less willing to rubber stamp investor-owned utilities' long-term resource planning. As one former utility commissioner told us in 2019, the solar industry was "already recruiting folks to run for the General Assembly," and predicted "it's going to be a tough day for the utilities starting in 2020." This prediction has come partially true. In Georgia, utility commissioners have pushed Georgia Power to increase the amount of renewable energy in their Integrated Resource Plans (Shao 2021). In South Carolina, regulators chided Dominion Energy for inadequately incorporating solar into generation planning, and cut Duke Energy's rate of return (Christian 2021; Forest 2021).

Shifting political dynamics and personnel are also provoking a re-examination of the merits of competition in the southeast. This push is led in part by new, competitive renewable energy companies, which have a vested interest in not having utilities monopolize renewable energy development. Partly at these companies' behest, state legislatures in North Carolina, South

Carolina, and Florida have introduced—and in the case of South Carolina, enacted—legislation to re-study the question of regional transmission organization membership and wholesale electricity markets (Chen 2020).

An additional constituency in favor of markets and renewable energy has also emerged in the southeast: firms seeking to buy renewable energy to meet internally established 100% renewable energy goals. These firms—which include tech giants such as Google, Microsoft, and Amazon in addition to retailers like Walmart—have organized themselves into a membership organization called the Clean Energy Buyers Association (CEBA) that lobbies for large electricity buyers to have greater access to clean energy. On the question of how best to do this, CEBA is quite clear: all regions of the U.S. should have organized wholesale electricity markets that allow for competition among generation sources (CEBA 2022). CEBA has also mounted arguments to state regulators that the southeast's lack of a regional market may cause reliability challenges (Google, LLC 2022)—a point vehemently disputed by the utilities. Either way, it is interesting to watch concerns over reliability drive a new fight over the relative merits of monopoly and competition.

Of course, Google and other corporate renewable energy buyers are not committed to markets solely because they believe markets increase renewable energy. Rather, informants have told us that corporate buyers prefer acquiring renewable energy by issuing requests for proposals and then selecting the least cost offers—a move that effectively cuts out the utility middleman. Corporate buyers also prefer to structure their power purchasing contracts in ways that necessitate a liquid market, that is, one in which electricity purchases can easily be traded. These

tactics have enabled corporate buyers to push their cost of renewable power to near rock bottom. However, these tactics only work in organized wholesale markets, where utilities no longer have a state-sanctioned monopoly over electricity generation and sales. Large-scale solar developers in the southeast that are eager to work with tech firms have described trying to work with southeastern utilities as "run[ning] into this wall over and over again." In the view of one informant, renewable energy "resources can compete, but they're not being allowed to compete. There's an artificial box that they've been put in, [and] these vertically integrated markets need to be opened up."

Opening up the markets?

These growing calls for markets have finally forced southern utilities to recalibrate their long-closed monopoly systems—sort of. In 2021 pro-market pressures culminated in southeastern utilities proposing and gaining federal approval for a market-like entity called the Southeastern Energy Exchange Market (SEEM). But to call this a market is in some ways misleading, given that southern utilities designed SEEM to ensure that their stranglehold over southern electricity remains intact.

SEEM functions as a wholesale energy "exchange" between investor-owned utilities in the southeast U.S. The market exchange allows utilities—which were already engaged in trading blocks of electricity informally, typically over the phone—to begin formally trading electricity in 15-minute segments in a market that would provide transparency into the current operating costs in neighboring grids (Guidehouse, Inc and Charles River Associates, Inc 2020). However, the

utilities have been quick to emphasize that SEEM is only a short-term electricity trading platform—*not* a large-scale regional wholesale market where market algorithms determine the dispatched generation mix. Nor have southern utilities turned over control of their transmission lines to a regional manager, as in the case of RTOs and ISOs, to create a regionally integrated grid.

On the plus side, SEEM will create some cost savings through allowing utilities to more efficiently share excess generation and transmission capacity. These savings are shared between the utilities and then, supposedly, passed on to consumers. And SEEM may also aid renewables' integration: economic modeling has shown that intermittent resources benefit from regional cooperation on transmission to manage and smooth intermittency challenges (Clack et al. 2021; Gimon et al. 2020). However, in the months that followed the introduction of SEEM, various studies demonstrated that while SEEM would provide *some* customer and carbon emission savings, those benefits would be dwarfed by the savings that would arise from a shift to a fully restructured wholesale market (Clack et al. 2021; Gimon et al. 2020; Guidehouse, Inc and Charles River Associates, Inc 2020; Southern Alliance for Clean Energy 2021). Environmental and clean energy groups criticized SEEM for these shortcomings, noting that SEEM was little more than a private buyers club (Stoff 2021). Despite widespread condemnation, utilities succeeded in having their proposal approved by the FERC, which reasoned that SEEM was designed to increase bilateral transactions among southern utilities and therefore would benefit consumers. (Federal Energy Regulatory Commission 2021).

Through SEEM, utilities may have successfully de-fanged the mounting regional movement for a truly competitive southeastern wholesale electricity market. One FERC commissioner, Allison Clements, recognized as much, writing a dissenting opinion that derided her fellow commissioner's naivete in approving SEEM. Commissioner Clements criticized the "simplistic logic" guiding SEEM's approval, which "defies the fundamental purpose of utility regulation, which is premised in large part on the basic proposition that one cannot simply assume that monopoly utilities will act in the best interest of their retail customers" (Howland 2021). In short, Clements makes the same point that we did at the start of this paper: given the choice, utilities would prefer to operate as monopolies.

Conclusion

The electricity industry in the U.S. is characterized by a complex, regionally stratified mix of monopoly and competition. In this article, we examine how investor-owned utilities in the southeast have managed to maintain their position as monopolies in the face of intermittent calls for competition. We highlight the historic stranglehold that utilities have kept on state regulators and legislators, a dominance that has sidelined calls from environmental groups and large electricity buyers for restructuring the electricity system. We also point to the half measures utilities have taken around markets, including Grid South, SEEM, and a variety of studies that were designed with one conclusion in mind: regulated monopoly is the preferred way of managing the electricity system.

Utilities have been able to maintain this regional consensus through a robust set of regulatory relationships that mix law with cultural and economic power. Indeed, one of the most striking features of southern utility regulation is the degree to which utilities have turned self-preservationist instincts for monopoly into a set of ideological talking points, later parroted by regulators and politicians. These talking points equate monopoly with consumer protection in terms of both cost (don't let those Northerners steal our cheap power) and reliability (sub-par sunshine). Southeastern regulators and legislators have absorbed these narratives—and used them to justify continued regulated monopoly status—despite their own widespread preference for competition and free markets. Perhaps lurking behind these discordant viewpoints is some sense that the competitive model does not work well for what one interviewee termed the "political good" of electricity. But our interviewees rarely probed this more progressive understanding of the purpose of public utility law (Boyd 2018)—instead remaining content to obscure the unreconciled tension between their general views and concrete actions. Our interviews allowed us to capture this complex, subsurface dynamic in the field of public utility law, thus adding a critical cultural economy dimension to the ongoing scholarly exploration of the forces at work in balancing competition and monopoly under capitalism (Christophers 2016a).

The cultural, relational aspect of public utility law highlighted here has both explanatory and reformist implications. Per Jessop's call (2016), our account supplies a crucial explanatory link in the narrative of how legal oscillations between monopoly and competition manifest, highlighting how utilities' political power translated into their ability to successfully sell the idea of a regulated monopoly to a regulation-hostile audience. Our findings regarding the nuanced

ways in which regulated industries interact with regulators to shape outcomes in their favor also add texture and empirical depth to what is often a politicized conversation on regulatory capture (Ramanna 2021). More pragmatically, our results offer reformers hoping to advance clean energy a new object of focus: perhaps the path to energy transition in the South lies in governance and institutional reforms centered on changing relational dynamics.

Ultimately, the business model for electric utilities in the southeast is likely to change only when other segments of capital grow strong enough to provide a real challenge. Tech firms seem the most likely today, but will Google or Microsoft make the inroads required in state legislatures to undo decades of relationships forged over drinks between regulators, legislators, and utility lobbyists? If so, perhaps the financial forces of Wall Street will be the political economic force strong enough to drive competition into one of the last bastions of regulated monopoly in the U.S. electricity system.

Resisting competition has obviously benefitted utilities in the southeastern U.S. It is unclear, however, whether it has benefited the region as a whole. The transition to electricity markets does not ineluctably bring about a cleaner or more equitable energy system—as evidenced by the too-slow shift to renewable energy in regions of the U.S. that have embraced wholesale markets, where utilities have found inventive new ways to stave off competition (Welton, 2021). Whether greater monopolization or more competition is "better" is entirely contingent on the shape of each, as well as the goals each is designed to serve. In the end, we do not aim to diagnose what should or will happen regarding deregulation in the southeastern U.S. electricity industry. As the foregoing shows, the struggle between forces of monopoly and competition does not unfold "in a

rational, timely, predictable fashion" (Christophers 2016b, 2554)—especially in a field as relationally complex as public utility law. Indeed, any future legislation on deregulation will always be "the outcome of complex political tensions and differences within states" (Potts 2016, 2538). But if the utility regulator from our introduction is any indication—committed free-marketeer and staunch defender of utilities' regulated monopoly, all in one—real change may be a while coming in the southeastern U.S.

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[1] We will use both terms in this paper.
[2] We provide a full account of this period in (Harrison and Welton 2021).
[3] “Winter peak” refers to a utility whose highest demand comes in the winter months. Ironically for purposes of this quote, the primary cause of utilities shifting to a winter peak is that installed solar energy has been so effective at reducing summer peaks (Walton 2021).
[4] California continues to lead in installed solar capacity, followed by Texas.