

Institute for
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

May 3, 2021

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

VIA ELECTRONIC SUBMISSION

Attn.: Case 20-G-0103 – Proceeding on Motion of the Commission in Relation to Gas Planning Procedures

Subject: Comments of the Institute for Policy Integrity

Dear Secretary Phillips:

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)¹ appreciates the opportunity to submit these comments to the New York Public Service Commission (Commission) in response to its February 12, 2021 Notice of Stakeholders Forum and Soliciting Comments on the Staff Gas System Planning Process Proposal (Planning Proposal) and Staff Moratorium Management Proposal (Moratorium Proposal). 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.

Respectfully,

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¹ This document does not present the views of New York University School of Law, if any.

Comments of the Institute for Policy Integrity

Staff's Planning Proposal represents a thoughtful approach to a challenging set of issues at a moment when commercially available technologies, business models, and policy are all, in combination, pushing gas sector stakeholders to change in fundamental ways. After describing important aspects of the context in which Staff has developed the proposal, Policy Integrity's comments encourage the Commission to add several minor requirements to it. Our comments also encourage the Commission not to play down the tensions and ambiguities that freight the proposal and this proceeding more generally, but to address them directly.

More specifically, we suggest the following additions to the Planning Proposal:

- Clarify how the thresholds that are to define reliability standards should be distinguished from the criteria for an exemption from conducting a non-pipes alternative (NPA) screen before proceeding with a conventional supply solution; and
- Ensure that emissions impacts are considered fully when comparing alternatives.

In addition, we urge the Commission to consider taking the following steps, which go beyond the scope of the Planning Proposal:

- Update the BCA Framework Order to better reflect the legal and policy context established by the Climate Leadership and Community Protection Act (CLCPA) for gas-related valuation and planning.
- Identify whatever open questions or gaps in legal authority prevent the Commission from taking decisive action on key issues now and indicate whether answers to those questions will be sought from the Climate Action Council, other agencies, or the legislature.

1. Background

The Commission's March 19, 2020 Order directs Staff to develop proposals for updating gas planning,² but does so in a context characterized by legal tensions and several ambiguous policies. These tensions and ambiguities, described below, make the tasks and decisions before Staff and the Commission more challenging.

Legal tension. The CLCPA is in tension with provisions of the Public Service Law (PSL) and Transportation Corporations Law (TCL).³ The CLCPA sets an overarching net-zero emissions reduction target with a deadline of less than 30 years from today and directs agencies to align their decisions to it.⁴ Emissions from the gas distribution system today are roughly double what the CLCPA prescribes for *economy-wide* emissions by 2050,⁵ yet provisions of the PSL and

² See Order Instituting Proceeding, Case 20-G-0131, at 1 (issued and effective Mar. 19, 2020).

³ For a full discussion of this legal tension, see Justin Gundlach & Elizabeth Stein, *Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws: A Case Study of New York*, 41 ENERGY L.J. 211, 223–36 (2020).

⁴ CLCPA, 2019 N.Y. LAWS c.157, §§ 2, 7, 8; N.Y. ENV'T CONSERV. L. (ECL) § 75-0103 (directing Climate Action Council to develop plan for achieving 2050 net-zero emissions goal).

⁵ See Gundlach & Stein, *supra* note 3, at 224–26.

TCL, support continuous expansion of gas service and related infrastructure.⁶ Some measures established by the CLCPA itself help to resolve that tension, but only indirectly. For instance, the CLCPA directs the Department of Environmental Conservation (DEC) to quickly issue Guidance on how agencies should value the Social Cost of Carbon (and of methane),⁷ prescribes a greenhouse gas inventory that reflects upstream emissions as well as direct emissions related to energy use,⁸ convenes the Climate Action Council to develop a scoping plan for statewide decarbonization,⁹ and directs DEC to codify in “rules and regulations” elements of that scoping plan by January 2024.¹⁰ Thus, while the CLCPA implicitly mandates large and rapid reductions in New Yorkers’ consumption of gas and provides a framework for regulators to eventually chart a reduction pathway, nothing in the CLCPA’s provisions prescribes *specific* actions with respect to gas.¹¹

Key ambiguities. Several ambiguities are present in Staff’s Planning Proposal. These include:

- how much of the emissions budget specified by DEC in its expected 2024 regulation will allow for continued reliance on fossil gas in 2030 and over the twenty years thereafter;
- whether and how gas utilities might receive incentive payments to support beneficial electrification and how those payments might be designed;¹² and
- whether investments that enable the consumption of biogenic or synthetic gas might qualify as NPAs.¹³

These ambiguities do not wholly undermine the process contemplated in the Planning Proposal, but they introduce meaningful uncertainties for utilities and other stakeholders. As described more fully in section 3.b, below, it would therefore be helpful for the Commission to clarify whether it believes that it has the authority to address some or all of these uncertainties, and also whether it intends to use that authority.

2. Comments on the Planning Proposal

The Planning Proposal directs utilities to make radical changes in their current approach to gas system planning.

⁶ See, e.g., PSL §§ 30, 31, 66-p; TCL § 12; see also Gundlach & Stein, *supra* note 3, at 223–35.

⁷ ECL § 75-0113(1)–(3); see also N.Y. DEP’T ENV’T CONSERV., ESTABLISHING A VALUE OF CARBON: GUIDELINES FOR USE BY STATE AGENCIES (2020) [hereafter DEC GUIDANCE].

⁸ ECL § 75-0105.

⁹ *Id.* §§ 75-0103(11), (12)(c), (13), (14)

¹⁰ *Id.* §§ 75-0109(1) & (2)(c).

¹¹ Notably, the Act’s lone reference to the PSL pertains to renewable generation of electricity. CLCPA § 4 (“The public service law is amended by adding a new section 66-p”).

¹² Planning Proposal at 27 (“Issues related to these incentives include whether and how gas-only LDCs can be incentivized to encourage electrification.”).

¹³ Planning Proposal at 24 (noting “LDCs’ interest in pursuing renewable gas alternatives in NPAs” and proposing “Avoided Cost of Gas (ACG) ‘best practices’ working group to address that and other issues); see also GUIDEHOUSE (FOR NATIONAL FUEL GAS DISTRIBUTION CORPORATION), MEETING THE CHALLENGE: SCENARIOS FOR DECARBONIZING NEW YORK’S ECONOMY 14 (2021) (presenting scenario “that retains natural gas for selective end uses and introduces low carbon alternatives such as renewable natural gas and hydrogen”).

a. Reliability standards

The Planning Proposal directs utilities to “identify the methodology by which reliability will be forecast and measured, including . . . trigger or threshold values of those metrics that will establish that a reliability issue exists.”¹⁴ However, the Planning Proposal also provides for an exemption from the requirement that utilities undertake an NPA screen before proposing a traditional infrastructure solution: if there is an “immediate threat to system reliability and/or public safety, or where construction is imminent, i.e., within 12 months”¹⁵

Because the threshold values established by utilities are likely to inform application of this NPA screen exemption, the Commission should direct utilities to set thresholds that not only identify potential reliability issues but also distinguish between non-urgent and urgent issues. Identifying non-urgent issues before they become urgent should ensure that those issues are treated as NPA opportunities that would avoid consuming fossil gas rather than exceptions that allow for continued or even expanded fossil gas consumption.

b. Comparing alternatives

Policy Integrity suggests several adjustments and additions to the BCA and emissions impacts segments of the Planning Proposal’s provisions relating to how utilities should compare alternative solutions to meet an identified need for energy.

BCA. In relation to the assessment of projects’ benefits and costs, the Commission should:

- Direct utilities to consider the potential benefits of improved air quality—indoor as well as outdoor—resulting from reducing or wholly avoiding gas consumption,¹⁶ ideally for particulate matter and carbon monoxide, but at a minimum for NOx emissions, which the BCA Framework directs utilities to quantify and monetize;¹⁷
- In addition to directing utilities to include a sensitivity analysis in which any new gas asset depreciates fully by 2050,¹⁸ direct them to include an additional sensitivity that swaps the “net avoided CO2 value” prescribed by the BCA Framework Order with one that applies the \$125/ton central value for the social cost of carbon presented in DEC’s Value of Carbon Guidance.¹⁹ This would be consistent with Staff’s statement that “[t]he current sensitivity analyses [in utilities’ BCA Handbooks] can be improved to make them

¹⁴ Planning Proposal at 17–18.

¹⁵ *Id.* at 18–19.

¹⁶ See BRADY ANNE SEALS & ANDEE KRASNER, ROCKY MTN. INST., PHYSICIANS FOR SOCIAL RESPONSIBILITY, MOTHERS OUT FRONT & SIERRA CLUB, HEALTH EFFECTS FROM GAS STOVE POLLUTION 7–8, 11–16 (2020).

¹⁷ Case 14-M-0101, Order Establishing the Benefit Cost Analysis Framework, App’x C at 15 (issued January 21, 2016); see also CONSOLIDATED EDISON, BENEFIT-COST ANALYSIS HANDBOOK FOR NONPIPE SOLUTIONS 20–21 (2018).

¹⁸ See Planning Proposal at 22–23.

¹⁹ DEC GUIDANCE, *supra* note 7, at 3; see also CLCPA § 2, ECL § 75-0113 (directing DEC to develop a value of carbon estimate for use by state agencies).

more robust and better aligned with CLCPA goals and mandates,”²⁰ and it would not supplant the analysis required by the BCA Framework Order, just supplement it.

- Consider including a further element in an emissions-focused sensitivity analysis: in addition to applying DEC’s value of carbon, also apply DEC’s estimated value of methane—which DEC’s Guidance indicates is \$2,782/ton²¹—to estimates of fugitive emissions released in the course of extraction, as well as lost and unaccounted for gas emitted during transmission and distribution. This would be consistent with the Planning Proposal’s statement that utilities should “provide estimates of . . . avoidable upstream . . . variable costs.”²²

Adding these components would make utilities’ application of the BCA Framework Order to gas planning more consistent with the CLCPA, and failing to add them would risk straying from what the CLCPA requires.

Emissions impacts. Policy Integrity agrees with Staff that utilities should adopt “a stringent [emissions impacts] test for new infrastructure.”²³ As Staff explain, “calculating and reporting the emissions of greenhouse gas associated with all solutions, both supply-side and demand-side, is necessary for transparency when considering choices among alternative solutions.”²⁴ Such a test is arguably necessary for the Commission to discharge its duty under the CLCPA, which requires that, when the Commission issues “administrative approvals and decisions, . . . [it] shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits.”²⁵ Notably, to capture emissions impacts in a way that is consistent with the CLCPA’s definition of statewide emissions,²⁶ such a test must take into account the upstream emissions that arise from extraction and transmission of fossil gas outside of New York as well as the emissions resulting from its distribution and eventual combustion within the state’s borders.

3. Comments Beyond the Scope of the Planning Proposal

Staff said during the March 25, 2021 Stakeholders Forum (March Forum) that the Planning Proposal and this proceeding as a whole were first inspired by the 2019 moratoriums in Westchester and Long Island—and that they were not developed primarily to align the gas sector with the CLCPA’s decarbonization agenda.²⁷ Staff explained that point more fully in its

²⁰ Planning Proposal at 22.

²¹ DEC GUIDANCE, *supra* note 7, at 3 (indicating central value for social cost of methane), 22 (stating “it is possible to estimate additional damages from methane so they can be more easily integrated into cost benefit analyses or in the description of the benefits of emission reduction policies. The Department recommends consideration of such estimates if available in the peer-reviewed literature.”).

²² Planning Proposal at 23.

²³ *Id.* at 26.

²⁴ *Id.*

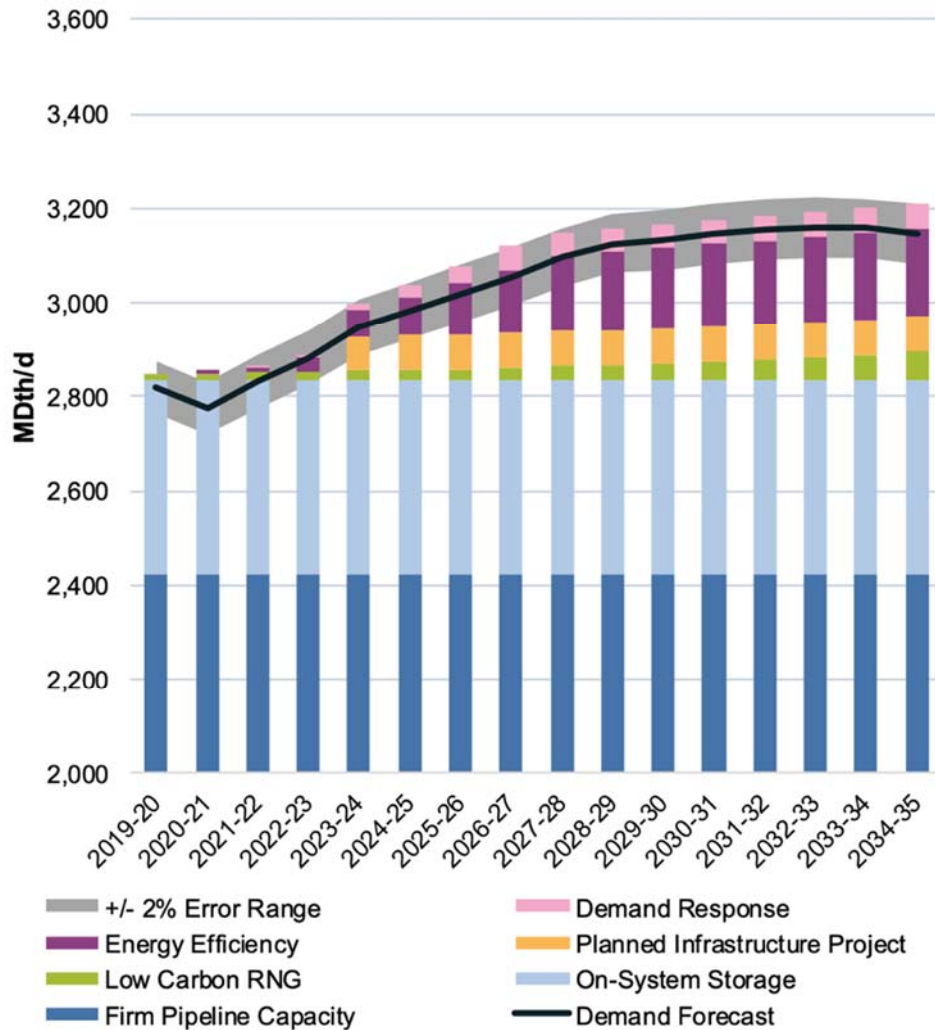
²⁵ CLCPA § 7(2).

²⁶ *Id.* § 2, ECL § 75-0101(13).

²⁷ The March Forum was not recorded. *See also* Order at 3, 12 (stating that purpose of proceeding is “to examine issues related to the operation of gas utilities in a supply-constrained environment,” and “[a]dditionally, planning

responses to questions: this proceeding will involve “an iterative process” and the Planning Proposal “is where we start;” Staff “does not want to get ahead of” the Climate Action Council;

Figure 1. Staff’s Illustrative Gas Supply Forecast.



and, although the CLCPA prescribes an emissions reduction target, “how you put the pieces of the puzzle together hasn’t been worked out yet.”²⁸

But the narrow, moratorium-focused scope of Staff’s approach is not neutral with respect to future options for the broad regulatory realignment New York State’s energy sector urgently requires. Instead, it implicitly assumes that important features of the status quo will persist. Consider Figure 1, which appears on page 16 of the Planning Proposal.²⁹

must be conducted in a manner consistent with the recently enacted Climate Leadership and Community Protection Act (CLCPA).”).

²⁸ Quotations from notes on file.

²⁹ Planning Proposal at 16.

Staff may have intended for this graphic to illustrate how NPAs can substitute for traditional solutions to meeting growing demand for energy and nothing more, but the graphic also clearly suggests a future in which, among other things, electrification—to the extent that it even occurs—remains wholly separate from gas planning and gas system management, and in which existing pipeline and storage capacity remain *constant* for the next 15 years. Such a future is difficult to reconcile with the one envisioned by pathways analyses conducted for New York State (figure 2)³⁰ and New York City (figure 3).³¹ As those figures reflect, aggressive electrification is expected to feature in *all* future scenarios, and utilization rates of gas distribution infrastructure are expected to fall—even in the event that consumers come to rely heavily on biogenic or synthetic substitutes for fossil gas.

Figure 2. State Pathways Analysis: Building Final Energy Demand, High Technology Availability Pathway.

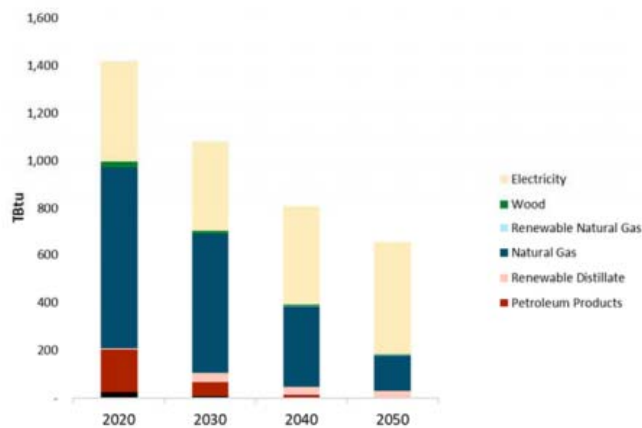
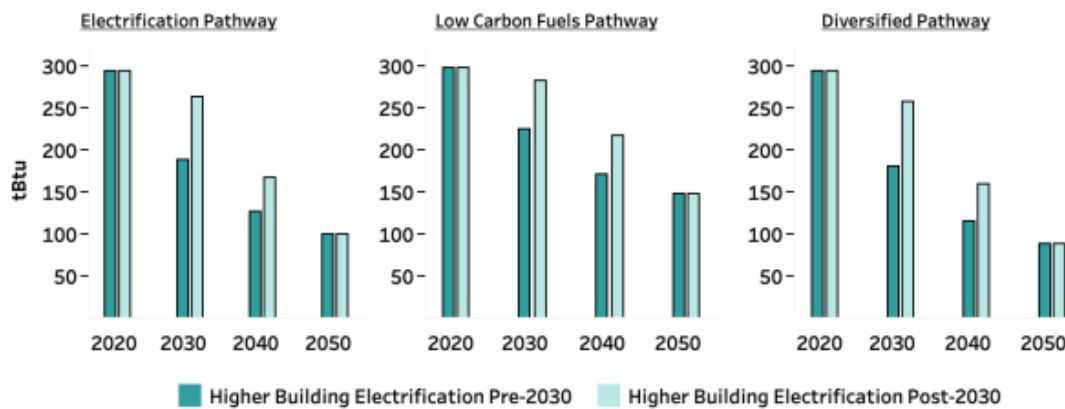


Figure 3. City Pathways Analysis: Annual Gas Use (Fossil and Low Carbon) in the Buildings Sector, Select Years.



³⁰ E3 (for NYSERDA), PATHWAYS TO DEEP DECARBONIZATION IN NEW YORK STATE 25 fig.13 (2020) [hereafter NYS PATHWAYS].

³¹ NYC MAYOR’S OFFICE OF SUSTAINABILITY, PATHWAYS TO CARBON-NEUTRAL NYC: MODERNIZE, REIMAGINE, REACH 75 fig.41 (2021) [hereafter NYC PATHWAYS].

The Commission can take a number of steps to improve the alignment of its approach to gas with the CLCPA’s overarching mandate. Policy Integrity recommends that it consider the following.

a. Reexamine the BCA Framework Order

The Avoided Cost of Gas “best practices” working group is meant to develop methodologies and information to enable calculations of avoidable upstream and distribution system costs as well as standards for “renewable gas alternatives,” such as biogenic natural gas.³² Its recommendations will be made against the backdrop established by the BCA Framework Order, which was adopted in 2016. This working group will perform an important task, but rather than limit the scope of work to those items identified in the Planning Proposal, the Commission should consider a broader reexamination of the BCA Framework Order. After all, that order was adopted in 2016, and the CLCPA has since changed fundamental features of energy systems valuation and planning in New York State. As such, a reexamination of the BCA Order should, for instance, enable apples-to-apples comparisons of electric and gas solutions, which presently occupy different regulatory silos,³³ and identify ways to give due consideration environmental justice goals.³⁴

b. Highlight decisions by other entities, information, or authority that are prerequisite to action

To provide clarity and context for all stakeholders, the Commission should describe more fully how it plans to deal with the legal tension and ambiguities noted in the Background discussion above—as well as other open questions that implicate decisions by the Climate Action Council or actions on the part of other agencies. For instance, the Planning Proposal acknowledges that “[i]ssues related to [the potential incentives it describes] include whether and how gas-only [utilities] can be incentivized to encourage electrification measures.”³⁵ Even if the potential to produce biogenic or synthetic gas eventually exceeds current expectations,³⁶ deep decarbonization in line with the CLCPA will require most—and possibly nearly all—gas customers to opt for partial or complete electrification instead of relying on gas in their buildings.³⁷ This likelihood makes the issue of how to incentivize electrification an urgent one. If the Commission believes, for instance, that provisions of the Public Service Law prevent it from making incentives available to gas utilities to encourage fuel switching to electricity, then the

³² Planning Proposal at 23–24.

³³ For a fuller description of how the BCA Framework might be updated, see Gundlach & Stein, *supra* note 3, at 252–53.

³⁴ CLCPA § 2, ECL §§ 75-0103(7), -(12), -(15). *See also* 2019 N.Y. LAWS 735, ECL § 48-0105(1)-(2) (establishing Environmental Justice Advisory Group and Environmental Justice Interagency Coordinating Council).

³⁵ Planning Proposal at 27.

³⁶ *See* NYC PATHWAYS, *supra* note 31, at 71 Box 15 (indicating that only the low and medium renewable gas production scenarios were considered, and that the high-production scenario was determined to be too implausible to integrate as an input into the larger analysis).

³⁷ NYS PATHWAYS, *supra* note 30.

Commission should say so—or at least seek input on the issue from stakeholders in this proceeding—and thereby flag the issue for the Climate Action Council or legislature to take up.

By way of analogy, Policy Integrity highlights the fact and role of the Accelerated Renewable Energy Growth and Community Benefit Act,³⁸ which was adopted once it became clear that hitting the CLCPA’s deployment targets would benefit from reconfiguring existing processes and agencies’ responsibilities for permitting.³⁹ If the Commission has identified legal and institutional problems in this context similar to what that Act sought to address, it should not keep quiet about them.

³⁸ See N.Y. EXEC. L. § 94-c (codifying Act’s provisions).

³⁹ See Robert Walton, *New York Becomes First State to Establish Renewables Siting Office in an Effort to Speed Up Deployment*, UTILITY DIVE, Apr. 7, 2020 (describing aims of new Act and siting challenges to which it responded).