

Institute for  
**Policy Integrity**

NEW YORK UNIVERSITY SCHOOL OF LAW

September 19, 2024

Hon. Michelle L. Phillips, Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350

**VIA ELECTRONIC SUBMISSION**

**Subject:** Case 20-G-0131 – Proceeding on Motion of the Commission in Regard to Gas Planning Procedures

Dear Secretary Phillips:

The Institute for Policy Integrity at New York University School of Law<sup>1</sup> (Policy Integrity) respectfully submits this comment letter in response to the Public Service Commission’s (the Commission or PSC) Notice Soliciting Comments issued July 16, 2024 (the Notice),<sup>2</sup> which concerns a Staff Straw Proposal regarding Modification of 16 NYCRR Part 230 (the Straw Proposal),<sup>3</sup> and the Notice Extending Initial Comment Period.<sup>4</sup> Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has extensive experience advising stakeholders and government decisionmakers on the rational, balanced use of economic analysis, both in federal practice and at the state level.

The current version of Part 230 is a gas-company regulation that was adopted by the Commission in 1986 to give effect to multiple statutory provisions concerning utility line extensions. Staff’s Straw Proposal describes how entitlements created, or enlarged upon, by Part 230 distort customers’ decisions, creating a bias in favor of natural gas service over other options, including electrification. The Straw Proposal notes that “[u]ntil fairly recently, the State had promoted the use of natural gas by mass market customers as a cleaner alternative to heating oil and coal-fired electricity, but the CLCPA’s adoption in 2019—alongside the growing availability of more efficient electric substitutes—has shifted State policy priorities. *Now, facilitating installation of additional natural gas plant is at odds with the greenhouse gas emissions reduction goals codified in the CLCPA.*”<sup>5</sup>

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<sup>1</sup> This document does not purport to present the views, if any, of New York University School of Law.

<sup>2</sup> Case 20-G-0131, *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, Notice Soliciting Comments (July 16, 2024) [hereinafter Notice].

<sup>3</sup> Case 20-G-0131, *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, Staff Straw Proposal Regarding Modification of 16 NYCRR Part 230 (July 16, 2024) [hereinafter Straw Proposal].

<sup>4</sup> Case 20-G-0131, *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, Notice Extending Initial Comment Period (Sept. 13, 2024).

<sup>5</sup> Straw Proposal at 10-11 (emphasis added).

Staff's recognition that current practice is "at odds with" the CLCPA's statewide greenhouse gas emissions limits is important, insofar as the CLCPA directs the Commission to consider the risk of interfering with attainment of those limits whenever making administrative approvals and decisions.<sup>6</sup> Thus, to the extent any administrative approvals or decision relating to these line extensions might be on the table in the future, the Commission should be concerned about this conflict. Further, the CLCPA directs the Commission to promulgate regulations to contribute to achieving the statewide limits.<sup>7</sup> Given that here, a previously adopted Commission regulation is interfering with attainment of the greenhouse gas limits, Staff's proposal to revise the regulation to reduce its harmful impact constitutes a first step toward the Commission meeting its obligation to regulate in this area. Overall, the Straw Proposal's attention to the need to identify incentives that distort customers' preferences in the direction of natural gas over other options, and its focused inquiry into what would be required to thoroughly neutralize that bias, lays the groundwork for better protecting ratepayers and individual customers against unwise utility investment practices that increase stranded cost risk.

Policy Integrity appends hereto a robust analysis<sup>8</sup> that examines the need for a profound overhaul of existing institutional frameworks in energy law to resolve tensions with mandates in newly adopted climate statutes. The analysis reviews existing regulatory provisions hampering PSC compliance with the CLCPA's mandate that it contribute to achieving the statewide limits, and sets forth key principles for the PSC to keep in mind as it addresses the Straw Proposal and other future regulatory revisions. It finds that any state effort to resolve this misalignment "should embody several core principles: it should eschew durable biases that favor particular technology or fuel types, and it should ensure that the transition away from emitting energy resources appropriately prioritizes safety and fairness."<sup>9</sup> Identifying New York's pre-existing approach to gas line extensions as "an especially clear example of a new emissions-reduction mandate at cross-purposes with an area of existing law and policy,"<sup>10</sup> the analysis provides support for the Straw Proposal's focus on amending Part 230 to better harmonize with the CLCPA.

We are grateful for your consideration of this comment.

Sincerely,

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<sup>6</sup> CLCPA Section 7(2).

<sup>7</sup> CLCPA Section 8.

<sup>8</sup> J. Gundlach and E. Stein, *Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws: A Case Study of New York*, 41 ENERGY L. J. 211 (2020).

<sup>9</sup> *Id.* at 212.

<sup>10</sup> *Id.* at 211.

**J. Gundlach and E. Stein, *Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws: A Case Study of New York*, 41 ENERGY L. J. 211 (2020)**

**(attached behind)**

## HARMONIZING STATES' ENERGY UTILITY REGULATION FRAMEWORKS AND CLIMATE LAWS: A CASE STUDY OF NEW YORK

*Justin Gundlach and Elizabeth B. Stein*<sup>\*\*</sup>

**Synopsis:** Several states have recently passed legislation mandating ambitious levels of economy-wide greenhouse gas emissions reductions. Maine and New Jersey have each adopted “80 x 50” mandates, meaning that they set 2050 as the deadline for reducing annual emissions by 80% from their level in a benchmark year. Colorado’s mandate calls for a 90% reduction by 2050. California adopted a 40% by 2030 mandate in 2006 (later supplemented by executive orders directing state agencies to aim for “80 x 50” and then net-zero emissions by 2045). New York has adopted the goal of net-zero emissions by 2050, with an underlying annual emission reduction mandate of at least 85% below 1990 levels. Massachusetts resembles New York, but its 2008 legislative mandate both called for an 80% reduction by 2050 and authorized updates by the Secretary of State, who in April 2020 announced a net-zero target for 2050 and mandated a reduction in annual emissions to at least 85% below 1990 levels. More state mandates are likely to be adopted in the coming years by legislatures across the country. While the laws establishing these state mandates authorize agencies to adopt new regulations and, in some cases, create ways to challenge inconsistent agency action, they do not spell out what to do about existing laws that require, authorize, or subsidize the development and use of infrastructure designed to enable the consumption of fossil fuels. Thus, these laws add a new layer of legislation to the landscape, but fail to excavate the foundations of existing, countervailing laws that are likely to impede to some degree the realization of the new legislation’s basic objective.

Each jurisdiction mentioned above is home to examples of this dissonance, but, since its effective date of January 1, 2020, New York’s Climate Leadership and Community Protection Act has provided an especially clear example of a new emissions-reduction mandate at cross-purposes with an area of existing law and policy, namely residential customers’ access to gas for use in buildings and the development and maintenance of related gas distribution infrastructure in New York. This article concentrates on New York’s situation to illustrate how these

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\* *New York Urgently Needs to Harmonize Its Energy Utility Regulation Framework with Its New Climate Law*, published by the authors in the October issue of the Environmental Law in New York newsletter, covers some of the same material as this article.

tensions can manifest and what might be done to address them. State agencies and the coordinating body—the Climate Action Council—that the Act calls on to weave together plans for progress from various sectors have yet to indicate what path the state will take to resolve tensions between the Act’s overarching mandate and the provisions of the Public Service Law that govern gas access and infrastructure.

The tension in New York is not abstract. Gas utilities, localities (including the City of New York), the state Public Service Commission and Department of Environmental Conservation, and even the Governor have all been directly and publicly involved in efforts to sort out what is to be done now that longstanding law and policy favoring gas infrastructure expansion is colliding with a mandate to effectively stop relying on fossil fuels for energy in buildings and elsewhere. But, to date, all planned solutions have involved temporary patches rather than a rewearing of underlying law. Even the Public Service Commission’s recently opened long-term gas planning proceeding takes as a given that problematic provisions of the Public Service Law are and must continue to be part of the regulatory landscape.

Because the CLCPA does not itself address the statutory provisions with which its mandate is in tension, the tension is not soluble without further focused action. Durable solutions might take the form of changes in utility oversight, new regulations that adopt a different interpretation of key provisions of the Public Service Law, or legislative amendments to those provisions—or a combination of all three. The range of potential solutions arises from the leeway afforded by courts to the state’s Public Service Commission, which can credibly point to the CLCPA as a tectonic shift in state law and policy that its decisions may not ignore. Whatever form the state’s effort at resolution takes, it should embody several core principles: it should eschew durable biases that favor particular technology or fuel types, and it should ensure that the transition away from emitting energy resources appropriately prioritizes safety and fairness.

Unless the institutional framework and laws pertaining to fossil fuels are modified appropriately, decarbonization efforts will likely be stymied by confusion and related opportunities for opposition. This article aims to start a wider conversation about the process of conforming existing energy law with novel, climate-oriented legislation. Such conformity is needed urgently in jurisdictions that have already adopted meaningful decarbonization targets, and is foreseeably an indispensable feature of any decarbonization agenda in other states and at the federal level as well. And yet, to date, even leading jurisdictions have taken only preliminary steps toward amending, repealing, or reinterpreting laws that impede decarbonization—indeed, little attention has been paid to this aspect of energy transition by legal and policy analysts, much less policymakers, even though it is sure to be both involved and consequential.

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## I. INTRODUCTION

The legislation with which multiple states have set ambitious, economy-wide greenhouse gas emissions reduction targets does not generally repeal or even substantially modify existing statutory provisions that pertain to fossil fuels and related infrastructure.<sup>1</sup> Consequently, even where such legislation creates broad authority for state agencies to establish new regulations, it can leave significant

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1. States whose legislatures have adopted economy-wide annual emissions reduction targets with 2050 deadlines include: Colorado (90% from 2005 baseline), Connecticut (80% from 2001 baseline), Maine (80%

energy transition issues unresolved if previously adopted statutes expressly establish rights and obligations related to the provision and consumption of fossil fuels.<sup>2</sup> This article takes note of tensions between new emissions reduction mandates and existing energy-related laws in several states, focusing on New York's adoption of the Climate Leadership and Community Protection Act (CLCPA), which entered into force on January 1, 2020, as an example of how these tensions can manifest and what might be done to address them.<sup>3</sup>

Our examination of tensions between New York's CLCPA and existing laws is not exhaustive; we look closely at key provisions of New York's Public Service Law (PSL), which governs New York's regulation of utility companies.<sup>4</sup> PSL section 30, for instance, states that "the continued provision of all or any part of [] gas, electric and steam service to all residential customers . . . is necessary for the preservation of the health and general welfare and is in the public interest."<sup>5</sup> Yet, according to New York's most recent greenhouse gas inventory, energy use in residential buildings accounts for 21% of New York's greenhouse gas emissions, primarily as a result of on-site combustion of fuel (mostly natural gas).<sup>6</sup> A close examination of PSL sections 30 and 31, and a comparison of those provisions with

from 1990 baseline), Massachusetts (initially 80% from 1990 baseline, but authorizing updates by Secretary of State, who has since set a net-zero target, with a minimum reduction not including offsets of 85%), New Jersey (80% from 2006 baseline), and New York (net-zero, with minimum reduction not including offsets of 85% from 1990 baseline). Multiple other states, including Hawaii, New Mexico, Virginia, and Washington, have adopted sector-specific mandates through legislation. Several states have both economy-wide and sector-specific mandates, some legislated, others imposed by regulations prompted by executive order. California's legislature, for instance, adopted a "40 x 30" goal in 2006, 2006 Cal. Stat. c.488, and its agencies are now operating under that goal and the "80 x 50" goal prescribed by a 2018 executive order. *See* Cal. Exec. Order B-55-18 (Sept. 10, 2018).

2. *See, e.g.,* Tracy Hunckler & Ryan Mahoney, *Legal Update: New California Oil & Gas Laws -- New Laws Target California's State Oil and Gas Agency and Address Liability Concerns*, DAY CARTER MURPHY LLP (Nov. 23 2019), <https://daycartermurphy.com/2019/11/23/legal-update-new-california-oil-gas-laws/> ("This new purpose [introduced by AB 1057, Section 9 (adding Cal. Pub. Res. Code §3011)] arguably could conflict with other statutory mandates that apply to [the California Geological Energy Management Division] CalGEM, including a California Public Resources Code Section that requires the Supervisor of CalGEM to 'encourage the wise development of oil and gas resources.' Cal. Pub. Res. Code § 3106(d)."); Cal. Pub. Res. Code § 3106(d) (West 2019); *See also* Ethan N. Elkind & Ted Lamm, *Legal Grounds: Law and Policy Options to Facilitate a Phase-out of Fossil Fuel Production in California*, BERKELEY CTR. FOR L., ENERGY & THE ENV'T. (Apr. 2020), at 28 (suggesting various changes to existing regulations and statutes).

3. 2019 N.Y. Sess. Laws 106 (McKinney) [hereinafter CLCPA].

4. N.Y. Pub. Serv. Law § 18-a (McKinney 2003).

5. N.Y. Pub. Serv. Law § 30 (McKinney 2019). Several other potentially relevant items are beyond this article's scope. For instance, we do not examine the efforts currently underway on the part of New York's Public Service Commission, the New York Independent Service Operator, and the Federal Energy Regulatory Commission to formulate an approach to resource adequacy that recognizes ongoing and prospective changes to the electricity generation mix—changes driven mainly by the CLCPA's resource deployment targets. *See* Kathleen Spees, Samuel Newell & John Imon Pedtke, *Qualitative Analysis of Resource Adequacy Structures for New York*, THE BRATTLE GRP. 8 (2020) (noting impasse between state and federal authorities and presenting different potential approaches (termed "Structures") to resource adequacy for consideration by the New York Commission and stakeholders). Another unexamined item is N.Y. Energy Law § 3-101(5) (McKinney 2013), which provides that "It shall be the energy policy of the state . . . to foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas . . ." and so is clearly also in tension with the CLCPA.

6. *See* NYSERDA, NEW YORK STATE GREENHOUSE GAS INVENTORY: 1990-2016, FINAL REPORT, S-4 fig.S-1, 10 tbl.4 (2019) [hereinafter NY GHG INVENTORY].

relevant provisions of the CLCPA, suggests that the CLCPA may not by itself undo New Yorkers' rights to access gas distribution infrastructure and to consume fossil gas,<sup>7</sup> nor gas utilities' procedural right to seek recovery from existing customers of the costs of extending service to new customers.<sup>8</sup> In other words, for the buildings sector to eliminate its greenhouse gas emissions footprint in an expeditious and cost-effective manner, the legal framework governing the energy services available to buildings requires a retrofit.

This article proceeds in five parts. The first provides relevant background on utility regulation in New York and on the nature of the transformation of New York law wrought by the CLCPA. The second explains the scope and nature of the tensions between key provisions of PSL sections 30 and 31 and the CLCPA.<sup>9</sup> It also identifies, briefly, examples of similar tensions between existing laws and emissions reduction mandates in other states. The third highlights and explains that because the key provisions of the CLCPA are not self-executing with respect to the tensions addressed here, the law itself will not necessarily resolve them. This part also notes the availability and limits of implied repeal in New York and elsewhere. The fourth part identifies three principles to guide whatever reforms will resolve the tensions described in part two. Finally, the fifth part describes regulatory and legislative options for dealing with those tensions.

## II. THE SITUATION IN NEW YORK

Before considering tensions between new environmental and old energy laws in New York, it is critical to understand key features of the context in which those tensions play out. One set of features relates to New York Public Service Commission (Commission) rulemaking and regulatory oversight authority, including with respect to utilities' decisions about capital and operational expenditures and the recovery of the resulting costs from customers. The other key contextual feature is the CLCPA's reformulation of a set of somewhat scattershot policies relating to the causes and effects of climate change into a comprehensive rubric that

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7. We use the term "fossil gas" to emphasize and clarify that nearly all the methane burned to generate electricity and serve heating loads in the United States is a fossil fuel. The term "natural gas" was initially adopted to distinguish methane extracted from fossil fuel deposits from "town gas" or "manufactured gas," which was derived from coal. Although organically sourced methane exists, today's "natural gas" remains primarily fossil-sourced methane.

8. On the issue of utilities' rights and those rights' limitations, many courts and commentators refer to two foundational U.S. Supreme Court decisions. In *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, the Court recognized that a utility should have an opportunity to earn a return on its investments sufficient to "assure confidence in the [utility's] financial soundness" and to enable it to raise adequate private capital in the future. 262 U.S. 679, 693 (1923). Then, in *Fed. Power Comm'n v. Hope Natural Gas Co.*, the Court determined that the due process rights available to private entities, including utilities, guarantee not cost recovery but only decisionmaking by public utility commissions that results in "just and reasonable" rates—implicitly, a reasoned process that affords utilities the opportunity to state their position and object to decisions as unreasonable or unreasonable. 320 U.S. 591, 602 (1944). *See also* *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548, 566-67 (1945) (citing *Hope* and stating: "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.").

9. *See generally* N.Y. Pub. Serv. Law § 66-b (McKinney 2016) (provision that should be examined for reasons similar to those discussed below in relations to N.Y. Pub. Serv. Law §§ 30-31).



has implications for all uses of fossil fuels and other greenhouse gas-emitting energy resources in New York State.

#### A. *The “Regulatory Compact” and Relevant Legal Standards*

The term “regulatory compact” refers to the understanding between monopoly utility companies and their economic regulators, pursuant to which

the regulator grants the company a protected monopoly . . . for the sale and distribution of electricity or natural gas to customers in its defined service territory. In return, the company commits to supply the full quantities demanded by those customers at a price calculated to cover all operating costs plus a ‘reasonable’ return on the capital invested in the enterprise.<sup>10</sup>

The very existence of the regulatory compact in New York is a matter of some dispute.<sup>11</sup> But in any event, utilities do not in reality, in exchange for submitting to government oversight, receive a legal right to regulatory approval of prices that achieve specific outcomes with respect to invested capital or shareholder returns.<sup>12</sup> Utilities *do* have a procedural right to seek recovery of investments made with regulatory approval, but the PSL places the burden on utilities to show that a proposed rate pursuant to which customers are to be charged for service is “just and reasonable,” meaning that the rate appropriately balances customer interests against investor interests.<sup>13</sup> The PSL also directs the Commission to assess such showings, and to approve, reject, or modify utilities’ proposals for capital and operational expenditures, as well as recovery of those expenses from ratepayers, as appropriate.<sup>14</sup>

10. JONATHAN A. LESSER & LEONARDO R. GIACCHINO, FUNDAMENTALS OF ENERGY REGULATION 43 (2007). *See also, e.g.*, *PacifiCorp v. Wyo. Pub. Serv. Comm’n*, 103 P.3d 862, 871 (Wyo. 2004) (“[T]he compact is a theoretical agreement between the utilities and the state”); and *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 797 (Ind. 2000) (“The bedrock principle behind utility regulation is the so-called ‘regulatory compact’”).

11. *Energy Ass’n of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 169 Misc. 2d 924, 938 (N.Y. Sup. Ct. 1996) (rejecting argument that denial of full cost recovery constituted a “breach of the regulatory compact”).

12. *See Ari Peskoe, Utility Regulation Should Not Be Characterized as a “Regulatory Compact”*, HARV. ENVTL. POL’Y INITIATIVE (2016), <http://eelp.law.harvard.edu/wp-content/uploads/Harvard-Environmental-Policy-Initiative-QER-Comment-There-Is-No-Regulatory-Compact.pdf> (tracing origin of term’s popularization to utilities seeking rate recovery of cancelled nuclear projects in the early 1980s); *see also* Scott Hempling, *What “Regulatory Compact”?* (Mar. 2015), <https://www.scotthemplinglaw.com/essays/what-regulatory-compact>; and Harvey L. Reiter, *Competition Between Public and Private Distributors in a Restructured Power Industry*, 19 ENERGY L.J. 333, 337 (1998) (“In short, there is no regulatory compact guaranteeing utilities a return allowance or protection against franchise competition (i.e., the competition between public and private entities for the right to serve) in return for accepting rate regulation”).

13. *See New Rochelle Water Co. v. Pub. Serv. Comm’n*, 31 N.Y.2d 397, 407, 292 N.E.2d 767, 773 (1972) (“It is well settled, of course, that a public utility cannot be deprived of a reasonable return upon its investment for an extended period of time as this would constitute a confiscation of its property in violation of due process of law.”); N.Y. Pub. Serv. Law §§ 30, 66(12)(i), 72; *In re Abrams v. Pub. Serv. Comm’n.*, 492 N.E.2d 1193, 1195-96 (1986) (construing PSL § 72); *Fed. Power Comm’n v. Hope Gas Co.*, 320 U.S. 591 (1944). *See also* *Energy Ass’n of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 169 Misc. 2d 924, 940, (N.Y. Sup. Ct. 1996), *aff’d*, 273 A.D.2d 708, (2000) (“The law of ratemaking in New York State—indeed, throughout the United States—is well and thoroughly stated in *Matter of Abrams v. PSC*, 67 N.Y.2d 205, 501 N.Y.S.2d 777, 492 N.E.2d 1193 [1986].”).

14. N.Y. Pub. Serv. Law §§ 30, 72.

New York's PSL gives the Commission a great deal of leeway in how it arrives at determinations that a utility has carried its burden of showing that a proposed rate is "just and reasonable," but several standards apply when the Commission reviews the proposed capital expenditures, programmatic proposals, and operating costs contained in utilities' periodic filings presenting new rates for service to customers.<sup>15</sup> The "prudence" standard, whether applied prospectively or retrospectively, requires that investments are reasonable in light of the anticipated circumstances in which they are or were expected to perform.<sup>16</sup> Importantly, a party, including a state agency, seeking to challenge the prudence of a utility expenditure must make an initial showing that the investment is not prudent before the burden of proof shifts to the utility.<sup>17</sup> The "used and useful" standard<sup>18</sup> also remains available to the Commission and courts.<sup>19</sup> Whether articulated by the Commission or a court in terms of a "prudence," "used and useful," or "just and reasonable" requirement, the Commission can apply these standards to adjust utilities' recovery of operating or capital expenses.<sup>20</sup>

The Commission has rulemaking as well as oversight authority.<sup>21</sup> Whereas the Commission can use its oversight authority to steer individual utilities on a case-by-case basis, assessing and selectively approving the programs and investments proposed in each rate case, it can also adopt rules that apply generally.<sup>22</sup>

15. *Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n of N.Y.*, 507 N.E.2d 287, 289 (1987) ("it has been recognized that when it comes to setting rates for such service the Commission has been granted 'the very broadest of powers,' the Legislature mandating only that the rates fixed be 'just and reasonable.'"). Such filings are generally made in periodic "rate case" proceedings. *See generally* N.Y. Comp. Codes R. & Regs. tit. 16, § 61.5 (1972).

16. *Niagara*, 507 N.E.2d at 289-90; *Abrams*, 492 N.E.2d at 1195; *see also* Nat'l Fuel Gas Distribution Corp. v. Pub. Serv. Comm'n of N.Y., 947 N.E.2d 115, 120 (N.Y. 2011) ("A utility's decision is prudent if it acted reasonably based on the information that it had and the circumstances that existed at the time. A decision may be viewed as prudent even though a different course of action would ultimately have been more advantageous to the utility or its ratepayers. In this regard, hindsight is irrelevant to a prudence analysis because the utility must make a determination that addresses its business prospectively.") (internal citation omitted).

17. *Nat'l Fuel Gas*, 947 N.E.2d at 120.

18. *See* N.Y. Comp. Codes R. & Regs. tit. 16, § 61.5 ("Where return is involved or claimed, the utility shall establish by competent evidence the original cost of the property used and useful in the service to which the rates, rules and regulations involved in the proceeding relate and the accrued depreciation thereon. All property not so used and useful shall be excluded.")

19. N.Y. Pub. Serv. Law §§ 30, 66(16); *see also, e.g.*, Order Approving in Part, with Modification, and Denying in Part Smart Solutions Program, Case 17-G-0606, 2018 WL 3472745, at \*13 (July 12, 2018) ("Pipeline developer costs associated with successfully implemented projects are included in rate making proceedings at the Federal Energy Regulatory Commission (FERC) . . . . Projects that are not implemented or not in-service never become used and useful assets. This process inherently provides New York State gas customers with protection from speculative pipeline projects that may never achieve implementation, and the Commission will not allow the circumvention of this protection on behalf of customers."). The clearest articulation of this standard's availability to the Commission is in *Abrams*, 492 N.E.2d at 1197 ("in their treatment of investments in abandoned facilities, courts and commissions have applied both the 'used and useful' and 'prudent investment' tests with results ranging from total disallowance of costs to full recovery.")

20. *Abrams*, 492 N.E.2d at 1195 ("The PSC does have the discretion under *Hope Gas Co.* to permit no more than partial recovery of investment in a subsequently abandoned facility.")

21. *See* N.Y. Pub. Serv. Law §§ 30, 66(12)(i), 72.

22. Such rules can take the form of a "hard" regulation that is codified in the New York Code of Rules and Regulations following a process of public notice and comment, *see, e.g.*, N.Y. Comp. Codes R. & Regs. tit.

Such rules provide utilities and stakeholders with more fully articulated and consistent parameters than past orders approving specific rate case settlements or other utility proposals can.<sup>23</sup>

New York law clearly provides the Commission with authority to require regulated entities to plan to meet new environmental requirements. First, New York courts recognize that with respect to ratemaking the PSL grants the Commission “the very broadest of powers,”<sup>24</sup> and so review Commission actions deferentially, even in instances where the Commission adopts a new policy or makes a significant policy reversal.<sup>25</sup> While Commission decisions are not invulnerable to legal challenge,<sup>26</sup> the limits that courts have tended to impose on the Commission’s authority to respond to changed circumstances with policy changes afford the Commission a great deal of flexibility.<sup>27</sup> Second, PSL section 5, titled “jurisdiction, powers and duties of the [P]ublic [S]ervice [C]ommission,” states in its second paragraph that:

The commission shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.<sup>28</sup>

Read in combination with *Niagara Mohawk’s* deference to Commission decisions that respond to changed circumstances, this provision arguably empowers the Commission to impose significant and novel requirements on utilities in light

16, pt. 255 (gas system safety rules), or a “soft” order issued by the Commission but not codified, *see, e.g.*, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework, N.Y. Pub. Serv. Comm’n Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision* (May 19, 2016).

23. *Id.*

24. *Niagara Mohawk*, 507 N.E.2d at 289.

25. *See, e.g.*, *Energy Ass’n of N.Y. v. N.Y. State Pub. Serv. Comm’n*, 710 N.Y.S.2d 662, 666 (2000) (rejecting challenge to Commission’s authority to require utilities to divest from generation and transmission resources and file amended tariffs even though no legislative amendments had altered the statutory authority cited by the Commission). New York courts sometimes refer to the basic principle that “when an agency determines to alter its prior stated course it must set forth its reasons for doing so” as the *Field Doctrine*. In *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516, 520 (1985).

26. *See, e.g.*, *Nat’l Energy Marketers Ass’n v. N.Y. State Pub. Serv. Comm’n*, 37 N.Y.S.3d 178, 188 (N.Y. Sup. Ct. 2016), *aff’d*, 56 N.Y.S.3d 485 (App. Div. 2017), *aff’d as modified*, 33 N.Y.3d 336 (2019), and *aff’d sub nom*; *Retail Energy Supply Ass’n v. Pub. Serv. Comm’n of State*, 59 N.Y.S.3d 590 (N.Y. App. Div. 2017), and *aff’d as modified*, 33 N.Y.3d 336 (2019) (“notice given to petitioners was clearly inadequate”); *see also* *Home Depot U.S.A., Inc. v. N.Y. State Pub. Serv. Comm’n*, 868 N.Y.S.2d 770, 772 (N.Y. App. Div. 2008) (“based upon the analysis contained in the PSC’s determination, we find no rational basis for the PSC to disregard the clear language of the development and lease agreements between Home Depot and Emgee in favor of Emgee’s tax and accounting treatment of the funds on its books.”).

27. The key case is *Niagara Mohawk*, in which the Court of Appeals held that Commission ratemaking authority included the power to ground decisions in “a realistic appraisal of the situation” and to respond to changed circumstances—in that case by clawing back “imprudently incurred fuel expenses”—based on such an appraisal. 507 N.E.2d at 292.

28. N.Y. Pub. Serv. Law § 5 (McKinney 2019).

of long-term trends or objectives, so long as those requirements demonstrably serve one or more of the reasons listed.<sup>29</sup>

*B. The Promise of Comprehensive and Coherent Greenhouse Gas Emissions Regulation under the CLCPA*

New York’s policy posture with respect to gas has been confused and conflicted for over a decade. An “80 by 50” climate pollution reduction goal (requiring greenhouse gas emissions to be reduced to 80% below 1990 levels by 2050) was originally established in 2009 by Governor Paterson through Executive Order No. 24.<sup>30</sup> Although the executive order did not state this climate goal in metric tons, New York’s most recent greenhouse gas inventory shows that in 1990, New York’s greenhouse gas emissions totaled about 237 million metric tons of CO<sub>2</sub> equivalent.<sup>31</sup> Reducing those emissions by 80% would have given us a 2050 emissions budget of under 48 million metric tons of CO<sub>2</sub> equivalent.<sup>32</sup> However, in 1990 (the year specified as the baseline), emissions associated with gas already totaled about 52 million metric tons—enough that emissions from gas alone had already, in the base year, exceeded the state’s 2050 target.<sup>33</sup> By 2010, the year after Paterson established the “80 by 50” goal, gas was driving nearly 67 million metric tons of climate pollution—almost 40% above the total 2050 emissions budget.<sup>34</sup> Though it was foreseeable from the outset that emissions associated with gas would ultimately need to fall to meet the 2050 goal, the emissions advantages of gas compared with other fossil fuels made it the foundation of much of the State’s emissions-reduction progress during the first decade after the “80 by 50” goal was adopted<sup>35</sup>—with the predictable result that gas-related emissions continued to rise,<sup>36</sup> especially in the residential sector, where gas now accounts for a majority of annual greenhouse gas emissions (see Figure 1).<sup>37</sup>

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29. An important open question about the extent of the flexibility available to the Commission relates to whether and precisely how the Commission might exercise authority with respect to emerging categories of energy or heating resources that are not part of any monopoly energy distribution system. *See generally* N.Y. Pub. Serv. Law § 5; *Niagara Mohawk*, 507 N.E.2d at 292.

30. N.Y. Executive Order No. 24, N.Y. Comp. Codes R. & Regs. tit. 9, § 7.24.

31. NY GHG INVENTORY, *supra* note 6, at S-10 tbl.S-2.

32. *Id.*; *see also* N.Y. Executive Order No. 24, N.Y. Comp. Codes R. & Regs. tit. 9, § 7.24.

33. NY GHG INVENTORY, *supra* note 6, at S-10 tbl.S-2.

34. *Id.*; *see also* N.Y. Executive Order No. 24, N.Y. Comp. Codes R. & Regs. tit. 9, § 7.24.

35. *See* Marie J. French, *Cuomo’s Middle Ground Isn’t Pleasing Many in Natural Gas Debate*, POLITICO (Apr. 24, 2017), <https://www.politico.com/states/new-york/albany/story/2017/04/24/cuomos-strange-relationship-with-natural-gas-111394>; *see also* Harrison Fell & Peter Manilof, *Leakage in Regional Environmental Policy: The Case of the Regional Greenhouse Gas Initiative*, 87 J. ENVTL. ECON. & MGMT. 1 (2018) (describing “beneficial leakage” that reduced emissions intensity of electricity generated for New York and other Regional Greenhouse Gas Initiative states as a result not only of coal-fired generation *within* New York being squeezed out of the marketplace but also of gas displacing coal-fired electricity generation in states *adjacent to* New York and other RGGI participants).

36. NY GHG INVENTORY, *supra* note 6, at 5-14 (showing growth in use of gas for electricity generation as well as residential and commercial consumption from 1990-2016).

37. *Id.* at 10 tbls.4&5. The next five-year batch of data have not yet been published.

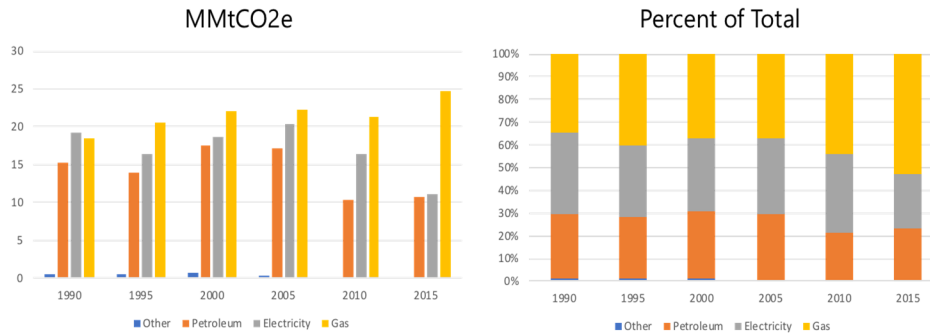


Figure 1. Residential Sector Emissions Inventory 1990-2015, Volume (Left) and Percent (Right).<sup>38</sup>

For decades, natural gas enjoyed an edge in space heating, where the comparatively immature state of electric technologies and the predominance of high-emitting generation on the electric grid conspired to make electric heating appear to be an environmental loser.<sup>39</sup> Gas also could be used as a comparatively low-emitting fossil fuel for electric generation.<sup>40</sup> Once low-cost fossil gas became available,<sup>41</sup> fossil gas emerged as an attractive near-term opportunity for emissions reductions in both sectors.<sup>42</sup>

Nonetheless, the problems with this trajectory should have been apparent even in 2009, when the deep decarbonization goal was first adopted.<sup>43</sup> Throughout the ensuing decade, the State's stance toward gas grew all the more muddled. In 2011, the City of New York Department of Environmental Protection adopted a regulation that in effect required the phase-out of #6 and eventually #4 heating oil

38. *Id.*

39. The emissions impact of electric consumption for any purpose depends on the characteristics of the electric generation that will meet the electric demand when it arises. Even highly efficient electric technologies can have poor emissions profiles if they are powered by high-emitting generation types, such as coal combustion.

40. In 1990, more than 18% of electric generation in New York was from coal and another 24% was from petroleum, both of which emit far more carbon dioxide emissions when combusted than natural gas; by 2016, natural gas generation had nearly tripled, while coal and petroleum were approaching zero. NY GHG INVENTORY, *supra* note 6, at 5 tbl.1.

41. U.S. ENERGY INFO. ADMIN., NATURAL GAS: NEW YORK NATURAL GAS IMPORTS PRICE (Aug. 31, 2020), [https://www.eia.gov/dnav/ng/hist/na1274\\_sny\\_3a.htm](https://www.eia.gov/dnav/ng/hist/na1274_sny_3a.htm).

42. The short-term greenhouse gas emissions advantages may have been greatly overstated due to lack of understanding of the short-term global warming potential of methane. See generally Daniel J.G. Crow, et al., *Assessing the Impact of Future Greenhouse Gas Emissions from Natural Gas Production*, 668 SCI. TOTAL ENV'T 1242 (2019).

43. See N.Y. Executive Order No. 24, N.Y. Comp. Codes R. & Regs. tit. 9, § 7.24; NY GHG INVENTORY, *supra* note 6.

in buildings.<sup>44</sup> The new regulation was expected to save thousands of lives,<sup>45</sup> and is believed to have succeeded in that regard.<sup>46</sup> Buildings that were covered by the regulation could switch to #2 heating oil, but the cost advantage of gas was so compelling that municipal policymakers (in New York City as well as other localities that followed suit)<sup>47</sup> sought to increase the availability of gas in order to make conversions away from more polluting grades of heating oil cost-effective and thus improve air quality more quickly.<sup>48</sup> The Commission adopted its 2012 Order encouraging expansion of gas availability against this backdrop.<sup>49</sup>

New York State agencies stopped short of fully embracing gas, however. In 2014, New York turned its back on the opportunity to become a significant fossil fuel producer when Governor Cuomo banned hydraulic fracture drilling (“fracking”) for fossil fuel extraction.<sup>50</sup> Since that time the State has refused repeatedly to issue permits for additional gas transmission pipeline capacity.<sup>51</sup> Notably, all the rejections issued prior to the CLCPA’s adoption were justified as protections of water quality and public health, and did not mention climate change.<sup>52</sup>

44. 15 R.C.N.Y. ch. 2 (2016), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-24125#rid-0-0-0-24441>.

45. Mireya Navarro, *City Issues Rule to Ban Dirtiest Oils at Buildings*, N.Y. TIMES (Apr. 21, 2011), <https://www.nytimes.com/2011/04/22/nyregion/new-york-city-bans-dirtiest-heating-oils-at-buildings.html>.

46. Kate Taylor, *New York’s Air is Cleanest in 50 Years, Survey Finds*, N.Y. TIMES (Sept. 26, 2013), <https://www.nytimes.com/2013/09/27/nyregion/new-yorks-air-is-cleanest-in-50-years-survey-finds.html>.

47. See, e.g., Westchester, N.Y., Local Law No. 9014-2016 (June 20, 2016), *codified at* Westchester Cty. L. § 873.1321 (prohibiting use of #6 fuel oil after July 2018 and of #4 after July 2020); City of White Plains, N.Y., Ordinance repealing ch. 3-3- and adopting ch. 3-3 §§ 1-29 of White Plains Muni. Code, (July 7, 2014), <https://perma.cc/PKN4-HG3F>.

48. As an air quality measure, the strategy worked. See Taylor, *supra* note 46.

49. See N.Y. Pub. Serv. Comm’n Case 12-G-0297, *Proceeding on Motion of the Commission To Examine Policies Regarding the Expansion of Natural Gas Service*, Order Instituting Proceeding (Nov. 30, 2012). See also Case 13-G-0031, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc., for Gas Service*, Order Approving Electric, Gas, and Steam Rate Plans in Accord with Joint Proposal (Feb. 21, 2014) at 34–35.

50. N.Y. DEP’T ENVTL. CONSERV., FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS, AND SOLUTION MINING REGULATORY PROGRAM: FINDINGS STATEMENT 5 (2015) [hereinafter DEC, FINDINGS STATEMENT].

51. Devin McDougall, *New York Denies Water Quality Permit for Another Natural Gas Pipeline*, SIVE, PAGET & RIESEL (May 16, 2018), <https://sprlaw.com/new-york-denies-water-quality-permit-for-another-natural-gas-pipeline/> (listing four examples of permit denials). Because the Federal Energy Regulatory Commission and pipeline developers have sought with some success to reverse the Department of Environmental Conservation (DEC)’s refusals, however, pipelines initially refused permits by DEC may yet be built, albeit after significant and costly delay. See Order on Voluntary Remand, Constitution Pipeline Co., 168 F.E.R.C. ¶ 61,129 (2019) (concluding that “New York DEC waived its authority” to refuse a water quality permit to the pipeline developer); Nat’l Fuel Gas Supply Corp. v. N.Y. Dep’t of Env’tl. Conservation, 761 F. App’x 68, 70 (2d Cir. 2019) (acknowledging FERC approval of proposed pipeline and vacating and remanding DEC permit denial).

52. See DEC, FINDINGS STATEMENT, *supra* note 50, at 3-5; see also, e.g., Letter from Daniel Whitehead, DEC, to Joseph Dean, Transcontinental Gas Pipeline Company, regarding “Notice of Denial of Water Quality Certification” 4 (May 15, 2019) (“The Department denies the [Water Quality Certification] Application without prejudice based on Transco’s inability to demonstrate the Project’s compliance with all applicable water quality standards.”). The first post-CLCPA pipeline rejection, issued on May 15, 2020, is also grounded in DEC’s authority to protect water quality, but it expressly acknowledges that “the State needs to continue its ongoing transition away from natural gas and other fossil fuels,” and further that “the continued long-term use of fossil fuels is inconsistent with the State’s laws and objectives and with the actions necessary to prevent the most severe

By adopting the CLCPA, New York has signaled its intent to quiet this whirlwind of conflicting policy signals, and to replace it with measures that push uniformly in the direction of deep decarbonization.<sup>53</sup> Four elements of the CLCPA illustrate how it lays the groundwork for this shift:

- Establishment of a 22-member Climate Action Council, as well as several working groups and advisory panels to inform its work, charged with “outlining the recommendations for attaining . . . net zero emissions in all sectors of the economy” that will guide state policy for all sectors of the economy. The resulting Scoping Plan is to be final by 2023.<sup>54</sup>
- Establishment of ambitious economy-wide greenhouse gas emissions reduction targets and a mandatory schedule for meeting them.<sup>55</sup>
- Clarification that all emitters above a very low threshold will be subject to regulation, even if only in the aggregate.<sup>56</sup>
- Directing the Department of Environmental Conservation (DEC) to develop, in consultation with NYSERDA, a Value of Carbon that “shall serve as a monetary estimate of the value of not emitting a ton of greenhouse gas emissions.”<sup>57</sup> Once established, that uniform value will be available to all state agencies to apply in the context of benefit-cost analyses, as a shadow price to include in planning

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impacts from climate change.” Letter from Daniel Whitehead, DEC, to Joseph Dean, Transcontinental Gas Pipe Line Co., 14–16 (May 15, 2020) [hereinafter Whitehead Letter], <https://perma.cc/W778-QJE2>.

53. Jesse McKinley & Brad Plumer, *New York to Approve One of the World’s Most Ambitious Climate Plans*, N.Y. Times (June 18, 2019), <https://www.nytimes.com/2019/06/18/nyregion/greenhouse-gases-ny.html>.

54. CLCPA § 2; N.Y. Env’tl. Conserv. Law §§ 75-0103(11) & (12)(c); N.Y. Env’tl. Conserv. Law §§ 75-0103(7) (directing Council to convene “at a minimum,” advisory panels on “transportation, energy intensive and trade-exposed industries, land-use and local government, energy efficiency and housing, power generation, and agriculture and forestry”), 75-0103(8) (directing Council to convene Just Transition Working Group), 75-0111 (directing Council to convene Climate Justice Working Group); 75-0103(12) (directing Council to develop the draft Scoping Plan in consultation with designated working groups); *see also* 2019 N.Y. Laws c.735 (adopting law to convene permanent Environmental Justice Working Group); *see also* An Act to Amend the Environmental Conservation Law, In Relation to Establishing a Permanent Environmental Advisory Group and an Environmental Justice Interagency Coordinating Council, S.B. 6958, 2019 Sess. (N.Y. 2019).

55. CLCPA § 2; N.Y. Env’tl. Conserv. Law § 75-0107(1).

56. CLCPA § 2; N.Y. Env’tl. Conserv. Law §§ 75-0103(12)(c), 75-0109(2)(d) (“The regulations promulgated by the department pursuant to this section shall: \* \* \* (d) Include measures to reduce emissions from greenhouse gas emission sources that have a cumulatively significant impact on statewide greenhouse gas emissions, such as internal combustion vehicles that burn gasoline or diesel fuel and boilers or furnaces that burn oil or natural gas.”).

57. Prior to the CLCPA, the Commission applied the Social Cost of Carbon identified by the federal Interagency Task Force on the Social Cost of Carbon in two contexts: calculation of Zero Emission Credits to be purchased from nuclear generation facilities, Order Adopting a Clean Energy Standard, N.Y. Pub. Serv. Comm’n Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard 49–50 (Aug. 1, 2016); and valuation and compensation for energy produced by non-emitting distributed energy resources, Order Establishing the Benefit Cost Analysis Framework, N.Y. Pub. Serv. Comm’n Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision 18 (Jan. 21, 2016); N.Y. Env’tl. Conserv. L. § 75-0113 (Lexis Nexis 2019).

decisions or accounting processes, or even as the price element of a market-based regulatory mechanism.<sup>58</sup>

Other recent State and local legislative and executive actions also reflect that New York governments are beginning to row in the same direction—that is, away from fossil fuels. In April 2020, state legislation overhauled renewables siting and codified the administrative ban on hydraulic fracturing.<sup>59</sup> The New York City Council adopted Local Law 97 in July 2019, establishing an aggressive schedule for decarbonizing the emitting sector over which it has the greatest authority: buildings.<sup>60</sup> And in February 2020, New York City Mayor Bill DeBlasio issued Executive Order 52, which directs City agencies to oppose the expansion of infrastructure that facilitates fossil fuel use<sup>61</sup>—with potentially immediate and significant effects for National Grid’s near-term plans for securing a supply of gas to serve its customers in New York City and on Long Island.<sup>62</sup> These local measures in particular will contribute to the transformation of the fossil fuel demand curves that utilities might have relied on to justify investments in additional infrastructure.<sup>63</sup>

In short, the State’s current approach to the task of identifying and reducing greenhouse gas emissions from all sources, including many that had previously been subject to inconsistent levels of environmental protection regulation or had been wholly ignored, gives the Commission an unmistakable but largely implicit directive to proceed with caution in authorizing further investment in certain of the energy resources it regulates.

### III. TENSIONS—IN NEW YORK AND ELSEWHERE

In several basic and important respects, New York’s PSL and CLCPA are in tension. On the one hand, the PSL states that gas service is in the public interest and ensures that customers may receive gas service (including free infrastructure

58. Moreover, the CLCPA’s treatment of greenhouse gases other than carbon dioxide—affording them uniform treatment based on their warming potential compared to carbon dioxide over a 20-year horizon. N.Y. Evtl. Conserv. Law § 75-0101(2). This appears to open the door to applying a version of the new Value of Carbon price to a wide range of climate pollutants that previously may not have been priced at all.

59. 2020 N.Y. Laws c.58; Samantha Maldonado & Marie J. French, *Environmental Wins in Budget*, POLITICO (Apr. 2, 2020), <https://www.politico.com/states/new-york/newsletters/politico-new-york-environment/2020/04/02/environmental-wins-in-budget-333823>; A Budget Bill, Submitted by the Governor Pursuant to Article Seven of the Constitution, S.B. 9508 B, 2020 Sess. (N.Y. 2020).

60. City of New York, Local Law 97 of 2019. Although transportation accounts for approximately 40% of greenhouse gas emissions statewide, New York City’s greenhouse gas emissions are overwhelmingly attributable to energy use in buildings, including on-site combustion of fuel as well as indirect emissions resulting from electricity consumption. For a clear summary of the law, see Jahnvi Sajip, *Local Law 97 of 2019: Understanding the NYC Building Emission Limits*, NEARBY ENG’RS (Nov. 14, 2019), <https://www.ny-engineers.com/blog/local-law-97-of-2019>.

61. OFFICE OF THE MAYOR OF THE CITY OF N.Y., EXEC. ORDER NO. 52 (2020), <https://perma.cc/58PU-X86M> (“Statement of Administration Policy Against Addition of Infrastructure that Expands the Supply of Fossil Fuels in New York City”); see also David Iaconangelo, *Fight Over Gas Supplies Could Renew Next Winter — Official*, E&E NEWS (Mar. 31, 2020), <https://www.eenews.net/energywire/2020/03/31/stories/1062746469> (noting potential conflict between National’s Grid’s plans and New York City policy).

62. See note 120, *infra*, and accompanying text.

63. *Id.*



additions), and that gas corporations may recover from customers the costs of providing that service, as well as earn returns on capital invested.<sup>64</sup> On the other hand, the CLCPA states that decarbonization—which logically excludes reliance on the fossil gas transported by gas utilities unless all leakage is avoided and it is coupled with carbon capture and sequestration or utilization—is an existential necessity.<sup>65</sup> More concretely, the CLCPA establishes a schedule of binding emissions limits that eventually falls to 15% of 1990 emissions, with an aspirational goal of net-zero.<sup>66</sup> This section describes these features of New York’s laws and the tensions between them in more detail. It concludes by identifying laws in other states that give rise to similar tensions with those states’ respective greenhouse gas emissions reduction mandates.

#### A. Gas Consumption and “the Public Interest”

The CLCPA’s policy declarations and emissions reduction targets imply a limited role, if any, for fossil gas in the energy system by 2050. Yet section 30 of the New York Public Service Law expressly asserts that the provision of gas to customers is in the public interest:

This article shall apply to the provision of all or any part of the gas, electric, or steam service provided to any residential customer by any gas, electric or steam and municipalities corporation or municipality. It is hereby declared to be the policy of this state that the continued provision of all or any part of such gas, electric and steam service to all residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest.<sup>67</sup>

Notably, this section 30 declaration of policy in effect incorporates a customer right and a corresponding utility company obligation. The customer right is to the continuation of utility services already received, including *inter alia* gas. The corresponding utility obligation is to continue providing customers with those same services. Whereas customers’ need for energy services that preserve their health and welfare, like heating, could conceivably be met by a variety of fuels or services, the PSL channels customers to a particular subset of such fuels or services—i.e., whatever they had used in the past—and to the incumbent utility company that had previously provided such fuels or services.

Though the CLCPA does not expressly repeal or modify section 30 of the Public Service Law, it mandates greenhouse gas reductions by 2050 that are almost certainly unattainable while gas utilities continue to furnish residential customers with the amount of gas service they currently receive. Specifically, section

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64. N.Y. Pub. Serv. Law § 30.

65. CLCPA §§ 1(1)-(4).

66. *Id.* § 2.

67. N.Y. Pub. Serv. Law § 30. A different section of the Public Service Law also applies this principle—that continued access to gas where it has been available previously is fundamentally a good thing—to situations where a major building renovations or even demolition open up a clear opportunity to cut back on gas combustion. Section 66-b of the Public Service Law provides that “no gas customer shall be denied a continuation of gas service following the demolition and reconstruction of any structure or structures owned by any such customer, provided that any such reconstructed structure or structures are on the same parcel of real property, reconstruction commences within one year of demolition and the new structure or structures do not materially increase the customer’s gas usage.” N.Y. Pub. Serv. Law § 66-b.

2 of the CLCPA establishes a new section, 75-0107, of the Environmental Conservation Law, which requires the establishment of a statewide, economy-wide greenhouse gas emissions limit for 2050 that is to be equivalent to 15% of the State's 1990 emissions.<sup>68</sup> According to the most recent version of New York's Greenhouse Gas Inventory, New York's 1990 greenhouse gas emissions totaled 236.19 million metric tons of CO<sub>2</sub>e.<sup>69</sup> Fifteen percent (15%) of that figure—New York's greenhouse gas emissions budget in the year 2050—is 35.42 million metric tons of CO<sub>2</sub>e.<sup>70</sup> As of 2016, however, statewide annual emissions attributable to the combustion of gas alone was greater than 70 million metric tons—approximately double the 2050 budget—with residential combustion of gas accounting for more than 20 million metric tons of CO<sub>2</sub>e.<sup>71</sup>

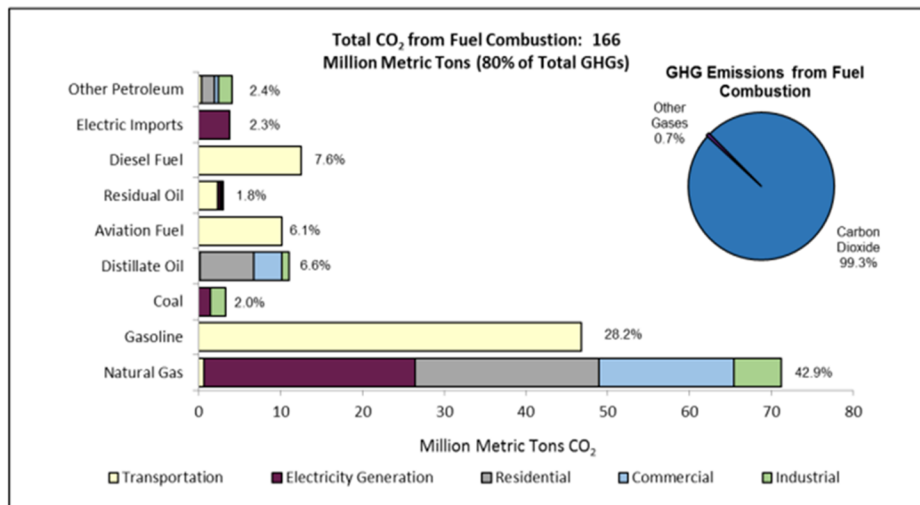


Figure 2. Greenhouse gas emissions from fuel combustion by fuel type in 2016.<sup>72</sup>

Even if all gas combustion were to stop other than the residential consumption that section 30 asserts is in the public interest, gas consumption by current residential customers alone would exhaust more than half of the 2050 carbon budget of approximately 35 million metric tons.<sup>73</sup> Therefore, except to the extent

68. CLCPA § 2.

69. NY GHG INVENTORY, *supra* note 6, at S-10.

70. *Id.*

71. NY GHG INVENTORY, *supra* note 6, at S-7 fig.S-4.

72. NYSERDA, PATTERNS AND TRENDS NEW YORK ENERGY PROFILES: 2002-2016 FINAL REPORT, at A-3 (Jan. 2019), <https://www.nyseda.ny.gov/-/media/Files/Publications/Energy-Analysis/2002-2016-Patterns-and-Trends.pdf> [hereinafter PATTERNS AND TRENDS].

73. For purposes of this article, we will treat this number, 35.42 million metric tons, as the 2050 greenhouse gas budget; however, methodological changes in the greenhouse gas inventory, including some required by the CLCPA (for example, the new definition of carbon dioxide equivalent and the accounting for upstream impacts associated with fossil fuel extraction), may ultimately result in a different understanding of New York's

that future emissions resulting from consumption are captured,<sup>74</sup> and/or except to the extent that future “natural gas” is a renewable methane product with a strikingly different lifecycle emissions profile than fossil gas,<sup>75</sup> the CLCPA necessarily requires that New Yorkers in 2050 combust dramatically less gas than they do now, including the residential consumption that section 30 of the Public Service Law has declared to be in the public interest.<sup>76</sup>

The tension between the two laws is not limited to service to existing gas customers. New York’s utility law not only declares that continuation of all gas service to residential customers is in the public interest, but also provides that certain expansions in gas service to additional customers should be made at no cost to those new customers.<sup>77</sup> Section 31(4) of the Public Service Law provides in relevant part, with respect to residential gas or electric service:

In the case of any application for service to a building which is not supplied with electricity or gas, a utility corporation or municipality shall be obligated to provide

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1990 greenhouse gas footprint and thus a different number for its greenhouse gas budget. The actual 2050 target in metric tons of carbon dioxide equivalent is the topic of a rulemaking that New York’s Department of Environmental Conservation has announced, but with respect to which, as of the date of this writing, no proposed rule is yet available. See [https://www.dec.ny.gov/docs/administration\\_pdf/draftpart496.pdf](https://www.dec.ny.gov/docs/administration_pdf/draftpart496.pdf).

74. To our knowledge, capturing carbon released from combustion of gas in residential and commercial buildings is not anyone’s technology pipeline.

75. For a thorough examination of legal changes involved in making way for renewable gas, see Romany M. Webb & Melinda E. Taylor, *Production and Delivery of Low-Carbon Gaseous Fuels*, in LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE U.S. 670 (Michael Gerrard and John Dernbach eds., 2019), and James M. Van Nostrand, *Production and Delivery of Biofuels*, in LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE U.S. 692 (Michael Gerrard and John Dernbach eds., 2019). For a skeptical view of renewable gas as an emissions-reducing alternative to fossil gas solutions, see Emily Grubert, *At Scale, Renewable Natural Gas Systems Could Be Climate Intensive: The Influence of Methane Feedstock and Leakage Rates*, ENVTL. RES. LETTERS (2020) (in press), <https://doi.org/10.1088/1748-9326/ab9335>.

76. These numbers somewhat understate the magnitude of the challenge the CLCPA poses to continued use of fossil gas because the CLCPA also requires significant changes to how greenhouse gas emissions are calculated and attributed in the first place—changes that are not yet reflected in the July 2019 version of New York’s Greenhouse Gas Inventory. Specifically, the numbers above are based on emissions directly resulting from the *combustion* of gas—primarily CO<sub>2</sub>, a byproduct of such combustion—whereas the CLCPA’s definition of total statewide emissions includes emissions associated with “the extraction and transmission of fossil fuels imported into the state.” CLCPA § 2, N.Y. Envtl. Conserv. Law § 75-0101 (defining “Statewide greenhouse gas emissions”). Such upstream emissions are not included in the math described above. Moreover, upstream emissions associated with gas include fugitive emissions of methane itself, a significant short-term carbon forcer that breaks down comparatively quickly compared with carbon dioxide, but whose global warming potential during the first twenty years after its release is 84 times as great as that of carbon dioxide. G. Myhre et al., *Anthropogenic and Natural Radiative Forcing*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 714 tbl.8.7 [T.F. Stocker et al. (eds.) 2013]. Until recently, the global warming potential of methane and other greenhouse gases were compared to carbon dioxide based on their respective impacts over a 100-year horizon, and that is the methodology reflected in the 2019 greenhouse gas inventory (see NY GHG INVENTORY, *supra* note 6, at S-1); however, the CLCPA establishes twenty years as the proper horizon for comparing other greenhouse gases to carbon dioxide. See N.Y. Envtl. Conserv. Law § 75-0101 (defining “Carbon dioxide equivalent”). In the future, when upstream emissions associated with the extraction and transmission of gas are included in the inventory, and when the short-term climate forcing character of methane is fully recognized, today’s gas usage will most likely be shown to be even less compatible with the 2050 greenhouse gas mandate established in the CLCPA.

77. N.Y. Pub. Serv. Law § 31(4).

service to such a building, provided however, that the commission may require applicants for service to buildings located in excess of one hundred feet from gas or electric transmission lines to pay or agree in writing to pay material and installation costs relating to the applicant's proportion of the pipe, conduit, duct or wire, or other facilities to be installed.<sup>78</sup>

Thus, where applicants for new service require more than 100 feet of new line to serve their premises, the Commission *may*, but need not, require those customers to pay a portion of the cost of the new investment. The portion of such cost that the applicant does not pay is generally funded in the same manner as other investments by such utility companies—that is, it is paid for by the company's ratepayers in aggregate. Adding new customers to the gas system can benefit existing customers by spreading certain fixed costs across a larger number of customers, but the practice of extending lines to new customers at no cost—or greatly reduced cost—to those customers obscures both the magnitude of the costs being caused by new customers and how those costs are allocated across existing and future customers. Because this obscurity encourages prospective energy customers and real estate developers to opt for gas, depending on one's definition, the 100-foot rule can be considered either a cross-subsidy (costs caused by some consumers are paid by others) or a subsidy—that is, not a subsidy *to* a particular party but *for* the consumption of fossil fuels.<sup>79</sup>

The language in sections 30 and 31 of New York's Public Service Law provides for equivalent treatment of electric and gas service; neither section specifies

78. *Id.* This language was initially added to the Public Service Law in 1981 along with section 30 and the rest of Article 2 (Residential Gas, Electric and Steam Utility Service). N.Y. L. 1981 c. 713 § 3, at 2045. The “100-foot rule” provision appears to have been drawn from a Transportation Corporations Law provision that dates to 1859. N.Y. L. 1859 c. 311 § 6, at 698, 700; a version of that provision, titled “Gas and electricity must be supplied on application,” remains in force, and now applies to non-residential customers. N.Y. Transp. Corp. Law § 12 (McKinney 2019). Notably, by 1920, New York's courts had concluded that the Commission had no discretion to adopt anything other than a literal reading of the Transportation Corporations Law's 100-foot rule. *See* Pub. Serv. Comm'n v. Iroquois Nat. Gas Co., 189 A.D. 545 (N.Y. App. Div. 1920), *aff'd sub. nom.* People ex rel. Burke v. Iroquois Nat. Gas Co., 229 N.Y. 593 (1920). A 1920 Commission decision illustrates what this meant. In that case, a complainant asked the Commission to order a gas company to connect the complainant's premises to either of two gas mains, each less than 100 feet away. *In the Matter of the Application of Edward P. Stevenson against Baldwinsville Light and Heat Company, Asking that its Gas Main be Extended to Furnish His Residence with Natural Gas*, Case No. 7487 (N.Y.P.S.C., 2d Dist. Sept. 30, 1920). The Commission noted that both of those mains were fed by a depleted gas field, and that the Company had refused extension only because it could not adequately serve its own customers, much less the complainant. The Commission deemed the company's refusal to extend service to new customers until adequate service could be assured to existing ones “sound policy,” but concluded that it “had no discretion, and was required as a matter of law to order service to be supplied.” 24 St. Dept. Rep. 92, 95 (1920).

79. Doug Koplow, Earth Track Inc., *Subsidies to Energy Industries*, in ENCYCLOPEDIA OF ENERGY 749 (2004) (defining cross-subsidy and direct subsidy). *See also* Masami Kojima & Doug Koplow, *Fossil Fuel Subsidies: Approaches and Valuation*, World Bank Policy Research Working Paper 4 (Mar. 2015) (“defin[ing] a subsidy for fossil fuels as a deliberate policy action . . . that has one or more of the following effects: \* \* \* B. Reducing the cost of production or delivery of fuels, electricity, or heat.”). In addition to placing an economic thumb on the scale in favor of fossil fuels, fossil fuel subsidies communicate a *message to markets* about the future of fossil fuels. “Subsidies also have a symbolic effect, in that they communicate the normative position that this industry and its activities are beneficial for society as a whole and, therefore, should be encouraged.” Peter Erickson et al., *Why Fossil Fuel Producer Subsidies Matter*, 578 NATURE E1, E2 (2019), <https://perma.cc/KTF4-239S>. This message is irreconcilable with the message of the CLCPA.

that gas should be privileged over electricity for any particular use.<sup>80</sup> However, various aspects of the existing utility law and regulatory practice effectively tilt the field in favor of gas for applications where gas has been adopted at some point, an effect that is amplified by existing buildings' configurations and customary practices in new construction.<sup>81</sup> The result is a strong bias in favor of continued and constantly expanding use of gas for various applications, even where electricity could perform the same function at the same or lower overall cost.<sup>82</sup>

### B. Gas Infrastructure Expansion and “the Public Interest”

Gas distribution infrastructure and service do not extend to all corners of New York State.<sup>83</sup> The white space on the map below indicates where no gas or gas-and-electric corporation provides gas service, and in several of the gas service territories shown service is provided only in relatively densely populated areas.

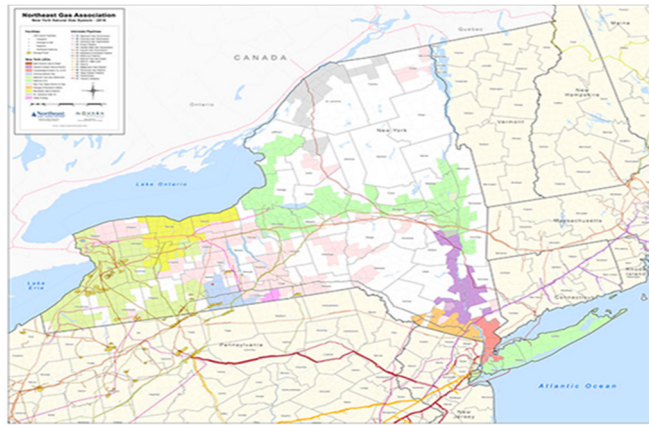


Figure 3. Map of Gas Service Territories in New York State.<sup>84</sup>

In areas where gas service is already available, section 31 of the Public Service Law in effect creates an entitlement, with respect to any prospective new residential customer, to have built on their behalf, free of charge, up to 100 feet of gas line (or electric line), from the main to the building for which service is being requested.<sup>85</sup> A regulation promulgated by the Public Service Commission in 1986 in relation to gas line (but not electric line) extensions magnifies this arguably modest entitlement into something far more significant.<sup>86</sup> Section 230.2 of Title

80. See generally N.Y. Pub. Serv. Law §§ 30-31.

81. Sherri Billimoria et al., *The Economics of Electrifying Buildings: How Electric Space and Water Heating Supports Decarbonization of Residential Buildings* 6, ROCKY MTN. INST. (2018).

82. *Id.* at 34–36 (describing phenomenon and example of Providence, Rhode Island).

83. See PATTERNS AND TRENDS, *supra* note 72, at 7.

84. NORTHEAST GAS ASSOCIATION, MAP OF GAS SERVICE TERRITORIES IN N.Y., [https://www.northeast-gas.org/ny\\_map.php](https://www.northeast-gas.org/ny_map.php).

85. N.Y. Pub. Serv. Law § 31.

86. N.Y. Comp. Codes R. & Regs. tit. 16, § 230.2(d) (1986).

16 of New York Codes, Rules and Regulations specifies as follows with respect to prospective residential gas customers who apply for heating service:

If an applicant requests residential heating service, the corporation shall furnish, place and construct all mains, service lines, service connections and appurtenant facilities necessary to render the service requested. The cost and expense which the corporation must bear shall include:

- (1) the material and installation costs relating to:
  - (i) up to 100 feet of main and appurtenant facilities; and
  - (ii) up to 100 feet of service line measured from the centerline of the public right-of-way (or the main if it is closer to the customer and development will be limited to one side of the right-of-way for at least 10 years), service connections and appurtenant facilities; but not less than the length of service line necessary to reach the edge of the public right-of-way; and
- (2) the amounts legally imposed by government authorities for obtaining required work permits and for repairing or replacing disturbed pavement.<sup>87</sup>

Thus, where the statute has created an entitlement for a new residential customer to have built on their behalf, at the utility's expense (to be recovered from other ratepayers), up to 100 feet of gas line, from the main to the building for which service is being requested, the regulation has created a *per-customer entitlement* for the utility to build on their behalf up to 100 feet of main and appurtenant facilities as well as 100 feet of service line. Moreover, in practice, these per-customer entitlements (100 feet of main each) can be pooled where multiple customers jointly request gas line extensions, allowing for significant line extensions, far in excess of the 100 feet from the gas transmission line contemplated in the statute, to be performed at the utility company's expense (an expense that, like most utility company infrastructure expenditures, is recoverable from customers collectively through rates).<sup>88</sup> The *Assessment for Public Comment* published in the New York State Register upon the adoption of Part 230 of Title 16, in July 1986, acknowledged this expansion of the section 31 entitlement and explained that the Commission had found this expansion to be "good public policy."

After review of the comments and cited references, the Commission concluded that Section 31(4) grants to residential applicants whose buildings are located within 100 feet of gas mains the right to have the facilities necessary for receipt of gas service provided, without charge. The Commission also found that good public policy of equitable treatment among customers would require the provision, without charge, of a comparable amount of facilities for residential applicants located more than 100 feet away. . . .<sup>89</sup>

Any finding that a per-customer right to have additional gas infrastructure constructed on their behalf, at no cost to them, is in the public interest must be predicated on the understanding that gas infrastructure expansion is itself in the public interest, or at least not contrary to the public interest. It would seem that in

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87. *Id.*

88. *See, e.g.,* Niagara Mohawk Tariff, PSC No. 219 – Gas, Rule 10 §§ 10.3.4, to .5 (Apr. 2012).

89. 8 N.Y. Reg. 14–17 (July 2, 1986).

the 1980s, both the Legislature and the Public Service Commission shared this understanding.<sup>90</sup>

Another provision in Part 230 indicates that in 1986 the Commission saw gas infrastructure as being not just in the public interest and a good use of ratepayer funds but something that ought to continue indefinitely.<sup>91</sup> Section 230.2(b) requires any applicant for new gas service to have first “assured the corporation that he/she will be a reasonably permanent customer.”<sup>92</sup> This uncomplicated perspective prevailed as recently as 2012, when the Commission issued an order initiating a proceeding to expand availability of gas, specifically citing environmental benefits, as follows:

Natural gas is cleaner than other fossil fuels used for home heating and under current market conditions costs a third as much. Moreover, New York State is well-located geographically to take advantage of existing and newly developed natural gas supplies located outside our State but which, when competitively-priced, are available to supply customers within the State. New York’s location relatively close to these new sources of supply could provide the State a competitive advantage in attracting and retaining employers concerned about costs of, and access to, a reliable source of energy. In addition, consumers may enjoy significant savings in household fuel expenses which in turn could benefit the State’s economy to the extent that households redeploy those savings.<sup>93</sup>

The quoted Order is noteworthy for its recognition of the environmental advantages associated with gas as compared with other fossil fuels, and for its silence on disadvantages.<sup>94</sup> While that omission may seem striking today, it is important to note that in 2012 gas was widely believed to be the least-emitting, readily available heating technology.<sup>95</sup> It was “cleaner” burning than other combustion-based technologies (the point made in the 2012 Order), and avoiding on-site combustion entirely by using electricity to heat space was widely believed to have *worse* emissions outcomes based on the large amount of electricity that that would require and the poor emissions profile of electric generation.<sup>96</sup> However, that conventional wisdom has been turned on its head in recent years, as changes in both heating technology and the makeup of the electric generating fleet have given electric heating a potentially superior emissions profile, and the clear opportunities to further clean up electric generation have opened up new pathways for reducing or

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90. This understanding rested at least in part on the language in the Home Energy Fair Practices Act, L. 1981 c. 713, which amended PSL § 31 to provide “detailed safeguards to protect persons receiving public assistance from being deprived of utility service.” *Montalvo v. Consol. Edison Co. of New York*, 92 A.D.2d 389, 398, 460 N.Y.S.2d 784, 790 (1983), *aff’d*, 61 N.Y.2d 810, 462 N.E.2d 149 (1984); *see also* Peter Kerr, *Utility Consumers Gain New Rights*, N.Y. TIMES (Mar. 11, 1982).

91. N.Y. Comp. Codes R. & Regs. tit. 16 § 230.2(d).

92. *Id.* at § 230.2(b)(1).

93. Order Instituting Proceeding, Case 12-G-0297, *supra* note 49.

94. *Id.*

95. *See* Richard G. Newell & Daniel Raimi, *Implications of Shale Gas Development for Climate Change*, 48 *Envtl. Sci. Tech.* 8360, 8363 (2014) (noting that, in 2013, gas was less emissions-intensive than electric resistance heating for uses in buildings in many regions and that heat pump technology was uncommon).

96. Order Instituting Proceeding, Case 12-G-0297, *supra* note 49.

even eliminating emissions from building heating indirectly through electrification.<sup>97</sup>

While the New York Public Service Commission’s historical perspective on gas may have been understandable given the then-current state of law in New York and now-outmoded beliefs about the relative emissions impact of gas heat compared with other options, it can no longer be justified.<sup>98</sup> The New York legislature now recognizes the role of greenhouse gases in driving climate change and has established deadlines for profound emissions reductions to avoid the most catastrophic effects of climate change.<sup>99</sup> Furthermore, given the growing consensus that there *are* technologically feasible pathways for achieving those reductions in the buildings sector,<sup>100</sup> the idea of “reasonably permanent” consumption of any fossil fuel without some plan for mitigating the resulting emissions seems at best quaint, and at worst dangerous—and at a minimum irreconcilable with the greenhouse gas reduction targets contemplated in the CLCPA.<sup>101</sup>

### C. Ratepayers Bear the Risk of Gas Corporations’ Optimism

The tensions described above all but guarantee that at least some, and quite possibly most, gas distribution infrastructure assets in New York, will ultimately be in actual use for a period that is significantly shorter than its physical useful life. Figure 4 illustrates how the transition mandated by the CLCPA will lead to some portion of those assets’ value being “stranded”—that is, unrecoverable in the way that was initially planned—because of reductions in both the level and duration of the assets’ usage.<sup>102</sup>

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97. See Keith Dennis, Ken Colburn & Jim Lazar, *Environmentally Beneficial Electrification*, 29 ELECTRICITY J. 52 (2016), <https://www.sciencedirect.com/science/article/pii/S1040619016301075?via%3Dihub#bfh0050>.

98. Order Instituting Proceeding, Case 12-G-0297, *supra* note 49.

99. Mckinley, *supra* note 53.

100. See, e.g., Trieu Mai et al., *Electrification Futures Study: Scenarios of Electric Technology Adoption and Power Consumption for the United States*, NAT’L RENEWABLE ENERGY LAB., at xii (2018) (“The high efficiency and multi-service potential of heat pumps can support their economic attractiveness; however, barriers to heat pump adoption, such as buildings retrofits and consumer familiarity, might limit growth in sales.”).

101. In March 2020, the Commission took an initial step toward grappling with this tension when it opened a generic proceeding on gas planning. N.Y. Pub. Serv. Comm’n Case 20-G-0131, *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, Order Instituting Proceeding (Mar. 19, 2020). See section III.D *infra* for a further discussion of the new proceeding.

102. See Andy Bilich, Michael Colvin & Timothy O’Connor, *Managing the Transition: Proactive Solutions for Stranded Gas Asset Risk in California*, ENVTL. DEF. FUND, at 4 (2019), [https://www.edf.org/sites/default/files/documents/Managing%20the%20Transition\\_1.pdf](https://www.edf.org/sites/default/files/documents/Managing%20the%20Transition_1.pdf).



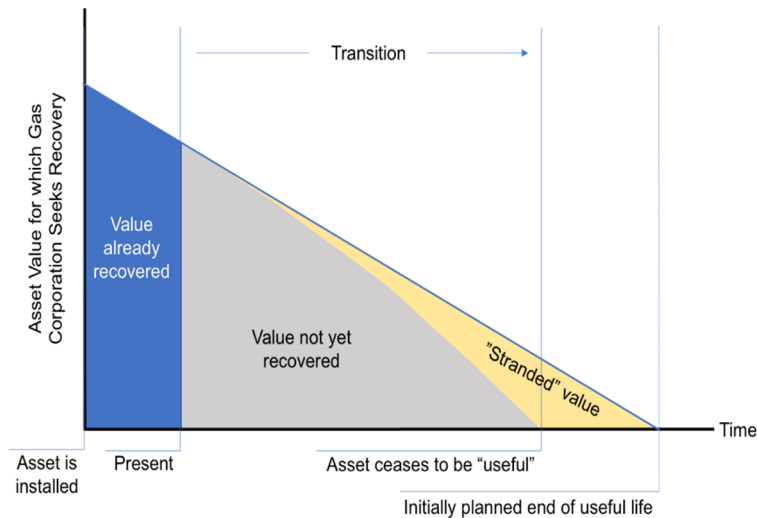


Figure 4. Effect of transition away from residential gas consumption on asset value.<sup>103</sup>

Normal, non-monopoly businesses make capital investment decisions based on, among other things, their expectations for revenues they could reap, typically requiring a certain level of profitability within a certain timeframe.<sup>104</sup> Regulated utilities operate under different obligations than their competitive peers.<sup>105</sup> They are to provide a certain level of service, with their prices (rates) set by their regulator so as to give them the opportunity to earn a return on capital invested.<sup>106</sup> As a general matter, regulated utilities do not have carte blanche to make whatever capital investments they want.<sup>107</sup> Rather, they typically will need to show that any investment from which they wish to recover revenues was a good use of their ratepayers' funds.<sup>108</sup>

103. *Id.*; See also PATTERNS AND TRENDS, *supra* note 72, at 24-39.

104. Tracy M. Roberts, *Stranded Assets and Efficient Pricing for Regulated Utilities: A Federal Tax Solution*, 11 COLUM. J. TAX L. 1, 3, 8 (2019).

105. ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, vol. I, 3 (2d ed. 1988).

106. *Id.*; *Hope Nat. Gas Co.*, 320 U.S. 591, 603; see also *Nat'l Energy Marketers Ass'n v. N.Y. State Pub. Serv. Comm'n*, 37 N.Y.S.3d 178, 185 (2016).

107. Roberts, *supra* note 104, at 34 (citing Oliver E. Williamson, *Deregulatory Takings and the Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 1000, 1016-18 (1996) (clarifying that making compensation contingent on the requirement of prudent investment in the regulatory compact deters excess investments ex ante and that guaranteeing full reimbursement would have the opposite effect, which is likely the reason that there is no express guarantee in the compact)).

108. *Id.* at 34.

Where utilities are actually required to consider whether investments are sound, they often perform some form of benefit-cost analysis (BCA).<sup>109</sup> Such an analysis would weigh the present value of benefits against that of costs over the expected life of the investment.<sup>110</sup> But when evaluating gas distribution infrastructure expansion decisions that respond to requests for service from residential customers, the Commission does not require or expect gas corporations to conduct a benefit-cost analysis—presumably because there is no decision to be made.<sup>111</sup> In practice, this means that the costs of these as-of-right line extensions are presumed to be prudently incurred by virtue of the rights established pursuant to section 31 and Part 230, even if they are demonstrably terrible business decisions whose cost far exceeds any reasonably foreseeable revenue opportunity or other benefit.<sup>112</sup>

If any BCA were performed, any conclusions regarding the relative magnitudes of benefits and costs (to be cost-beneficial, the ratio of the present value of benefits to the present value of costs should be greater than 1) would depend on the expected useful life of the investment.<sup>113</sup> In the past, it may have been the case

109. See, e.g., Energy AND ENVTL. ECON., INC. & REGULATORY ASSISTANCE PROJECT, UNDERSTANDING COST-EFFECTIVENESS OF ENERGY EFFICIENCY PROGRAMS BEST PRACTICES, TECHNICAL METHODS, AND EMERGING ISSUES FOR POLICY-MAKERS, NAT'L ACTION PLAN FOR ENERGY EFFICIENCY 1-1, 1-2 (Nov. 2008), [https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/understanding\\_cost-effectiveness\\_of\\_energy\\_efficiency\\_programs\\_best\\_practices\\_technical\\_methods\\_and\\_emerging\\_issues\\_for\\_policy-makers.pdf](https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/understanding_cost-effectiveness_of_energy_efficiency_programs_best_practices_technical_methods_and_emerging_issues_for_policy-makers.pdf); see also Abigail Anthony, *What do regulators want most from grid modernization proposals? A compelling business case*, UTIL. DIVE (Sept. 9, 2020), <https://www.utilitydive.com/news/what-do-regulators-want-most-from-grid-modernization-proposals-a-compelling/584845/>.

110. Roberts, *supra* note 104, at 11-16; see also ENERGY AND ENVTL. ECON., *supra* note 109, at 1-1, 1-2, 3-10, 4-7.

111. In a 2018 rate case in which the settlement document provided for benefit-cost analysis to be done under limited circumstances but exempted what it called “statutory requirements under Part 230 of the Commission’s Rules and Regulations,” EDF urged in a statement (see *Environmental Defense Fund Statement in Support of the Joint Proposal*, No. 18-G-0068, N.Y. State Dep’t of Pub. Serv., 7-8 (Nov. 21, 2018), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={015768D0-2A98-4C53-B346-6E28A05BB9A7}>) for BCA to be applied to gas line extensions even where they were mandatory in order to shed light on hidden stranded cost risks and climate risks. Staff replied as follows:

When an application for gas service is made to a gas corporation, in no uncertain terms, 16 NYCRR §230.2 requires that the gas corporation, in this case, Orange and Rockland, render the service requested in accordance with the provisions of Part 230. While EDF may view this exclusion as an impediment to achieving the State’s goal to reduce greenhouse gas emissions, one cannot simply ignore the Company’s legal obligation to provide gas service when requested, notwithstanding the existence of other technologies that may further advance the State’s energy and climate goals.

*Staff Reply to Statements in Support of the Joint Proposal*, No. 18-G-0068, N.Y. State Dep’t of Pub. Serv., 7 (Dec. 5, 2018), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={80B99449-127D-41A1-930E-F61DC25F61A8}>.

112. Cf. Order Directing Formal Hearing, N.Y. Pub. Serv. Comm’n Case 02-G-0289, In the Matter of the Rules and Regulations of the Public Service Commission, contained in 16 NYCRR, in Relation to Complaint Procedures – Appeal by Mr. Leon Chalker of the Informal Decision in Favor of National Fuel Gas Distribution Corporation, filed in C 26358 (177678), No. 02-G-0289, N.Y. State Dep’t of Pub. Serv., at 11, (Jan. 28, 2003), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={66604FFA-DA3E-4373-BB50-E4CE5D5388CB}> (noting that “the public interest is not served by imposing disproportionate costs to replace antiquated lines producing little revenue on the utility and its general body of ratepayers in order to benefit a very small number of customers.”).

113. ENERGY AND ENVTL. ECON., *supra* note 109, at 1-1, 2-1, 3-10.

that such a BCA would easily be satisfied, as gas distribution infrastructure investments are very long-lived, such that benefits (enjoyed by customers) are potentially quite high, while costs, which are largely upfront, are comparatively fixed (especially if environmental harm that accrues over time, such as emissions, are not included along with other costs). Thus, in short, the longer the useful life, the greater the benefit, and the more likely it is the present value of total benefits will exceed that of costs. In such a context, foregoing the BCA may not have amounted to a missed opportunity of any consequence, as it may have been easy for any such investment to satisfy the requisite hurdle to be considered cost-effective. However, the CLCPA should modify any business decision-maker's expectations as to the actual useful life of such investments, opening up the possibility that useful lives are quite a bit shorter than previously assumed to be, such that investments that would once have appeared cost-beneficial before the fact no longer would. Reduced utilization in later years due to carbon constraints is another possibility that could erode the benefit-cost ratio; less utilization also, like a shorter useful life, means less benefit, while costs remain largely constant. In the absence of any such analysis, it is impossible to know for sure how cost-beneficial such investments would have appeared in the past, or how cost-beneficial they would appear now, but it is safe to assume that the business proposition associated with as-of-right line extensions to residential customers will have been significantly changed by the passage of the CLCPA. In other words, the current rules may obligate gas utilities to waste ratepayer money—either knowingly or disregarding available facts.

Necessarily, the CLCPA's mandates have implications for the future of mass market consumption of fossil fuels in New York, including for the services provided by gas corporations and the likely useful lives applicable to new investments in infrastructure to be used to provide such services. And yet, however clear those implications might be from a business standpoint, they do not effectuate revisions to longstanding practice and enforceable legal rights, including gas utilities' expectation that they can recover from ratepayers the cost of line extensions to new customers.<sup>114</sup> Barring further changes to existing law, gas corporations (which hold a monopoly only for the distribution of gas) and combination utilities (which hold monopolies for the distribution of gas as well as electricity), will continue to operate on the expectation that when they invest in gas assets to serve the needs of gas customers, they can recover from gas customers in aggregate the costs associated with such investments (amortized over the useful life of such assets), together with a reasonable rate of return.<sup>115</sup>

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114. Roberts, *supra* note 104, at 3, 11-13.

115. N.Y. Pub. Serv. Law § 5(1)(b) (McKinney 2019); *St. Lawrence Gas Co. v. Pub. Serv. Comm'n*, 368 N.E.2d 1234, 1236 (N.Y. 1977) (observing that “[w]hen a utility introduces a new service into an area, it bestows a benefit on the denizens of the region in return for rates which will adequately compensate investors and attract whatever capital is necessary to continue service. . . . it may be necessary, as well as just and reasonable, to charge a portion of these initial costs to later users”).

#### D. Clarity Is Needed Urgently

As noted above in section II.B, New York’s policies with respect to fossil gas—especially its environmental policies—have been confused and conflicted at least since 2009.<sup>116</sup> The tension between these policies has contributed to outright conflicts in several instances, including National Grid’s 2019 moratorium on gas hookups in Queens, Brooklyn, and Long Island for new customers and also some customers resuming service after a renovation.<sup>117</sup> National Grid said that the moratorium was necessary to avoid unreliable service amid constrained supplies of gas, but others, including the Governor and the Commission, argued that it was strategic and could have been avoided by better planning.<sup>118</sup> In fact, National Grid’s planning efforts have included plans to help customers convert from heating oil to gas—in accordance with the now long-standing policy of the Commission.<sup>119</sup> But those plans appear less and less consistent with state and local policy. In addition to the clarifying message implicit in the CLCPA, New York City’s Local Law 97 and Executive Order 52 aim to stanch further growth in reliance on gas there.<sup>120</sup>

Although the CLCPA’s text says little that is specific about the future of gas, its overall structure and timing leave little doubt that the future of gas in New York will not look like the past. The new Act establishes greenhouse gas reduction goals for 2050 that are somewhat more ambitious than the goal originally established in Gov. Paterson’s Executive Order No. 24—a goal that even when it was

116. See discussion *infra* Section II.B.

117. See Mark Harrington, *Grid Steps Up Pressure to Get State Approval of Undersea Pipeline*, NEWSDAY (Mar. 27, 2019), <https://www.newsday.com/news/region-state/grid-pipeline-project-1.28996040> (“National Grid will begin notifying the dozens of midsize companies that apply for new natural-gas service that it won’t be able to supply them with firm gas service if a new undersea pipeline fails to win state approval, a company official said.”); Danielle Muoio & Marie J. French, *Gas Moratorium Puts City Officials in a Bind*, POLITICO (Aug. 23, 2019), <https://www.politico.com/states/new-york/city-hall/story/2019/08/22/gas-moratorium-puts-city-officials-in-a-bind-1152020> (noting application of moratorium to existing customers as well as new ones).

118. Iulia Gheorghiu, *National Grid Says No New NYC Gas Customers Until State Approves Pipeline*, UTILITYDIVE (May 22, 2019), <https://www.utilitydive.com/news/national-grid-says-no-new-nyc-gas-customers-until-state-approves-pipeline/555283/> (“National Grid announced on Friday a moratorium on processing new natural gas service applicants in its New York City and Long Island service territory until the Northeast Supply Enhancement (NESE) gas pipeline receives its necessary permits.”); Marie J. French, *National Grid Agrees to Lift Gas Moratorium, Pay \$36M Penalty*, POLITICO (Nov. 25, 2019), <https://www.politico.com/states/new-york/albany/story/2019/11/25/national-grid-agrees-to-lift-gas-moratorium-pay-36m-penalty-9420130> (“‘Long term we have a supply issue, especially on Long Island, for natural gas, there’s no doubt about that. And we have to find different ways to bring in gas — do we pipe it in, et cetera, do we go to other forms of energy?’ said Cuomo in a radio interview on 1010 WINS on Monday. ‘But, that’s a discussion to be had and not with a gun to the head of New Yorkers.’”). It appears significant that the announcement was made on the day after DEC rejected the Northeast Supply Enhancement pipeline’s water quality permit request and months after the company might have been aware of a potential shortage.

119. *Id.*

120. City of New York, Local Law No. 97 of 2019 ([https://www1.nyc.gov/assets/buildings/local\\_laws/l197of2019.pdf](https://www1.nyc.gov/assets/buildings/local_laws/l197of2019.pdf)); N.Y.C., N.Y. Exec. Order No. 52 (Feb. 6, 2020) (<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-52.pdf>); See also Tom DiChristopher, *NYC Mayor to Pursue Building Gas Ban, Orders End to Fossil Fuel Infrastructure*, S&P GLOBAL (Feb. 6, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/nyc-mayor-to-pursue-building-gas-ban-orders-end-to-fossil-fuel-infrastructure-56993650> (discussing Mayor DiBlasio’s press conference on Executive Order No. 52).

first adopted would have required fossil gas-related emissions reductions.<sup>121</sup> Although it is not explicit about the pathway for getting to 2050, it establishes processes for identifying that pathway—so the long-delayed reckoning that was foreseeable as early as 2009 can now be expected sooner rather than later.<sup>122</sup> In any case, 2050 is rather closer now than it was in 2009—and more importantly, whereas executive orders that conflict with statute might simply be ineffectual, the CLCPA has crystallized the conflict between rigorous climate pollution goals embedded in statute and our legacy statutory and regulatory framework.

The Commission has clearly taken note of the urgent need to harmonize its regulation and oversight of gas utilities with the requirements of the new law: on March 19, 2020, the Commission issued an order initiating a proceeding to examine various planning and operational practices of gas utilities.<sup>123</sup> The order specifically notes the need for gas planning to be better aligned with policy, including the CLCPA.<sup>124</sup> Notably, however, the order does not characterize Public Service Law section 31 as a problem to be solved in that proceeding; rather, the fossil fuel subsidy arising from section 31 is characterized as simply a feature of the statutory framework within which the Commission is operating.<sup>125</sup>

#### *E. Similar Tensions in Other States*

The combination of the CLCPA's language and New York's favorable approach to gas for residential energy applications makes for an especially clear and acute source of tension, but that tension is not unique. Statutes in California, Colorado, and New Jersey all contain declarations that are similar to the declaration in New York's PSL section 30 that characterizes maintenance of customers' access to gas service as a state policy objective:

- California: "The Legislature finds and declares . . . the following: (a) In order to ensure that all core customers of a gas corporation continue to receive safe basic gas service in a competitive market, each existing gas corporation should continue to provide this essential service."<sup>126</sup>
- Colorado: "The general assembly finds, determines, and declares that natural gas service is essential to the health and well-being of all Colorado natural gas customers."<sup>127</sup>
- New Jersey: "[I]t is the policy of the State to foster the production and delivery of . . . natural gas in such a manner as to lower costs and rates and improve the quality and choices of services for all of

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121. N.Y. Exec. Order No. 24, N.Y. Comp. Codes R. & Regs. tit. 9, § 7.24 (establishing New York's goal to reduce emissions by 80% by the year 2050).

122. N.Y. Env'tl. Conserv. Law § 75-0109.

123. N.Y. Pub. Serv. Comm'n Case 20-G-0131, *In re Gas Planning Procedures*, Order Instituting Procedures (Mar. 19, 2020).

124. *Id.* at 2-3.

125. *Id.* at 4.

126. Cal. Pub. Util. Code § 328(a) (West 2000).

127. Colo. Rev. Stat. Ann. § 40-2-122(1) (West 2004).

the State’s consumers . . . ; to maintain universal access to reliable . . . gas utility service.”<sup>128</sup>

Because these states have also each legislated ambitious economy-wide greenhouse gas emissions schedules,<sup>129</sup> these declarations, like PSL section 30’s, present a clear and unresolved problem. And that problem is compounded to the extent that gas utilities have a legal obligation, as they do in New York, to serve prospective consumers that seek gas service.<sup>130</sup>

In other states with greenhouse gas emissions reductions mandates, there is a similar tension even though the laws supporting fossil fuel consumption differ from those of New York. Consider Maine and Connecticut, each home to an “80 x 50” emissions reduction mandate.<sup>131</sup> Maine’s mandate appears to be at odds with the Maine Public Utility Commission’s approach to the state’s “Second Utility” statute.<sup>132</sup> That statute authorizes the Maine Commission to permit a second utility to extend gas service into another utility’s service territory where an unmet “public need” is identified.<sup>133</sup> The Maine Commission has adopted a relaxed standard for identifying such need in relation to gas service for individual customers.<sup>134</sup> The result is a characterization of individual residential customers’ demand for gas service as a species of “public need,” as well as a firm legal basis for gas infrastructure expansion, and subsequent rate-based recovery of its costs, in response to individual consumer requests. As for Connecticut: much like New York, it is home to statutory provisions that have encouraged residential customers to adopt gas as an alternative to oil<sup>135</sup>—and succeeded.<sup>136</sup> Like in New York, such

128. N.J. Stat. Ann. § 48:2-21.24.

129. 2006 Cal. Stat. c.488, *codified at* Cal. Health & Safety Code § 38500 et seq.; Colo. Rev. Stat. § 25-7-102(2)(g); N.J. Stat. Ann. § 26:2C-38, *as amended by* 2018 N.J. Laws c.197.

130. *See, e.g.*, Cal. Pub. Util. Code § 451 (establishing utilities’ service obligation); *see also* GRIDWORKS, CALIFORNIA’S GAS SYSTEM IN TRANSITION: EQUITABLE, AFFORDABLE, DECARBONIZED AND SMALLER (2019), [https://gridworks.org/wp-content/uploads/2019/09/CA\\_Gas\\_System\\_in\\_Transition.pdf](https://gridworks.org/wp-content/uploads/2019/09/CA_Gas_System_in_Transition.pdf) (describing problems arising from gas utilities’ obligation to provide service to prospective customers) [hereinafter GRIDWORKS].

131. Me. Rev. Stat. Ann. tit. 38 § 576A(3); 2018 Conn. Pub. Act 82, § 7 (Reg. Sess.) (establishing interim emissions reduction target of 45% below 2001 baseline by 2030, in line with “80 x 50” target established by 2008 legislation), *codified at* Conn. Gen. Stat. Ann. § 22a-200a(a) (West 2018).

132. Me. Rev. Stat. Ann. tit. 35-a §§ 2102, 2104, 2105 (authorizing, among other things, “gas-on-gas” competition between two utilities in one service territory).

133. Me. Rev. Stat. Ann. tit. 35-a § 2102 (2020) (establishing that an actual showing of unmet need and of the second utility’s ability to meet it is only required if a proposed service extension is disputed; where a prospective customer and utility agree, the Maine Commission generally grants the request without review); *see* WILLIAM S. HARWOOD ET AL., MAINE REGULATION OF PUBLIC UTILITIES 95 n.462 (2d ed. 2018).

134. *See* Mid. Me. Gas Utils., No. 96-465, Request for Approval to Furnish Gas Service (1997) (“applicant [utility] seeking to serve an area which is unserved . . . need make no further evidentiary showing to demonstrate . . . need. . .”).

135. 2013 Conn. Acts 298, § 51 (Reg. Sess.) (directing utilities to jointly submit a 10-year gas infrastructure expansion plan to state agencies); Pub. Util. Reg. Auth., No. 13-06-02, Investigation of Connecticut’s Local Distribution Companies’ Proposed Expansion Plans to Comply with Connecticut’s Comprehensive Energy Strategy 32-33 (Nov. 22, 2013) (deciding that, during plan implementation, customers being connected to gas pipelines that are 150 feet or closer to gas mains do not need to pay a contribution toward construction).

136. Pat Knight et al., *Natural Gas in Connecticut: Assessing the State’s Options for a Clean Energy Future*, SYNAPSE ENERGY ECON. (2016), <http://www.conservaioneducation.org/uploads/6/2/0/1/6201942/natural>

oil-to-gas switching has reduced the intensity of local pollutants and greenhouse gas emissions from residential uses, but it has also spurred the development of significant new natural gas infrastructure whose useful life is at odds with the state's climate-driven emissions goals.<sup>137</sup>

A last example from Massachusetts is helpful for further illustrating the nature of the challenge arising from this tension between overarching emissions reduction mandates and existing laws. In Massachusetts, legislation established an "80 x 50" mandate but authorized updates by the Secretary of State, who adopted a net-zero 2050 target in April 2020.<sup>138</sup> There, the Attorney General recently rejected a local ban on the development of new buildings reliant on gas by the Town of Brookline, located southwest of Boston.<sup>139</sup> State law requires that localities seek the Attorney General's review of local by-laws before they enter into force,<sup>140</sup> and although Brookline's gas ban "is clearly consistent with this [state] policy goal" of greenhouse gas emissions reduction,<sup>141</sup> the Attorney General determined it to be in conflict with several state laws, namely the building code, the gas code, and the state Department of Public Utilities (DPU)'s comprehensive regulation of gas distribution and sales.<sup>142</sup> Of particular note here is the last of these three, which the Attorney General explained in part by quoting a letter sent to her by the Massachusetts DPU: "In effect, the [by-law] restricts National Grid's ability to add new customers in Brookline (particularly heating customers) and restricts National Grid's ability to serve existing customers who perform significant renovations on their buildings."<sup>143</sup> Thus, at present, DPU's approach to consumers' access to gas and related infrastructure is not just in tension but outright conflict with state emissions policy, and the Attorney General has found that the consumer right to fossil fuel use prevails.<sup>144</sup> Notably, the Attorney General has also petitioned DPU to

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\_gas.pdf ("In part because of the Connecticut state government efforts to switch consumers from oil to natural gas, natural gas consumption in the state has doubled since 1990.").

137. *Id.* at 4 ("Given these legal constraints on carbon dioxide emissions, it is unlikely that natural gas use in New England will be able to continue to increase, or even remain at current levels. . .").

138. Global Warming Solutions Act of 2008, ch. 298, *codified at* Mass. Gen. Laws ch. 21N, § 4 (West 2008) (directing state agencies to establish statewide GHG emissions limits for 2020, 2030, 2040 and 2050); EXEC. OFFICE OF ENERGY & ENVTL. AFF., DETERMINATION OF STATEWIDE EMISSIONS LIMIT FOR 2020 (Apr. 22, 2020), <https://www.mass.gov/doc/final-signed-letter-of-determination-for-2050-emissions-limit/download> (adopting net-zero statewide greenhouse gas emissions goal for 2050 with hard underlying annual reduction mandate, excluding offsets, of 85% reduction from 1990 baseline); *See also* Kain et al. v. Dep't of Env'tl. Protection, 474 Mass. 278 (2016) (requiring state agencies to adopt more aggressive regulations to implement statutory "80 x 50" mandate).

139. Maura Healey, MASS. ATT'Y GEN., RE: BROOKLINE SPECIAL TOWN MEETING OF NOVEMBER 19, 2019 – CASE NO. 9725 WARRANT ARTICLE NO. 21 (GENERAL) (July 21, 2020) (rejecting Brookline's general by-law 8.39, "Prohibition on New Fossil Fuel Infrastructure in Major Construction").

140. Mass. Gen. Laws Ann. ch. 40, § 32 (West 2008).

141. MASS ATT'Y GEN., *supra* note 139, at 1.

142. *Id.* at 1–2, citing *Boston Gas Co. v. City of Somerville*, 420 Mass. 702, 706 (1995), which emphasizes that state policy with respect to utilities must apply uniformly.

143. *Id.* at 11.

144. *Id.* at 11-12.

open an investigation into how to resolve this conflict in a way that does not simply subordinate the emissions reduction mandate.<sup>145</sup>

#### IV. THE RELEVANT PROVISIONS OF NEW YORK'S CLCPA DO NOT APPEAR TO BE SELF-EXECUTING

The CLCPA does not expressly invalidate any existing law, including laws like PSL sections 30 and 31, with which its emissions reduction targets are clearly at odds and which, unaddressed, could confuse and delay progress toward reducing emissions in the buildings sector. Furthermore, the provisions of the CLCPA that most directly address that tension do not appear to be self-executing. Those provisions include section 7, which directs state agencies to consider whether their actions are consistent with attainment of the CLCPA's emissions reduction goals and to justify instances of inconsistency, and section 8, which directs agencies to "promulgate regulations to contribute to achieving the statewide greenhouse gas emissions limits."<sup>146</sup> Both of these sections interact with section 12, which provides for judicial review of agency actions "under" the CLCPA if a party "aggrieved" by that action (or failure to act) sues.<sup>147</sup> Section 12 relies in turn on Article 78 of New York's Civil Practice Laws and Rules, which authorizes challenges to agency action for exceedance of jurisdiction, failure to discharge a non-discretionary duty, and arbitrary and capricious reasoning, among other grounds.<sup>148</sup> Apart from the express provisions in sections 7, 8, and 12,<sup>149</sup> there is also the question of whether the CLCPA repeals contrary pre-existing law *by implication*. Each of these is discussed below.

##### A. CLCPA § 7

Section 7 of the CLCPA calls upon state agencies to examine their decisions and to scrutinize their alignment with the emissions reductions prescribed by the Act.<sup>150</sup> Superficially, this would seem to address exactly the sorts of tensions identified above. However, section 7 does not direct agencies to treat the Act's emissions reduction agenda as superseding or in any way reinterpreting existing laws. Instead, it requires them to "consider" whether a given action is consistent with

145. Petition of the Office of the Attorney General Requesting an Investigation into the impact on the continuing business operations of local gas distribution companies as the Commonwealth achieves its 2050 Climate Limits, Mass. Dep't. Pub. Util. No. 20-80 (June 4, 2020).

146. CLCPA §§ 7-8.

147. CLCPA § 12.

148. *Id.* § 12; N.Y. C.P.L.R. §§ 7803(1)-(3) (McKinney 2019) (identifying "questions that may be raised in a proceeding under this article" to include: (1) whether the body or officer failed to perform a duty enjoined upon it by law; or (2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion; or (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.).

149. CLCPA §§ 7, 8, 12.

150. CLCPA § 7.



that agenda and to justify actions that are not.<sup>151</sup> Specifically, paragraph 2 of the CLCPA's section 7 provides that:

In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the [ECL]. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of statewide greenhouse gas emission limits, each agency . . . shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.<sup>152</sup>

This provision, which went into effect on January 1, 2020, will provide an increasingly clear directive to state agencies as the Department of Environmental Conservation (DEC) adopts regulations that specify statewide emissions limits (by January 1, 2021) and prescribe how to comply with them (by January 1, 2024).<sup>153</sup> During the early years, however—as those parameters are still coming into focus—the precise shape of agency compliance with its requirements will likely be somewhat malleable.<sup>154</sup> This is due primarily to the requirements set forth in section 7 being procedural rather than substantive, and also to the fact that those procedural obligations are ambiguous. The meaning of the term “consider,” for instance, is crucial, but not specified. Must the Commission conduct some sort of analysis for all projects connected in some way to greenhouse gas emissions? If so, what authority would specify the parameters for that analysis? Similarly, the provision's use of passive voice elides who exactly may “deem” decisions to be consistent with emissions reduction targets. Can each agency assess and characterize its own decisions as consistent? What other entity could claim such authority?

In sum, section 7 presently provides no substantive counterweight to the clear mandates of PSL sections 30 and 31, and offers little guidance to the Commission or to any court asked to decide whether a given Commission decision conforms to section 7's requirements.<sup>155</sup> As such, although section 12 of the CLCPA provides for judicial review of actions (or failures to act) taken under the CLCPA,<sup>156</sup> even a suit brought under section 12 to enforce the Commission's procedural obligations under section 7 does not by itself appear able to prevent the Commission

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151. *Id.*

152. *Id.* § 7(2).

153. *See* CLCPA § 2; N.Y. Env'tl. Conserv. Law §§ 75-0107(1), 75-0109(1).

154. Notwithstanding any uncertainty resulting from the fact that the DEC is still in the process of determining statewide greenhouse gas emissions targets, section 7(2) has been in force, imposing procedural obligations on state agencies, since January 1, 2020. Notably, in its May 2020 rejection of the Northeast Supply Enhancement Pipeline, DEC makes conspicuous use of the key terms in section 7 in a manner that suggests it undertook the exercise contemplated in that section, although it does not cite to that provision. Whitehead Letter, *supra* note 52, at 15 (“The Project would be inconsistent with or interfere with the Statewide GHG emission limits and other requirements established in the Climate Act, without the identification of additional alternatives or GHG mitigation measures.”).

155. *See id.*; *see also* N.Y. Pub. Serv. Law §§ 30-31.

156. CLCPA § 12; N.Y. C.P.L.R. §§ 7803(1)-(3)

from authorizing a gas corporation to continue to expand distribution infrastructure to serve new customers and to recover the cost of such expansion from other customers in the manner required by PSL section 31, at least early on. With that said, a court’s decision could compel the Commission to explain how a decision to continue to authorize cost recovery for such expansions relates to the CLCPA emissions reduction targets and to specify alternatives and mitigation measures identified. It follows that, whatever potency section 7 might eventually be interpreted to have, it cannot presently resolve the tensions described above.

### B. CLCPA § 8

Section 8 of the CLCPA, “[a]uthorization for other state agencies to promulgate greenhouse gas emissions regulations,”<sup>157</sup> is more straightforward than section 7. Section 8 directs the Commission, the New York State Energy Research and Development Authority (NYSERDA), and several other state agencies to “promulgate regulations to contribute to achieving the statewide greenhouse gas emissions limits established in article 75 of the [ECL].”<sup>158</sup> Apart from indicating that such regulations should not be read to somehow limit the authority of the DEC “to regulate and control greenhouse gas emissions pursuant to article 75 of the [ECL],” section 8 provides neither limits nor guidance, although it affirmatively requires that some regulatory action be taken to achieve statewide goals pertaining to greenhouse gas emissions.<sup>159</sup> It is a broad source of authority, but the directive’s precise requirements are vague.

Section 8 interacts with section 12 in at least two ways that are potentially important in relation to the tensions at issue here. First, section 12 authorizes a gas corporation or customer to challenge a Commission rule on the grounds that it contravenes the provisions of PSL section 30 or 31.<sup>160</sup> Second, section 12 provides some basis—though only a tenuous one—for challenging *inaction* on the part of an agency. Whether a petitioner seeks judicial review (termed “mandamus to review” by New York courts) of a delayed action or a mandamus proceeding to compel agency action,<sup>161</sup> the petitioner must show not only a legally cognizable injury connected to the agency’s inaction, but also that the agency has a non-discretionary duty to act.<sup>162</sup> Because the language of section 8 of the CLCPA is extremely broad, imposes no deadline, and is not clearly linked to provisions that impose any deadline or other constraint, it is difficult to see how a petitioner might use it to compel the Commission to undertake, or even to accelerate, a rulemaking related to PSL sections 30 or 31.

157. CLCPA § 8.

158. CLCPA § 8; *see also* N.Y. Envtl. Conserv. Law § 75-109.

159. *Id.*

160. CLCPA § 12; N.Y. Pub. Serv. Law § 31.

161. *See Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 573 N.E.2d 562, 565 (N.Y. 1991) (describing nature and availability of mandamus to review as compared to mandamus to compel proceedings).

162. *Id.* at 563 (describing the legal rights needed by a petitioner seeking mandamus review to compel agency action, and an agency’s “nondiscretionary duty . . . to grant that relief”); *See also*, *Hamptons Hosp. & Med. Ctr., Inc. v. Moore*, 417 N.E.2d 533, 537 (N.Y. 1981) (“Mandamus . . . lies only where the right to relief is ‘clear’ and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion.”).

### C. Implied Repeal

New York law recognizes the potential for a newly adopted statute to repeal an existing one, even though the new statute does not expressly effectuate that repeal.<sup>163</sup> As a result, a court could conceivably conclude that the CLCPA impliedly repealed a provision of the PSL. However, such a decision would almost certainly result in an incomplete resolution of the tensions described above. Furthermore, progress down the path to persuading a court that the CLCPA effectuated an implied repeal would be slow and would rely on conflict rather than coordination among agencies and stakeholders.

New York's legislature, in codifying features of long-standing case law,<sup>164</sup> has stated that "[r]epeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect."<sup>165</sup> New York courts, which are directed by statute and case law to base implied repeal determinations on legislative intent,<sup>166</sup> have looked to the following factors to assess that intent:

- Timing: adoption by the legislature of both provisions in the same year weighs against implied repeal;<sup>167</sup>
- Specificity: whereas relative specificity of the purportedly repealing provision weighs in favor of implied repeal,<sup>168</sup> relative generality of the purportedly repealing provision weighs against it;<sup>169</sup>

163. See, e.g., *420 Tenants Corp. v. EBM Long Beach, LLC*, 823 N.Y.S.2d 863, 866 (Sup. Ct. 2006) ("Although it is well established that repeal or modification of legislation by implication is not favored in the law, under the particular facts of this case, the manifest intent of the City Council was to repeal Code § 7-40.") (internal citations omitted); *Konviser v. State*, 687 N.Y.S.2d 877, 882 (N.Y. Ct. Cl. 1999) ("[T]his Court holds that chapter 466 of the Laws of 1995 impliedly repealed the provisions of section 10(8). . .").

164. See, e.g., *Miller v. State*, 244 N.Y.S. 547 (1930), *aff'd* 247 N.Y.S. 399 ("It is court's duty to so construe apparently conflicting statutes that both might stand in force.")

165. N.Y. Stat. Law § 391 (McKinney 2019); *People v. Newman*, 298 N.E.2d 651 (N.Y. 1973) ("If by any fair construction, a reasonable field of operation can be found for two statutes, that construction should be adopted [instead of a construction involving implied repeal].")

166. *Id.* § 392; see also *Newman*, 298 N.E.2d at 657 ("unless there is clear evidence of a legislative design to repeal or modify an earlier piece of legislation . . . we must, if at all possible, give full effect to both statutes."), *cert denied* 414 U.S. 1163.

167. See *Ball v. State*, 363 N.E.2d 323, 326 (N.Y. 1977) (holding the requirement that the conflict between statutes be "unavoidable . . . applies with peculiar force to statutes enacted at the same session of the Legislature.") (internal citations and quotation marks omitted).

168. *Pub. Serv. Comm'n v. Vill. of Freeport*, 110 A.D.2d 704, 488 N.Y.S.2d 22 (1985) ("To the extent that the billing and collection practices, etc., of Public Service Law article 2 conflict with the more general grant of authority to municipalities to establish their own methods of operation found in General Municipal Law article 14-A, the General Municipal Law provisions are impliedly revoked and the later, more specific, provisions of the Public Service Law control.")

169. N.Y. Stat. Law § 396 (McKinney 2019) ("A special law will not be repealed by a general law by implication unless there is such inconsistency that the two cannot stand together, so that an intent to repeal is manifest."); see also *Ball*, 363 N.E.2d at 326 ("[T]he budget bill is a general statute . . . [and] does not supersede the specific, detailed statutory provisions creating the Bingo Control Commission and its operations.")

- Alignment of policy aims: consistency weighs against implied repeal, while inconsistency weighs in favor of it.<sup>170</sup>
- Comprehensiveness: manifest legislative intent to occupy a given field weighs in favor of implied repeal.<sup>171</sup>

In applying these factors to the previously identified tensions, the statutory provisions of PSL 30 and 31 do not clearly weigh in favor of or against implied repeal. While timing and misalignment seem to weigh in favor of implied repeal, specificity seems to weigh against it; but, comprehensiveness is not clearly one side or the other. That is, the CLCPA was adopted long after the PSL, but pertains more generally; and while the CLCPA's basic policy aims are clearly inconsistent with those of the PSL provisions, it is unclear whether the legislature meant for the CLCPA to comprehensively occupy the field of fossil fuel infrastructure regulation. Another point that could weigh against characterizing the CLCPA as impliedly repealing PSL sections 30 or 31, in whole or in part, is section 4 of the CLCPA, which adds section 66-p, "establishment of a renewable energy program," to the PSL.<sup>172</sup> The existence of section 4 of the CLCPA indicates that the legislature opted to expressly amend one portion of the PSL, but not others, which could suggest to a court that the legislature's failure to amend other sections, such as section 31 of the PSL, was intentional.

In consequence, it is impossible to say how the Commission would fare in court if, for instance, a gas corporation challenged a regulation that was adopted pursuant to the authority granted in section 8 of the CLCPA, but that was arguably at odds with section 31 of the PSL. A court might conclude either that the CLCPA had effectuated a valid repeal by implication, or that the Commission had used its broad authority to interpret section 31 of the PSL in a new set of circumstances,<sup>173</sup> in a way that encouraged long-term planning to improve efficiency and environmental preservation<sup>174</sup> and that also gave full effect to both statutes.<sup>175</sup> Alternatively, a court might conclude that the Commission had impermissibly ignored that

170. *Consol. Edison Co. of New York v. Dep't of Envtl. Conservation*, 519 N.E.2d 320 (N.Y. 1988) (noting that DEC's code, based on newer, narrow statutory provisions as well as older, more general ones, shared "a common underlying policy objective" with the newer, narrow ones).

171. N.Y. Stat. Law §§ 392, 399 (McKinney 2019) ("A repeal by implication arises where a later statute, not purporting to amend an earlier one but rather covering the entire subject, embodies the legislative intention that it furnish the only law on the subject.").

172. *See* CLCPA § 4.

173. *See Niagara Mohawk*, 69 N.Y.2d 365, 371–72, 507 N.E.2d 287 (recognizing Commission authority to make determinations based on a "realistic appraisal" of changed circumstances); *see also* *Energy Ass'n of New York State v. Pub. Serv. Comm'n of State of N.Y.*, 710 N.Y.S.2d 662, 666 (2000) (rejecting challenge to Commission's decision to restructure electricity markets).

174. *See* N.Y. Pub. Serv. Law § 5(2) ("The commission shall encourage all . . . subject to its jurisdiction to formulate and carry out long-range programs . . . for the performance of their public service responsibilities with . . . efficiency, and care for the . . . preservation of environmental values. . .").

175. *See Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 395, 649 N.E.2d 1145 (1995) ("This result gives full effect to title 3 and title 7, and flows naturally from a reading of article 33 in its entirety. It does not viscerate, modify, bypass, override or repeal (expressly or impliedly) title 7.").

the CLCPA does not repeal section 31.<sup>176</sup> Much would likely depend on the particulars of the case. As such, the CLCPA does not appear to provide certainty to the Commission or to courts regarding the validity of PSL sections 30 and 31<sup>177</sup> to the extent that they are at odds with the CLCPA's emissions reduction targets.

#### D. Implied Repeal in Other Jurisdictions

There are many similarities and few meaningful differences between New York's approach to implied repeal and that of state courts in jurisdictions with similar greenhouse gas mandates. Those courts generally disfavor implied repeal,<sup>178</sup> seek to reconcile old and new statutory provisions wherever possible,<sup>179</sup> and consider similar factors when assessing legislative intent to effect implied repeal.<sup>180</sup> Specifically, courts consider the timing of the statutory provisions' adoption,<sup>181</sup> their relative specificity,<sup>182</sup> the (mis)alignment of their subjects and purposes,<sup>183</sup> and whether the later-adopted provision is intended to fully occupy the relevant field.<sup>184</sup> As for differences, California and New Jersey seem to set the evidentiary bar somewhat higher than other jurisdictions. For instance, California courts require "undebatable evidence" of legislative intent to impliedly repeal,<sup>185</sup> and New Jersey courts require "clear and compelling evidence" and a showing that the legislature's intent to impliedly repeal is "free from reasonable doubt."<sup>186</sup> But the minor differences among states' approaches do not clearly suggest divergent

176. *Chem. Specialties*, 85 N.Y.2d at 407 (Ciparick, J., dissenting) ("In our view, the majority also errs in repealing title 7 by implication."); N.Y. Pub. Serv. Law § 31.

177. N.Y. Pub. Serv. Law §§ 30-31.

178. See, e.g., *W. Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.*, 777 P.2d 157, 163 (Cal. 1989); *City of Florence v. Pepper*, 145 P.3d 654, 657 (Colo. 2006); *State v. Maioffes*, 171 A. 625, 626 (Conn. 1934); *Bowler v. State*, 108 A.3d 1257, 1262 (Me. 2014); *Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist.*, 374, 961 N.E.2d 83 (Mass. 2012); *Mahwah Twp. v. Bergen Cty. Bd. of Taxation*, 486 A.2d 818, 825 (N.J. 1985).

179. See, e.g., *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 198 P.3d 1109, 1120 (Cal. 2009), as modified (Mar. 11, 2009); *People v. James*, 497 P.2d 1256, 1257 (Colo. 1972); *Maioffes*, 171 A. at 626; *Bowler*, 108 A.3d at 1263.

180. See NORMAN J. SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION § 23:9 (7th ed. 2019) (listing factors and citing illustrative cases); see also *Town of E. Haven v. City of New Haven*, 271 A.2d 110, 117 (Conn. 1970) (listing probative factors).

181. See, e.g., *Bowler*, 108 A.3d at 1263; *Doherty v. Comm'r of Admin.*, 212 N.E.2d 485, 488 (Mass. 1965).

182. See, e.g., *All. to Protect Nantucket Sound, Inc. v. Dep't of Pub. Utils.*, 959 N.E.2d 413, 429 (Mass. 2011); *Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238, 241-42 (Colo. 2009).

183. See, e.g., *City of Chula Vista v. Sandoval*, 263 Cal. Rptr. 3d 236, 253 (2020) ("The two statutes seek to achieve conflicting purposes."); *Ragsdale Bros. Roofing v. United Bank of Denver, N.A.*, 744 P.2d 750, 753 (Colo. App. 1987) ("In light of the purposes underlying both [statutes]. . .").

232. See, e.g., *Mahwah Twp. v. Bergen Cty. Bd. of Taxation*, 486 A.2d 818, 825 (N.J. 1985) ("Dealing as they do, therefore, with two separate classes of State-owned property, the statutes can co-exist."); *James J. F. Loughlin Agency, Inc. v. Town of W. Hartford*, 348 A.2d 675, 678 (Conn. 1974).

185. *W. Oil & Gas Assn.*, 777 P.2d at 164.

186. *Mahwah Twp.*, 486 A.2d at 824. Compare, e.g., *People v. Burke*, 521 P.2d 783, 785 (Colo. 1974) (applying "clear and unmistakable" standard).

outcomes with respect to arguments that a new emissions reduction mandate effects the implied repeal of an existing energy-related statute. Such outcomes are far more likely to depend on the particulars of the case.

Notably, given the deference courts tend to show agencies on issues related to statutes that those agencies are charged to administer,<sup>187</sup> it is reasonable to expect that an implied repeal argument based on an economy-wide emissions mandate in any state jurisdiction would be far more likely to prevail if made *by* a public utility commission rather than *against* a commission's position. But because judicial interpretations of statutes typically focus narrowly on disputed issues, and so tend not to provide broadly clarifying policy statements, even a decision that accepted this sort of argument from a state commission would probably not provide broad resolution to the type of tensions considered here. However, such a decision could potentially spur efforts on the part of legislators or regulators to resolve tensions between existing energy laws and a new emissions reduction mandate.

#### V. PRINCIPLES FOR REFORM OF UTILITY REGULATION AND OVERSIGHT IN NEW YORK AND ELSEWHERE

Bringing the regulation and oversight of gas utilities into line with mandatory, economy-wide greenhouse gas emissions reductions will require undoing the legal basis for the current expansionary state of affairs, as well as adopting rules and business practices that are consonant with falling volumes of fossil gas flowing through distribution infrastructure (including, where appropriate, the decommissioning of the infrastructure itself).<sup>188</sup> Three principles should guide those changes in New York and elsewhere. One is neutrality with respect to fuels and technology—that is, avoiding rules and practices that create an enduring bias in favor of particular energy resources.<sup>189</sup> The two other principles are termed safe transition and just transition. For purposes of this article, “safe transition” refers to the balancing of public safety with respect to gas distribution and consumption with expeditious transition away from its usage.<sup>190</sup> We use “just transition” to refer to the containment and reallocation of gas system costs that would, without any intervention, simply be charged to customers who cannot afford to adopt alternative fuels or technologies as customers who can afford to defect from gas do so at an accelerating pace.<sup>191</sup> This section draws on particulars from New York, but its illustrative points and recommendations are meant to show how each principle could, and should, apply not just to New York, but to other states as well.

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187. See, e.g., *All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 802 (Mass. 2010) (“Where the statutory language is not without ambiguity . . . our deference to the agency’s interpretation of the governing statute is highest.”) (internal citation omitted); *Ste. Marie v. Riverside Cty. Reg’l Park & Open-Space Dist.*, 206 P.3d 739, 745 (Cal. 2009) (“courts must give great weight and respect to an administrative agency’s interpretation of a statute governing its powers and responsibilities.”).

188. See *Technology Neutrality in Energy Tax: Issues and Options: Hearing Before the S. Comm. On Finance*, 111th Cong. 4, 9, 10, 12 (2009) (statement of Gilbert E. Metcalf, Professor of Economics, Tufts University).

189. See, e.g., *id.*

190. See generally GRIDWORKS, *supra* note 130.

191. See, e.g., *id.* at 3, 15, 18-19.

### A. Fuel and Technology Neutrality

Codifying into statute or regulation clear preferences or biased parameters that favor a given technology or fuel—or language that simply locks in for future decision-makers a technology or fuel that is selected at a given point in time—can burden future policymakers and market actors with obligations that they may eventually find to be incompatible with the best means of achieving long-term policy objectives or with the economic realities of a greenhouse gas-constrained future marketplace.<sup>192</sup> Neutral language is also desirable because it does not shelter incumbent technologies or particular fuel types from either competition or from regulations aimed at reducing greenhouse gas emissions.<sup>193</sup> The conflict between PSL sections 30 and 31, on the one hand, and this neutrality principle, on the other, is made acute by two features of the present situation in New York. First, new technologies capable of meeting heating needs without consuming fossil fuels, like electric heat pumps and building energy management systems, are available, but not yet in a position to displace incumbents without significant policy support.<sup>194</sup> Second, these new technologies interact with but are not component parts of the networked systems that are owned and managed by utilities and regulated by the Commission.<sup>195</sup> Consequently, realizing a neutral approach will require policy interventions and the involvement of non-utility energy service providers, both of which could strain traditional notions of the Commission’s jurisdiction and role.

Examples of measures that would accord with this neutrality principle include, without limitation:

- Eliminating all direct and indirect subsidies for the transmission, distribution, and consumption of fossil fuels. The current list of subsidies includes, for instance, the 100 feet or more of gas line extensions made available to would-be gas customers at no cost to them.
- Amending PSL section 30 to provide that gas customers must receive continued service, not of gas specifically, but of energy and

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192. See Brad A. Greenberg, *Rethinking Technology Neutrality*, 100 MINN. L. REV. 1495, 1526-27 (2016).

193. A number of analyses have highlighted the limits and pitfalls of relying on “technology neutral” language in law and policy, see, e.g., *id.* at 1498 (identifying “four flaws” with technology-neutral language in copyright law that have proved to be “self-defeating”), including in relation to energy transition, see, e.g., Paulo Henriquede Mello Santana, *Cost-effectiveness as Energy Policy Mechanisms: The Paradox of Technology-neutral and Technology-specific Policies in the Short and Long Term*, 58 RENEWABLE & SUSTAINABLE ENERGY REV. 1216 (2016) (finding that neutral policies can leave in place barriers to uptake of novel technologies that would, over the long term, lower costs to a greater degree than existing ones), and Christian Azar & Björn A. Sandén, *The Elusive Quest for Technology-Neutral Policies*, 1 ENVTL. INNOVATION & SOCIETAL TRANSITIONS 135, 137 (2011) (“The debate about whether these policies should be technology specific . . . should be replaced by a discussion about how technology specific the policies should be.”). While we acknowledge that “technology neutrality” is generally much harder to implement than conceptualize, the stability and consistency of functions served by energy use in buildings (e.g., light, climate control, and operating machinery) make that context one in which technology neutrality in regulatory or legislative language is a worthwhile and feasible objective.

194. See NYSEERDA, *NEW EFFICIENCY: NEW YORK—ANALYSIS OF RESIDENTIAL HEAT PUMP POTENTIAL AND ECONOMICS—FINAL REPORT 66* (2019) (describing the market for electric heat pumps in New York as “nascent” and projecting adoption of heat pumps in just 20% of new construction and end-of-life heating system replacements by 2025).

195. *Id.*

heating services that meet their needs in accordance with performance criteria specified by the Commission.<sup>196</sup> Any criteria that relate to greenhouse gas emissions could, and should, make use of the New York Value of Carbon (to be specified by DEC by December 2020) in one way or another.<sup>197</sup>

- Requiring that all investments—or portfolios of investments—over a threshold size be subject to some form of BCA, and that the BCA framework support comparability across technologies and fuel types by using neutral performance standards—relating to, for instance, safety, reliability, emissions, and cost-effectiveness—to measure the cost-effectiveness of capital and operational expenditures. If harmonized with the CLCPA, such a framework would properly account for greenhouse gas emissions and would be used in a manner that anticipated comparatively short asset lives for infrastructure that is expected to be associated with greenhouse gas emissions in later years.

### B. *Safe Transition*

Physical safety in the present must be balanced with the need to make society safe from climate change. This means that whatever is done to protect society from the dangers of climate change cannot place people in danger today, whether as a consequence of inadequate space heating or of poor maintenance of the existing utility system,<sup>198</sup> and that, by the same token, actions that keep today's population safe and warm must be made in a manner that does not doom their descendants.

In the near term, this means that prospective gas customers who are to be denied the opportunity to have the system expanded on their behalf (or who are to be required to internalize the full cost of any such expansion, including the risk of early retirement) must have access to other heating options that are safe, adequate,

196. N.Y. Pub. Serv. Law §§ 65, 66(b). Fully realizing this replacement of language about fuel types with neutral language about types of service would also require amending or repealing other sections of the PSL, such as section 66-b. It would not, in our view, require modifying PSL section 65, which states that gas corporations “shall furnish and provide” service that is safe and adequate, as well as just and reasonable. In contrast to section 66-b, which entitles a gas customer to the resumption of gas service, section 65, although it does refer specifically to gas and electric service, does not create a right of access to, or obligation to provide, a particular fuel type.

197. See CLCPA § 2; N.Y. Env'tl. Conserv. Law § 75-0113.

198. One aspect of physical safety in the present relates to the risk of poisoning or explosion. See, e.g., Brady Seals & Andee Krasner, *Gas Stoves: Health and Air Quality Impacts and Solutions*, ROCKY MTN. INST. (2020); Bryan Pietsch, *2 Dead and at Least 7 Injured in Baltimore Gas Explosion*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/us/baltimore-explosion.html>. Another relates to access to heating services supplied in many instances by gas-fired appliances. See, e.g., U.S. ENERGY INFO. ADMIN., TODAY IN ENERGY: EXTREME COLD IN THE MIDWEST LED TO HIGH POWER DEMAND AND RECORD NATURAL GAS DEMAND (Feb. 26, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=38472> (“Natural gas is the main fuel used in the region for residential and commercial space heating.”); Tiffany Hsu, *Deep Freeze in U.S. Creates Heating Squeeze for Homeowners and Utilities*, N.Y. TIMES (Jan. 3, 2018) (reporting jump in gas prices and strains on access as electricity and home heating demand both jumped amid cold snap).



and not themselves environmentally detrimental.<sup>199</sup> In the long term, this means recognizing that until the transition is substantially complete, we will have to continue maintaining, repairing, and/or replacing infrastructure components that pose an imminent risk to physical safety, even though we are also likely to be shutting down other components simultaneously.<sup>200</sup> For these reasons, policymakers seeking to engineer a “safe transition” must simultaneously optimize several very different, and somewhat contradictory, values, which in turn will require operational and financial protocols that depart significantly from those that currently govern infrastructure expansion and maintenance. Examples of measures that would accord with this principle could include:

- Requiring gas corporations and other utilities to consider the long-term outlook associated with new gas infrastructure investments, and to the extent feasible, to plan near-term gas infrastructure investments with this long-term outlook in mind, including implications for service lives;<sup>201</sup>
- Authorizing gas corporations to invest in programs and assets that facilitate fossil-free thermal service, in a manner that gives them an opportunity to earn a rate of return;
- Requiring gas corporations and other utilities to develop a safe gas decommissioning protocol that balances the need for the physical safety of workers, customers, and anyone proximate to distribution infrastructure that undergoes significant operational changes, with the need for urgency; and

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199. This may be harder than is apparent at first blush, since many prospective gas customers would, if gas is unavailable to them, be likely to rely instead on other fossil fuels that are even more polluting than gas. This is supported generally by the pattern of fuel conversions in response to regulations adopted by New York City’s Department of Environmental Protection in 2011, banning #6 heating oil by June 2015, banning #4 by 2030, and requiring boiler replacements prior to 2030 to adopt use of a fuel cleaner than #4. While many buildings switched to natural gas, many also opted to use either ultra-low sulfur #2 heating oil or #4 (which is a blend of #2 and #6), and hardly any adopted electric heat pumps. See *Program Progress*, NYC CLEAN HEAT, <https://perma.cc/R9BN-LVNZ> (last visited May 24, 2020); see also Carlos F. Gould et al., *Soot and the City: Evaluating the Impacts of Clean Heat Policies on Indoor/Outdoor Air Quality in New York City Apartments*, 13 PLOS ONE (June 28, 2018), at 2 (noting that the number of boilers burning #4 oil grew as compliance with the clean heat program successfully ended the use of #6 oil).

200. Unfortunately, the opportunity to combine these efforts—for example, by prioritizing for early decommissioning the very infrastructure that is otherwise due for repair/replacement—is limited, because the safety risks associated with older infrastructure, where they exist, require remediation on a rapid timeline that is irreconcilable with the mindful, deliberate preparation process that any such early decommissioning would demand (i.e., ensuring that those served by such infrastructure would have satisfactory thermal service in its absence). Consequently, a safe transition cannot simply prioritize the decommissioning of equipment that is near the end of its useful life if safety concerns dictate that prompt repair or replacement is needed.

201. In March 2020, when the Commission opened a generic proceeding on gas planning, it took express note of this issue as follows: “The current approach to gas system planning poses risks of incomplete alignment with the CLCPA, sub-optimal consideration of alternatives and timeframe, increased risk and cost to consumers, and unsatisfactory provision of service and solutions for those same consumers to align with these policies and to recognize the emergence of potentially viable alternatives to gas infrastructure, gas planning must explicitly take account of the likely useful life of all alternatives, and of the resulting cost and risk implications.” N.Y. Pub. Serv. Comm’n Case 20-G-0131, *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, Order Instituting Proceeding (Mar. 29, 2020).

- Establishing a mechanism to fund gas infrastructure decommissioning.<sup>202</sup>

### C. *Just Transition*

Currently, the business model for gas utilities assumes continued growth in gas usage.<sup>203</sup> New customers cause new demand not only for gas itself, but also—and, from a gas corporation’s perspective, more importantly—additional capital expenditures on distribution infrastructure, which is the corporation’s largest and most reliable source of investor returns.<sup>204</sup> Unless a climate-neutral fuel becomes available at a scale that can provide a full substitute for fossil gas, transitioning gas customers from reliance on fossil gas to other solutions for heating loads requires first halting and then reversing this pattern of infrastructure expansion.<sup>205</sup>

However, this aspect of transition cannot proceed smoothly without changes both to gas corporations’ earnings opportunity model and to the way that capital and operating costs are recovered from gas customers. For example, in the absence of any policy intervention to prevent it, the loss of some customers would leave remaining customers with higher bills to pay,<sup>206</sup> as those who continue to receive service would be responsible for providing all the revenues that a utility relies on

202. See, e.g., GRIDWORKS, *supra* note 130, at 12.

203. National Grid’s May 2020 Supplement to its February 2020 *Natural Gas Long-Term Capacity Report* forecasts positive demand growth through 2032 in both high and low demand planning scenarios and states that “continued growth in gas use is consistent with a regional 40% reduction [in greenhouse gas emissions] by 2030, provided that it is coupled with energy efficiency and dramatic reductions in fuel oil utilization.” NATIONAL GRID, NATURAL GAS LONG-TERM CAPACITY REPORT FOR BROOKLYN, QUEENS, STATEN ISLAND, AND LONG ISLAND (“DOWNSTATE REPORT”) 8, 43, 72 (2020). Consolidated Edison also projects demand growth over the next 15-20 years. CONSOLIDATED EDISON CO. OF N.Y., GAS LONG-RANGE PLAN 2019-2038, at 20–21 (2019) (“The near-term compounded average annual growth rate for delivered firm natural gas volume is forecasted to be 1.3 percent over the next five years and approximately 0.6 percent over the next 20 years.”). The situation is not uniform across the United States, but is certainly similar to New York in several other states. See, e.g., Bruce Mohl, *Healey Calls for Orderly Transition Away from Natural Gas*, COMMONWEALTH MAG. (June 4, 2020), <https://commonwealthmagazine.org/energy/healey-calls-for-expanded-carbon-pricing/> (“... industry officials say the fuel is cheap, plentiful, and gaining market share.”).

204. See, e.g., CONSOLIDATED EDISON CO. OF N.Y., GAS LONG-RANGE PLAN 2019-2038, at 39 (2019).

205. In their filings with the Securities and Exchange Commission (SEC), New York’s gas utilities do not anticipate a halt to gas infrastructure expansion. National Grid PLC submitted its most recent annual filing before New York’s legislature voted to send the CLCPA to the Governor. See National Grid PLC, Annual Report (Form 20-F) (June 4, 2019). That filing notes several of New York State’s decarbonization and grid modernization initiatives, *id.* at 12, 204–06, and concedes that the “future of heat” in general will involve greater use of heat pumps and energy efficiency investments, *id.* at 211, but it does not mention any state or city-level regulations focused on decarbonizing the buildings sector. Consolidated Edison, Inc.’s most recent annual SEC filing ascribes the moratorium on new gas connections in Westchester “to gas supply constraints” and not, for instance, to pipeline permitting refusals by DEC or decarbonization policy. Consolidated Edison, Inc., Annual Report 2019 (Form 10-K) at 24 (Feb. 20, 2020). That filing does, however, note the adoption of the CLCPA and states that “[t]he cost to comply with legislation, regulations or initiatives limiting the Companies’ GHG emissions could be substantial.” *Id.* at 38.

206. This point holds true both among residential customers and across different customer classes; that is, without revisiting cost allocations among classes, different rates of defection from gas could lead to entire classes of customers subsidizing other classes.

to cover its costs and provide its investors with a return on their investment.<sup>207</sup> Thus, an unmanaged transition away from gas consumption by end-use customers would likely saddle the most vulnerable customers—those who lack the means to defect from gas early—with costs that they simply cannot bear.<sup>208</sup> On the other hand, too slow a transition would impose unjust intergenerational costs.

To avoid those problems, a CLCPA-aligned transformation of the laws and rules that shape gas corporations' business models could provide for the following:

- Affirming that customers have a right to energy and heat, at just and reasonable rates, while eliminating provisions that ensure the indefinite continuation and expansion of gas service;
- Maintaining the financial and functional capacity of gas corporations to operate through the transition, recognizing that they are unique repositories of know-how, data, and customer relationships; and
- Ensuring that customers who continue to rely on gas to serve their heating loads do not face spiraling bills as the number of customers contributing to gas company revenue shrinks while gas company expenses and liabilities skyrocket.<sup>209</sup>

Although they go beyond the scope of this paper's analysis, we note here two further, related points that policymakers should recognize when implementing the foregoing principles. First, pursuing a safe and just transition could involve allocating costs among not only ratepayers served by gas, electric, and gas-and-electric corporations, but also among shareholders in those corporations, departing customers, and taxpayers as well.<sup>210</sup> Indeed, failing to draw on resources beyond revenues collected from the diminishing pool of gas ratepayers makes unjust transition likely. Second, because alternatives to gas, such as heat pumps combined with energy efficiency improvements, have high initial capital costs (even if their operating costs and cumulative costs over the long term are lower), their deployment, especially among customers with low and moderate incomes (LMI), will require policy support.<sup>211</sup> That is, while conforming the PSL to the CLCPA's mandates will help remove barriers to electrification, it will not necessarily—without further policy interventions focused on overcoming economic barriers—spur

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207. New York State has adopted revenue decoupling for gas as well as electricity service. While this decoupling of utility revenues from gas sales mutes the incentive to a utility to sell more gas during the horizon of any rate plan, it does not mute the incentive to expand the infrastructure that would deliver that gas.

208. See Daniel Then et al., *Impact of Natural Gas Distribution Network Structure and Operator Strategies on Grid Economy in Face of Decreasing Demand*, 13 ENERGIES 664 (2020) (describing how rate of decline in number of gas customers in Germany is expected to quickly and significantly exceed coincident declines in capital and operating costs, resulting in increasingly higher per-customer costs among remaining customers).

209. For a valuable and thorough discussion of the risks of unjust transition, see generally GRIDWORKS, *supra* note 130. For a summary of concerns regarding a speedy transition off of gas raised on behalf of poor communities, see Amy Harder, *Exclusive: Civil Rights Leaders Oppose Swift Move Off Natural Gas*, AXIOS (Mar. 30, 2020), <https://www.axios.com/civil-rights-leaders-natural-gas-d87e27de-b206-47bd-ac4e-d46e3da4f3b6.html>.

210. Cf. GRIDWORKS, *supra* note 130, at 16-17; Bilich, *supra* note 102, at 34-35.

211. NYSERDA ET AL., NYS CLEAN HEAT: STATEWIDE HEAT PUMP PROGRAM IMPLEMENTATION PLAN, filed in N.Y. Pub. Serv. Comm'n Case 18-M-0084, at 57-58 (Mar. 16, 2020).

deployments of non-fossil-fueled technologies on the scale required to adhere to those mandates.

## VI. APPROACHES TO REFORM IN NEW YORK

In principle, changes to the rules of the road for continued and expanding availability of gas to residential customers could be effected through statutory or regulatory changes—or a combination of both. This section describes a variety of potential changes, some regulatory, others legislative, to address the tensions discussed in this article between New York’s CLCPA and its Public Service Law. We emphasize that legislative amendments to PSL sections 30 and/or 31 would not obviously be superior to adopting regulations that reinterpret those sections in a manner that resolves their tensions with the CLCPA. Of course, just as the substance of the recommendations below is varied, so too are the processes that would be required to undertake them. For example, regulatory measures might involve greater litigation risk but avoid the need for political compromise, while legislative measures might involve greater political risk but provide greater legal certainty. Those processes are not explored here, except to note the high likelihood that litigants would seek judicial review of ambitious policy changes through regulation, and the related need for the Commission to marshal adequate evidence and analysis in anticipation of such legal challenges.<sup>212</sup>

### A. Regulatory

After describing the substance of several regulatory changes that could largely reconcile the tensions identified above, this section identifies points of caution about taking a regulatory approach that relies on existing legislation for its legal basis.

#### 1. New Rules

As noted above, section 8 of the CLCPA directs the Commission and other agencies to “promulgate regulations to contribute to achieving the statewide greenhouse gas emissions limits established in Article 75 of the environmental conservation law.”<sup>213</sup> Amending 16 NYCRR section 230 and the existing Benefit Cost Analysis Framework, which are described in turn below, would help to satisfy this directive as well as helping to address the tensions between the PSL and CLCPA.

##### a. Pare back 16 NYCRR part 230.

Perhaps the most obvious opportunity to reduce the subsidization of gas infrastructure would be for the Public Service Commission to amend 16 NYCRR part 230 so that it merely implements PSL section 31 rather than expanding on it. Specifically, the amended regulation would allow gas corporations to recover from ratepayers only the costs of 100 feet of pipe, and would consider each customer’s

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212. *Cf.* Energy Ass’n of N.Y. State v. N.Y. Pub. Serv. Comm’n, 273 A.D. 2d 708, 711 (N.Y. 2000) (rejecting challenge to Commission’s decision to require retail electric utilities to divest themselves of generation assets, even though no new legislation provided basis for Commission’s decision to change policy).

213. CLCPA § 8.

application for extensions individually rather than collectively, saddling prospective gas customers with all other costs associated with any expansion undertaken on their behalf pursuant to section 31.

b. Eliminate the term “reasonably permanent customers.”

Part 230 of NYCRR title 16 currently requires prospective customers to show that they will be “reasonably permanent customers” in order to receive gas service.<sup>214</sup> Given that it is no longer reasonable to expect any particular example of fossil gas usage will be “permanent” in New York, or even long-lived, this requirement should be changed. At a minimum, that change should replace “reasonably permanent customers” with “customers until 2035,” or a similarly clear and specific threshold based on a date certain. In addition to eliminating the concept of permanence from the regulation, an outside date that inched closer with the passage of time would also highlight the misalignment of new residential fossil gas consumption with the decarbonization targets established by the CLCPA. Ideally, as the outside date draws closer, the extent of the subsidization of the fossil fuel infrastructure would gradually decline, such that applicants in later years would increasingly bear the cost and risk (including the risk that early retirement would render the expenditure uneconomic) associated with their line extension requests.

c. Benefit Cost Analysis Framework modifications.

We propose changes to several aspects of existing BCA Frameworks in New York, including the factors they consider, the scope of the projects to which they apply, and their interoperability across fuels and technologies. Existing BCA Frameworks available to utilities in New York are not blind to climate impacts. For example, the BCA Framework established in the Reforming the Energy Vision proceeding (a proceeding focused on transforming electric utilities) directs utilities to value some of the costs of carbon dioxide emissions.<sup>215</sup> The Interim BCA Framework that Consolidated Edison filed as part of the Smart Solutions program applied a similar methodology to gas infrastructure alternatives.<sup>216</sup> However, the following changes would better align existing Frameworks with the CLCPA’s emissions reduction targets while also avoiding the confusions and discrepancies of applying different approaches to valuing the benefits and costs of employing different technologies.

First, every BCA Framework should value the social cost of methane as well as CO<sub>2</sub>, and should direct utilities to account for emissions of those pollutants from sources upstream and downstream of the utility’s distribution infrastructure assets. This would be consistent with what the CLCPA more generally requires

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214. N.Y. Comp. Codes R. & Regs. tit. 16 § 230.2.

215. N.Y. Pub. Serv. Comm’n Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Establishing the Benefit Cost Analysis Framework (Jan. 21, 2016).

216. CONSOLIDATED EDISON CO. OF N.Y., BENEFIT COST ANALYSIS HANDBOOK FOR NON-PIPELINE SOLUTIONS (Mar. 1, 2018), <https://www.coned.com/-/media/files/coned/documents/business-partners/business-opportunities/non-pipes/benefit-cost-analysis-handbook.pdf>.

for statewide greenhouse gas accounting purposes.<sup>217</sup> Notably, the CLCPA in effect requires that the social cost of methane and other short-term climate forcers be calculated based on their 20-year global warming impact compared to carbon dioxide,<sup>218</sup> departing from the convention of calculating such equivalency primarily or exclusively based on 100-year global warming potential.<sup>219</sup>

Second, BCA Frameworks should be designed to enable robust comparisons between gas and electric solutions in terms of their benefits and costs. Currently, incremental benefits and costs arising from factors unique to the electric or gas systems are not measured in ways that enable comparison. Obviously, this makes it difficult to identify opportunities for cost-effective electrification. Full comparability would make it possible to capture whether substituting an electric solution for gas could yield superior environmental outcomes due to system-level impacts on the electric side as well as the gas side. For example, electric water heaters can obviate gas water heaters, but the environmental consequences of substituting electric for gas will vary dramatically depending on the precise electric technology chosen as well as the electric generation expected to be relied upon, and in any case can only be evaluated through a thorough examination of both gas and electric system impacts.<sup>220</sup> Electric water heaters using heat pump technology eliminate *all* the emissions associated with on-site combustion of gas, while causing some new emissions as a result of electric consumption; these off-site emissions should be low, however, because heat pump water heaters are very efficient, meaning they require little electric energy.<sup>221</sup> Alternatively, electric water heaters using resistance technology (which also eliminate all on-site emissions from combustion) use more electric energy overall—which at first blush means more emissions from the electric system—but can be operated in a highly flexible manner in response to electric grid conditions; if this functionality is fully utilized, such water heaters can rely disproportionately on cleaner than average electric generation, and may improve the electric grid’s ability to integrate higher levels of intermittent generation, facilitating emissions reductions from the electric grid.<sup>222</sup> A BCA framework designed specifically for gas projects, which considers non-gas alternatives

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217. CLCPA § 2 defines “Statewide greenhouse gas emissions” to include “greenhouse gases produced outside of the state that are associated with . . . the extraction and transmission of fossil fuels imported into the state.” It also provides that “[t]he statewide greenhouse gas emissions report shall be a comprehensive evaluation, informed by a variety of data, including but not limited to: \* \* \* b. information relating to fugitive and vented emissions from systems associated with the production, processing, transport, distribution, storage, and consumption of fossil fuels, including natural gas.”

218. See N.Y. Env’tl. Conserv. Law §§ 75-0101 (Definition of “Carbon dioxide equivalent”) and 75-0113 (Value of Carbon).

219. EPA, GREENHOUSE GAS EMISSIONS: UNDERSTANDING GLOBAL WARMING POTENTIALS (Feb. 14, 2017), <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials>.

220. David Farnsworth et al., *Beneficial Electrification of Water Heating*, REGULATORY ASSISTANCE PROJECT 9–10 (Jan. 2019), <https://www.raponline.org/wp-content/uploads/2019/01/rap-farnsworth-lazar-shipley-beneficial-electrification-water-heating-2019-january-final.pdf>.

221. *Id.*

222. *Id.* at 29–30.

in a shallow way, is necessarily incapable of supporting a robust comparison among these options.<sup>223</sup>

Third, the Commission should require utilities to use these updated BCA Frameworks to undertake meaningful comparisons for projects or portfolios of projects. At present, both electric and gas utilities must sometimes consider non-wires and non-pipes alternatives to traditional infrastructure and service models, but such alternatives tend to be considered, if at all, as an afterthought. But, as the Commission has itself acknowledged, a decarbonization agenda demands that alternatives must be considered more systematically—something that improved BCA frameworks would support.<sup>224</sup> Together with other reforms that make it possible for utility companies to flexibly deploy and profit from both gas and non-gas thermal services, routine application of a BCA methodology that reveals the economic and environmental costs associated with a variety of solutions over a variety of timelines can both help slow the rush to gas and ensure that the most environmentally and economically efficient solutions have an opportunity to compete.

## 2. Changes in Oversight

Whatever regulatory changes the Commission adopts to address tensions or contradictions between the CLCPA and previously adopted laws and regulations, oversight of individual utilities offers an opportunity to require each such corporation to harmonize these conflicting obligations to the best of its ability. For example, the Commission could, when scrutinizing proposed investments in fossil fuel infrastructure, require the regulated entity to adopt useful life expectations for any such infrastructure that are not inconsistent with the greenhouse gas reduction requirements set forth in the CLCPA. In addition to informing the results of any benefit-cost analysis that might be performed with respect to such infrastructure, shorter asset lives should mean faster depreciation, which in turn would mean higher rates for service (and/or lower returns to be earned by the utility).<sup>225</sup> In turn, this should open the door for more serious and more productive investigation of alternative approaches to meeting energy and thermal needs that reduce the risk of saddling a utility and its ratepayers with long-term fossil fuel commitments.

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223. The Resource Value Framework can be used to modify frameworks that assume a particular energy source to enable robust comparisons among fuels. See <https://nationalefficiencyscreening.org/about-resource-value-framework/>.

224. In its recent Order Instituting Proceeding regarding gas planning procedures, the Commission recognized this: “Non-pipe solutions have been considered on an as-needed basis in previous cases; these solutions should be integrated into gas utilities’ planning processes, both in the context of specific avoidable projects in a particular area of the distribution system, and system-wide to reduce overall demand and the need for infrastructure investment. Non-pipe solutions should be built into the gas utility planning process, using criteria including reliability, practicality, environmental impact, avoided need for infrastructure investments, cost allocations over appropriate time frame, emissions, and local community impacts.” Order Instituting Proceeding, N.Y. Pub. Serv. Comm’n Case 20-G-0131, Proceeding on Motion of the Commission in Regard to Gas Planning Procedures 7 (March 19, 2020) (internal citations omitted).

225. Asa Hopkins et al., *Gas Regulation for a Decarbonized New York*, SYNAPSE ENERGY ECON., INC. 29–30 (June 29, 2020), [https://www.synapse-energy.com/sites/default/files/Gas\\_Regulation\\_Decarbonized\\_NY\\_19-082.pdf](https://www.synapse-energy.com/sites/default/files/Gas_Regulation_Decarbonized_NY_19-082.pdf).

More broadly, the Commission can require gas corporations to take the CLCPA's greenhouse gas mandates seriously by acting on them now. Specifically, as discussed above in part IV.A, CLCPA section 7 directs the Commission, in considering administrative approvals and decisions [presumably including its approval of any rate case settlement], to "consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law," and, where they are deemed inconsistent or to interfere, to "provide a detailed statement of justification. . . . And identify alternatives or greenhouse gas mitigation measures to be required. . . ." <sup>226</sup> As previously noted, this language, taken alone at this early point in time, likely provides inadequate guidance to compel the Commission, or a court reviewing a Commission decision, to nullify the provision for mandatory, subsidized expansions of gas distribution infrastructure. However, it clearly imposes a procedural obligation on the Commission—effective since January 1, 2020—and provides sufficient authority to impose substantive requirements on corporations seeking approval of proposals that include subsidized infrastructure expansions. <sup>227</sup>

Once the DEC issues a final regulation that translates CLCPA emissions reduction targets into mass-based emissions limits, as it is expected to do by the end of 2020, <sup>228</sup> the Commission will have firmer footing for any substantive action that makes CLCPA section 7 its legal basis. In the meantime, the procedural obligation contained in section 7 is in force and relevant to Commission decisions. Given the Commission's obligations relating to environmental oversight (under the CLCPA as well as the PSL <sup>229</sup>) and its paramount responsibility for just and reasonable rates, the Commission should fulfill that procedural obligation by, at a minimum, putting its regulated entities on notice regarding what emissions information they will be required to provide in conjunction with future requests for Commission approval of their investments, including, without limitation, in the context of rate cases. <sup>230</sup> It also has no reason to delay establishment of the procedural foundation for the substantive determinations of consistency or inconsistency with CLCPA targets that section 7 requires.

Exercising oversight in a manner that insists on consistency with the CLCPA will, if nothing else, highlight for utilities and other stakeholders the urgent need to find alternatives to traditional investments in fossil fuel-based infrastructure, and it may help focus the legislature on the need to harmonize the statutory frameworks governing greenhouse gas emissions and energy distribution.

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226. CLCPA § 7(2).

227. *Cf. supra* note 154 and accompanying text, highlighting DEC's apparent compliance with CLCPA § 7 but lack of express acknowledgement that CLCPA § 7 imposed specific requirements.

228. *See* DEP'T OF ENVTL. CONSERVATION, REDUCING GREENHOUSE GAS EMISSIONS: LIMITING FUTURE IMPACTS OF CLIMATE CHANGE, <https://www.dec.ny.gov/energy/99223.html>.

229. *See* N.Y. Pub. Serv. Law § 5(2) (charging the Commission to require entities subject to its regulation to undertake long-term planning with an eye to several factors, including "the preservation of environmental values and the conservation of natural resources.").

230. *Cf.* N.Y. DEP'T OF ENVTL. CONSERVATION, REGULATORY IMPACT STATEMENT- PROPOSED PART 496 (2020), <https://www.dec.ny.gov/regulations/121070.html> [hereinafter REGULATORY IMPACT STATEMENT].



### 3. Two Related Points of Caution

Although New York law, including both statutes and jurisprudence, gives the Commission very broad authority to reshape policy in light of changed circumstances, a Commission rule or decision is inherently more susceptible to legal challenge than an act of legislation.<sup>231</sup> This susceptibility is heightened where the regulation can be characterized as being at odds with existing statutory language.<sup>232</sup> Consequently, should the Commission adopt one or more of the changes proposed above, or others that are similarly ambitious and consequential, it would do well to anticipate Article 78 challenges alleging that it exceeded its authority or adopted rules that are arbitrary, capricious, or reflect an abuse of discretion.<sup>233</sup> To prepare for such challenges, the Commission must ground any new rule on a thorough and carefully developed record.<sup>234</sup> Notably, the Commission's track record in court reflects that successful Article 78 challenges to Commission actions have tended to hinge not on faulty reasoning, but rather on demonstrated failures by the Commission to consider adequately stakeholder input or objections.<sup>235</sup> The Commission should, therefore, assume that any rulemaking that resembles those suggested above will be litigated and that the litigants will take aim at how clearly and completely the Commission responded to stakeholders' points of contention.<sup>236</sup>

An issue related to the need for a well-developed record to support any one of the proposals above is the Commission's capacity to develop and implement such proposals. A regulatory approach, unlike a legislative one, puts a heavier burden on the Commission to justify the formulation of rules that would reshape the gas business in New York. Although that burden is analytical and evidentiary, carrying it will mean something more practical: marshalling staff and other institutional resources quickly and effectively, even as the Commission and Department of Public Service handle a host of other demands.

#### B. Legislative

The measures suggested here aim directly at the tensions between the CLCPA's mandate and PSL sections 30 and 31, described in parts III.A and III.B above. The first of these would amend PSL section 30 to clarify what exactly is in the public interest with respect to residential energy services. Each of the other three would amend PSL section 31 so that it no longer obscures the costs of gas distribution infrastructure expansion from stakeholders other than gas utilities. All

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231. *Voelckers v. Guelli*, 58 N.Y.2d 170, 176, 466 N.E.2d 764, 767 (1983).

232. *Juarez v. New York State Office of Victim Servs.*, 169 A.D.3d 52, 57, 92 N.Y.S.3d 738, 742, *leave to appeal granted*, 33 N.Y.3d 914, 132 N.E.3d 648 (2019).

233. *Id.*

234. *Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n*, 37 N.Y.S.3d 178, 184 (N.Y. Sup. Ct. Albany County 2016).

235. *Id.* at 188 ("notice given to petitioners was clearly inadequate"); *see also* *Home Depot U.S.A., Inc., v. New York State Pub. Serv. Comm'n*, 868 N.Y.S.2d 770, 772 (N.Y. App. Div. 2008) ("based upon the analysis contained in the PSC's determination, we find no rational basis for the PSC to disregard the clear language of the development and lease agreements between Home Depot and Emgee in favor of Emgee's tax and accounting treatment of the funds on its books.").

236. *See Nat'l Energy Marketers*, 37 N.Y.S.3d at 186.

four measures are discrete—that is, they are not interdependent or constituent elements of a broader reform agenda.

When considering these approaches, the reader should be aware of a basic challenge facing the Commission and New York as a whole: unlike gas, adopting clean solutions, such as building energy management systems and air and ground source heat pumps, requires capital investments to be made not necessarily by utilities but by customers themselves or non-utility energy service providers, although such non-utility capital investments would have significant ramifications for resulting demand for utility services.<sup>237</sup> Consequently, a fuel and technology-neutral approach to this transition may require policymakers to both leave room for non-utility businesses to provide services that may change or obviate the need for traditional utility services and also undertake somewhat novel forms of consumer protection.<sup>238</sup> What exactly that will involve is beyond the scope of this article, but it seems likely that the imperative of reducing the reliance on energy delivery systems that do not meet future generations’ environmental needs will necessitate a modulation of the Commission’s role in regulating portions of the energy sector.<sup>239</sup>

#### 1. Amend PSL § 30

- a. Clarify that it is energy and heating service—and not specifically gas service—that is in the public interest.

The following changes to PSL section 30 would, consistent with the neutrality principle described in section 4, remove an important source of bias favoring incumbent technologies available to provide energy services (including heating) to residential customers:

30. This article shall apply to the provision of all or any part of the gas, electric, ~~or steam~~ **or other thermal energy** service provided to any residential customer by any ~~gas, electric or steam and municipalities corporation or municipality~~ entity. It is hereby declared to be the policy of this state that ~~the continued provision of all or any part of such gas, electric and steam service to~~ all residential customers’ **continued access to energy and heat**, without unreasonable qualifications or lengthy delays, is necessary for the preservation of the health and general welfare and is in the public interest.<sup>240</sup>

237. See Then et al., *supra* note 208, at 18–20 (describing different responses of grid operators and users).

238. See Shelley Welton, *Clean Electrification*, 88 U. COLO. L. REV. 571, 640–46 (2017) (discussing how legal limits on commissions and utilities manifest in part as limits on potential sources of revenue for policy interventions that might overcome barriers to electrification); cf. Alexandra B. Klass, *Regulating the Energy “Free Riders”*, 100 B.U. L. REV. 581 (2020) (highlighting that clean energy transition programs require allocating benefits and costs without complete information about their incidences over the long term as well as the near term).

239. For a useful description of the diverse factors that can impede consumer uptake of electric solutions, as well as available policy responses, see generally Kenneth W. Costello, *Electrification: The Nexus Between Consumer Behavior and Public Policy*, 31 ELECTRICITY J. 1 (2018).

240. N.Y. Pub. Serv. Law § 30. Strikethrough indicates deletion; bold indicates addition. While the suggested changes to both sentences of the section implement the points discussed in this article about technology neutrality and just transition, some of the suggested changes to the first sentence seek to clarify the language in the existing provision.

Amended in this way, the first sentence of PSL section 30 recognizes that a variety of technologies can provide thermal energy services to residential customers. The rephrasing of the second sentence clarifies that customers have a right to continued access to energy and heating service in general rather than to provision of that service by a particular technology. This, among other things, prevents any inference that state policy disfavors fuel-switching.<sup>241</sup> These changes would also provide a basic legal foundation on which not only the Commission and utilities, but also other agencies and energy sector stakeholders could establish and coordinate measures to facilitate investment in electrification.

## 2. Amend PSL § 31

PSL section 31 currently shields new customers from the cost of expanding gas infrastructure to serve them, preventing scrutiny of that cost and imposing it on existing customers. If the PSL is to embody the principles above and stop mandating potentially imprudent spending on fossil fuel infrastructure, section 31 must be amended. However, a significant challenge would attend any such amendment: PSL section 31 creates an entitlement that cannot be reduced or eliminated without garnering accusations of unfairness as between existing utility customers and future customers who have yet to incur any direct costs or benefits.

The following three proposed amendments are just some of the possibilities that the legislature might consider:

### a. Cease requiring utilities to shift infrastructure extension costs.

PSL section 31 currently embodies the idea that utilities of various types are to extend existing infrastructure as needed to meet requests for service from new customers, and that those utilities should socialize at least part of the cost of all such extensions. Section 31(4) specifically authorizes utilities to charge customers for such costs above a threshold amount, but *not* for the costs of the first hundred feet of an extension.<sup>242</sup> In practice, the costs not charged to customers are never revealed—neither to the prospective customer nor to the general public. Amending PSL section 31 to allow (but, notably, not require) utilities to charge prospective customers for the full cost of all line extensions would end the practice of shielding prospective customers, other ratepayers, and the public from knowledge of the costs of infrastructure extensions required to support customers' access to energy networks. This change would, admittedly, result in differential treatment of existing and prospective customers, the former having been relieved of the cost of the first 100 feet of infrastructure extensions and the latter potentially being required to bear it, and as such would likely give rise to concerns about fairness.

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<sup>241</sup> Addressing the risk that anyone might infer that New York State policy disfavors the fuel switching that will be needed to achieve the State's greenhouse gas targets will require addressing multiple existing provisions of State law, not solely section 30 of the Public Service Law, as section 30 is not the only provision that could give rise to such an inference. For example, section 66-b guarantees "a continuation of gas service following the demolition and reconstruction of any structure . . . owned by . . . a gas customer within one year of demolition," a guarantee that is especially unfortunate given that demolition and reconstruction can be an ideal time to transition a property off fossil fuel.

<sup>242</sup> N.Y. Pub. Serv. Law § 31(4).

b. Force new customers to choose.

PSL section 31 could be amended so that a new customer could avoid paying for a utility connection for one form of service—*e.g.* gas or electric—but not both. This would preserve the commitment to socialize some of the cost of connecting new customers to a collective energy system, while partly curing the mandatory subsidization of fossil fuel infrastructure by requiring prospective customers to consider and bear a fuller share of the costs of their own energy choices. In practice, we would anticipate that in such a regime most residential customers would elect (or already have) a subsidized connection to the electric system—which we know is capable of delivering greenhouse gas-free energy—but would think harder before investing their own capital in gas line extensions that might have a limited operational horizon or future usefulness due to the CLCPA.

c. Compel disclosure of potential extension costs.

A more modest but potentially transformative amendment to PSL section 31 would leave intact the directive to utilities to cover the costs of the first 100 feet of line extensions for new customers and to recover those costs from existing customers, but would compel that those costs be disclosed to all concerned—the Commission, the prospective customer, and existing ratepayers. While this change could facilitate the coordination of public policy interventions and decisions by private actors to more efficiently align gas system and heating practices with New York’s greenhouse gas goals, it would not directly put a stop to subsidization of new fossil fuel infrastructure that interferes with attaining those goals.

## VII. CONCLUSION

New York customers first began relying on utility-provided, fossil-fueled energy services in the early nineteenth century, and such services have become ubiquitous since then, so it is no surprise that fossil fuel usage is embedded in aspects of state law.<sup>243</sup> But taking the CLCPA’s decarbonization mandate seriously means not only adding a new layer of law and policy on top of the old; but also incompatible elements need to be identified and rooted out. This article identifies an example of a tension between the CLCPA and existing law that could confuse and slow efforts to decarbonize energy use in buildings. There are sure to be others as well, and the principles identified in part V—fuel and technology neutrality, safe transition, and just transition—should guide all regulatory and legislative efforts to remediate such tensions. The same is true for other jurisdictions that have adopted meaningful decarbonization targets but have yet to repeal or modify older statutory and regulatory provisions pertaining to fossil fuels and related infrastructure. Furthermore, because no jurisdiction—state or federal—that sets itself the task of decarbonization can expect to avoid this sort of tension, efforts to think through how to resolve it in a variety of jurisdictions cannot begin too soon.

This article examines the first step of a process that begins with slowing infrastructure expansion and then moves to reversing it and likely decommissioning

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243. AM. OIL & GAS HISTORICAL SOC’Y, HISTORY OF CON EDISON (Apr. 29, 2013), <https://aoghs.org/stocks/con-edison-american-utility-company>.

some existing infrastructure. Even though these steps can be analyzed as discrete in an article like this one, policymakers, tasked with bringing clarity and predictability to particular sectors and industries, will likely need to address them both at the same time—or in close succession. Other analyses (focused on the California context) have considered what decommissioning is likely to entail and what regulatory reforms will be needed to accomplish it.<sup>244</sup> Like this article, their focus on a particular jurisdiction does not make their insights and conclusions irrelevant to other states, and their recommendations may be valuable for policymakers across the United States to consider as they begin the long process of decarbonizing the buildings sector and the rest of the economy.

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244. GRIDWORKS, *supra* note 130; Bilich, *supra* note 102.