



CleanLaw 55: Caitlin McCoy Speaks with Elizabeth Stein and Justin Gundlach About Harmonizing States' Utility Regulation Frameworks and Climate Laws – January 6, 2021

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Caitlin McCoy: Hello and welcome to another episode of CleanLaw, our podcast at the Environmental & Energy Law Program at Harvard Law School. This is Caitlin McCoy, and I'm a staff attorney at the program. And today I am joined by Justin Gundlach and Elizabeth Stein to discuss their recent article [Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws. A Case Study of New York](#). Thank you both for being with me and talking with me today.

Justin Gundlach: It's great to be here.

Caitlin McCoy: So let me give you all a brief introduction to Justin and Elizabeth and their work before we jump into our discussion of their article this morning. So Justin is a senior attorney at the Institute for Policy Integrity at New York University School of Law. His work focuses on state-level energy and climate policy. And he's a co-editor of *Climate Change, Public Health, and the Law*, and the author of numerous publications and amicus briefs on legal and policy issues related to the impacts of energy use on climate and of climate change on infrastructure and public health. He previously served as a member of the Policy Development Team at the New York State Energy Research and Development Authority, NYSERDA, and as a staff attorney at the Sabin Center for Climate Change at Columbia Law School.

Caitlin McCoy: And onto Elizabeth. Elizabeth is the lead counsel for energy transition at the Environmental Defense Fund. She engages in state proceedings to advocate for aligning energy policies with state climate policies. And she has a particular focus on reducing reliance on oil and gas in transportation and in the building sector. She's successfully developed and advocated for best practices in the electric system to make sure that the grid is resilient and supports sustainability and reliability. And an important part of her work of course is collaborating with state and local agencies. And she previously worked as a real estate attorney focusing on transactional issues.

Caitlin McCoy: I'm thrilled to have both of them with me today as I'm sure you could all just tell. They have fantastic all-around experience in this area that makes them an incredible team and an incredible group of collaborators here who have collaborated on this article, *Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws*. I'm going to say it again for all of you just because it's a lengthy title, but I think it's important because it's descriptive. And it's a case study of New York, and this is linked in the episode notes so that you all can read it.



Caitlin McCoy: And I first heard about this article a few months ago after I had a call talking with Elizabeth and Justin about some of their work. And I was just really struck by reading this draft version of the article that was available at that time because I could see that it's exactly the kind of work I personally think that lawyers should be doing to facilitate the transition away from fossil fuels. And by that, I mean, it's laser-focused legal analysis. They're zeroing in on the conflicts between our existing laws and new climate legislation. And those conflicts need to be addressed in order to achieve some of these new emission reduction goals that states are adopting in their new laws. And so the article is a guide to points of tension in New York utility law and the state's new Climate Leadership and Community Protection Act.

Caitlin McCoy: So they focus in on provisions and processes that need to be modified and how they could be modified to effectuate the state's emission reduction targets. From my perspective, it's a guide for lawmakers, policy experts, and advocates alike. And I find it really encouraging to see such insightful work. That's why I'm so thrilled to discuss it with them today. And I think all of that introduction just leads me to my first question, which is a simple one but something that I'm always curious about. So we'll kick it off by asking, how did you both come up with this idea to write this article?

Justin Gundlach: I'll take the first stab and let Elizabeth correct me when I get things wrong. There was a group of advocates and stakeholders who gathered back in 2019. It was clear that gas and the CLCPA were going to interact and in meaningful ways. But it wasn't clear how, and it wasn't clear what exactly the Public Service Commission and others should do. And so at this meeting of advocates and also officials, there wasn't much of an agenda. And folks left the meeting I think with a clear sense that much needed to be done, but no one came away as I recall with a very clear idea of where to start. And so Elizabeth and I started talking basically about where to start and what kind of foundation could be useful and would be needed for subsequent efforts to grapple with the kinds of things that, in that meeting, seemed like clear problems but problems that hadn't really been fleshed out. Are there salient details that I'm forgetting from this anecdote, Elizabeth?

Elizabeth Stein: Thanks, Justin. What I would add is that the advocacy community had already really begun to focus on certain sections of the public service law as potentially really problematic for decarbonisation even before there was a decarbonisation statute in New York. Notably the public service law, as I think we'll discuss further on this call requires line extensions of the natural gas system to new customers and requires that a portion of the cost of those expansions and potentially the whole thing be paid for, not by the customer requesting the expansion, but by the company, and therefore by the utility company, and therefore by rate payers as a whole. So those costs are being socialized.

Elizabeth Stein: The fact that those costs are being socialized means that they're invisible, which makes it impossible for alternatives to expansion of the natural gas system to really compete on a level playing field against those apparently free expansions.



So that was already out there as an issue before the CLCPA came into being. And so once we had the Climate Leadership and Community Protection Act, we started taking a look at whether and how it might address some of the barriers that we already knew were out there.

Caitlin McCoy: And just continuing to build on understanding the context for this article and the context for these tensions that exist, I wanted to ask you both about the fact that you begin the article by discussing New York's approach to natural gas since 2009. And that date is really important because that's the date when we started to see the state adopting increasingly more ambitious goals to try to reduce greenhouse gas emissions. And I thought that this section was particularly valuable, and it's something that makes the article broadly applicable too. Because as you know, there are many other states in this situation as well that rely on natural gas even as they're trying to formulate these new climate goals and create decarbonisation plans. Would you talk a little bit about some of this recent history just to set the stage for, as Elizabeth you just did, in discussing this 100-foot gas hookup law in New York, to understanding a little bit about the role of natural gas and some of the recent history in trying to set climate goals and some of that tension just to set the stage before we jumped in and get really wonky?

Elizabeth Stein: So New York started adopting carbon reduction policies back in 2009 when Governor Patterson issued an executive order number 24 calling for 80% reductions by 2050 against a 1990 baseline. And that was really ambitious in its time. And if you actually thought about that goal in terms of tons of emissions, right then you would have seen that the emissions associated with natural gas already exceeded the budget that would exist by 2050. But the perspective was how do we reduce? And we went down this pathway of reductions that wasn't necessarily so focused on the end point but on what could be accomplished from the starting point we were at. As a result during much of the 2010s, natural gas actually played a big role in achieving a lot of the reductions that happened over the course of that decade both in the building sector and also in the electric generation sector.

Elizabeth Stein: And additionally, natural gas played a role in reducing pollution from buildings that was a public health menace. So there was something of a push to get buildings off of certain grades of heating oil that produced a lot of particulate matter and other pollution and were causing deaths and illnesses. And one of the ways of getting away from those heavy heating oils was natural gas, especially when natural gas started to become a very, very affordable alternative to heating oil.

Justin Gundlach: Yeah. And I would jump in here just to emphasize that this was, I guess you could maybe even call it the heyday of the natural gas as bridge fuel theme in energy policy. As Elizabeth has mentioned, there were really material gains to be made from switching away from coal in the power sector and switching away from heating oil in the building sector. And in most respects, public health was the leading concern here as opposed to climate. But greenhouse gas emissions were



also sharply reduced as a result of these moves. So in the article, we emphasize that this bridge fuel era was one in which you saw the state setting up regulatory circumstances that encouraged gas adoption even though you could foresee that these would eventually be at odds with the need to continue reducing greenhouse gas emissions. But there were gains to be made in both relation to public health and climate-related emissions concerns.

Elizabeth Stein: I think it's important to note that in buildings, electric heating technologies were viewed as more polluting than fossil-fuel based technologies potentially for two reasons that work together. One being that older heating technologies are very energy intensive, and the other being that that electric energy was coming from an electric grid that was fueled by fossil fuels. So you actually would wind up with more fossil fuel emissions from electric heating than you would from onsite combustion of natural gas. And that was the case for a long time. And the conventional wisdom on that has shifted as electric heating technologies have evolved and as the electric grid itself is starting to really evolve.

Caitlin McCoy: I wanted to have you both unpack this situation because, like I said, New York is not alone in this situation, it's really the story. I'm glad you mentioned the phrase bridge fuel, Justin. I remember hearing that quite a bit during that era, of course, because this is the situation that we see across the country and in many other places, and it's a story of states trying to do the best they could at the time with the technology that they had, with the energy sources that we had, with an understanding of what was on the grid and the technology that was available and trying to incrementally work to reduce emissions as much as was feasible and really eliminate the worst of the worst and the things that were most harmful to public health.

Caitlin McCoy: And I think that's important to keep in mind that that is a part of this story, that's an important chapter in this story. And it's why we are where we are today. And I think that's why also this is such an important moment. We're on the precipice of another one of these moments where at that time we were moving away from fuel oil, but now we're working to start to imagine moving away from natural gas and really starting to try to make some progress on that. So without further ado, I suppose we should just jump straight in, and I'll pose to you guys. When we read the article, it talks about how New York's public service law, which is to say its utility law declares that the continuation of gas service to residential customers is in the public interest.

Caitlin McCoy: That's just this baked in declaration and assumption. And it also says that certain expansions, as Elizabeth has already mentioned, certain expansions in gas service to additional customers must be made at no cost to those new customers but be born by all rate payers. This is a summary of one of these key areas that you all point to in the article as a key area of tension between the New York public service law and the CLCPA. So would you explain a little bit more about this point of tension?



Justin Gundlach: Sure. To start, I think it's worth highlighting that the language that you are referring to Caitlin in the public service law, this is public service section 30, which declares that it is in the public interest that people have access to these fuels. That language wasn't written with an eye to somehow impeding subsequent transition. The way it's phrased in the statute just ensures that people have access to different expressly articulated sources of energy. And it just so happens that it's written in a way that supports continuity in that access in the silo of a particular fuel type rather than speaking generically about access to energy services that can provide whatever those services will support in terms of either heating or cooking or water heating. So it's not like we're dealing with a nefarious bit of legislation laid down back when someone thought, "Aha, we can stave off electrification."

Justin Gundlach: This is just a consequence of someone writing a law without thinking as far into the future as where we've now arrived. But to get to the answer to your question about the nature of the conflict, what you have as a result of that statutory authorship without a crystal ball is language that, the phrase I've ended up using is creates a "vicarious right to recovering the costs of providing gas service," for gas utilities. And here's what I mean by that. Under one provision of this law, you have an obligation on utilities to serve consumers and to preserve that service. Under another provision, you have a procedural right on the part of utilities to recover the cost of that service. And in addition, consumers get a right to seek access to that service.

Justin Gundlach: So the combination of these things results not in utilities having a right per se to get paid for providing gas service, but in effect that's the result because the law says utilities may not say no to consumers and utilities should be able to recover the costs of not saying no. Now, this is a problem in that gas service yields a lot of emissions and more emissions than the emissions budget under the CLCPA allows. So you have this tension where an old law creates this vicarious right to recover the costs of providing gas service, and a new law says nothing specifically about that old law but that one impact, one externality, if you like of that old law is now impermissible and at odds with the state's goals.

Elizabeth Stein: Yeah. I would agree with everything that Justin just said and would just emphasize that the wording of public service law section 30, which is the provision he's primarily talking about, it really sounds like a consumer protection provision. It's really describing customers who are receiving a variety of energy services. And whatever they are, it's in the public interest that they can continue. And then the CLCPA comes along and establishes a schedule of reductions that is logically impossible to square with that continuation unless there are some very significant changes in the nature of the fuel that's being provided.

Caitlin McCoy: Right. And I think you all said it very succinctly in the article when you said at one point, taking the CLCPA's decarbonisation mandate seriously means not only adding a new layer of law and policy on top of the old, but also that incompatible elements need to be identified and rooted out. And that I think is really the heart



of your article. So I think let's move forward and get to that question of where and how does the CLCPA fall short of addressing these conflicts? And is there a way to interpret the act in a way that could somehow provide more clarity?

Justin Gundlach: This harkens back to the genesis of our article, the story of what it is that led Elizabeth and I to start thinking that it was worth writing something. When the CLCPA first issued, there was a lot of excited attention paid to section seven, which broadly speaking says that agencies need to align what they do with the goals of the act. And if they do something that is out of alignment, then they need to justify it. And by implication, that justification can be prodded and challenged and maybe subject to judicial review. Now, a lot of people looked at that and saw in it a blanket solution that, well, agencies now need to conform whatever they're doing, whether it's under a previous statute or otherwise to this new law, and that's just how that works.

Justin Gundlach: But if you look hard at that statute, it's ambiguous in some really important ways. This isn't the only way in which the CLCPA leaves something unsaid or leaves a gap that needs to be filled, but it's worth I think highlighting at the outset because it would seem to be a solution if you read it quickly. But when you stare at it for a while, you can see that it's incomplete.

Elizabeth Stein: Yeah. The language of section seven uses terms like that the agencies need to examine whether the action they're taking will be "inconsistent with or interfere with the carbon reduction goals." And in addition to the ambiguities in the language of the section, how you would do any such evaluation when the goals that we have right now are still very far out, and these are actions that are being taken right now. So how you evaluate whether a particular action being taken in the near term with near-term impacts will interact with a 2030 or 2050 economy-wide goal is tremendously unclear. So to some extent, some of the uncertainty about how one would use section seven may work itself out as nearer term goals are promulgated, but other issues with it that I think Justin may want to speak about further are really baked into the language of section seven and who's supposed to be doing what under section seven.

Justin Gundlach: Thank you for that prompt. That is going to lead me to what I hope is an exciting moment in this podcast for English teachers and writing tutors, which is a conspicuous use of the passive voice. So according to section seven, no one in particular is meant to deem an agency action in alignment with, consistent with the CLCPA. An action shall be deemed, the statute doesn't say who does the deeming. And so any court looking at this would then need to assess it and decide whether the agency itself can deem an action consistent with the law, whether it's the court that should. But the point is that the statute does not give clear direction about who the referee is in this moment of assessing whether what an agency is doing is consistent with, as Elizabeth says, this very long-term goal. That use of the passive voice is actually effectively an inviting way for agencies to give themselves some flexibility.



- Justin Gundlach: In addition to section seven, another section that is important to point out as being on the one hand important and seemingly complete but on the other actually potentially an important gap is section eight. So whereas section seven says that agency action needs to conform to the objectives of the act as a whole, section eight would seem to create a generic regulatory authority. So agencies are directed in section eight to do what they have to to align actions or align to things that they are responsible for regulating with the goals of the act. But here again, there are ambiguities and gaps.
- Justin Gundlach: And in particular, section eight doesn't actually set deadlines or provide interim emissions targets. It's generic not only in the sense that it doesn't say what exactly an agency has to do, it also doesn't say when an agency has to do it or to what degree. And so yes, it is a source of authority that agencies may well find extremely useful when trying to implement the act. But it's not much of a hammer if you want to push agencies to actually conform to a devoted compliance schedule with the trend that you need to be on in order to hit the ultimate target.
- Elizabeth Stein: Yeah. Which is disappointing when one reads it because the section is termed an authorization for state agencies to promulgate regulations, but it includes this language that appears to affirmatively direct them to do so and then just doesn't say when.
- Justin Gundlach: There's a last provision to highlight here, which is section 12. Seven and eight speak very directly to what agencies are supposed to do or not do. Section 12 basically imports provision of New York law that any admin lawyer has seen many times, and this is article 78. It more or less says, section 12, that regulatory actions undertaken pursuant to the CLCPA are subject to judicial review. And the reasons for that review, it imports from article 78. But it is also a tool that can be used to slow action by parties that maybe they wouldn't frame it this way but want to make it harder for an agency to do something and characterize their challenge as motivated by wanting to ensure conformity to the statute.
- Caitlin McCoy: Oh, interesting. I think when I was reading the article, I essentially, as someone that is not barred in New York State and hasn't practiced in New York State. That section 12 and article 78 that you mentioned seem to me to echo and be like a state version of the Administrative Procedure Act in New York that allows for judicial review of agency action. And so it seems to me like this provision to keep an eye on and groups using section 12 of the CLCPA to ensure that agencies are doing what they need to do under sections seven and eight and really bringing some of these ambiguities that you both highlighted in those sections. Once we see the agencies really putting into practice and taking action under these two sections, some of the ambiguities that will rise to the surface.
- Caitlin McCoy: And once we really have a clear-cut example of an agency taking action on the basis of a mandate in section seven or a mandate in section eight, you could have a group then bringing an action under section 12 to say, hey, we don't think what



the agency's doing is sufficient or perhaps we think it's an overreach in some regard. So as you said, this tool can be used either for people who are supportive of the CLCPA and want to see it implemented to its fullest extent or people who might want to just say, as you said, say that they are looking out for the integrity of the process but perhaps ultimately their motives are to slow walk this a little bit.

Caitlin McCoy: I think it's going to be interesting, at least from those of us outside of New York State learning a little bit about New York State law and seeing some of these actions come into the courts under section 12. But I guess I should mention that the CLCPA has gone into effect. So have you all been seeing anything percolating in terms of actions under section seven, actions under section eight? And when might we see maybe a challenge under section 12? Any forecasts?

Justin Gundlach: Well, I don't think we need forecasts. I can think of two examples, and I'm inclined to introduce one and ask Elizabeth who's closer to the other to introduce the other. The one that I'm thinking of does not actually make express reference to the CLCPA, but you can see the contours there very clearly. It was the recent decision by the Department of Environmental Conservation to reject a permit for a gas pipeline into the state. And the nature of the rejection emphasized water quality concerns, but it also did allude to climate-related issues. And the logic of the rejection included recognition of the fact that you are now in a context where the CLCPA requires thinking through long-term changes to fossil fuel use and reflecting that consideration in decisions even though the numbers, even though the particulars of what is going to be demanded in 15 or 20 years might be really difficult to quantify.

Elizabeth Stein: So Justin, I think the example of that water permit is a really good one. And I can just also note that comments in various proceedings before the PSC have already pointed to section seven as creating an obligation for the commission to think seriously about whether various aspects of gas planning are consistent with or will not interfere with the achievement of the goals under the CLCPA, although none of those has gone to court to my knowledge.

Caitlin McCoy: That gives us something to keep an eye on then as I was hoping. That gives us all something to look out for and keep an eye on as these things move through the PSC and maybe other forums eventually too. I wanted to turn now, moving through your article towards the end of the article. And your penultimate section of the article describes your three principles for reform. Because of course, you two are thoughtful enough not just to write an article that points out these points of tension and then walks away and says, "Somebody deal with this." But you all actually set out three principles for reform and then eventually also propose some possible approaches to reform. So we'll get to that in a minute, but I first wanted to ask you to talk us through the three principles that you set out in the article for reform of utility regulation and oversight in New York and elsewhere. And to just give us a sense of what those principles are and their importance.



Elizabeth Stein: So the first of the principles that we lay out is fuel and technology neutrality. The idea that any approach to resolving this should endeavor to not commit to a particular fuel or technology pathway partly because when we look at the existing sections of the public service law, it's pretty clear that the assumption that is embedded in there, that our current understanding of fuels and technologies can be projected into the indefinite future has shown itself to be so flawed. To assume that today we have the correct answer to how best to decarbonize and bake that into either a statutory or regulatory framework could bind successors from choosing a more efficient economical and effective way of meeting the goals of the CLCPA while providing the energy needs for future New Yorkers.

Justin Gundlach: And I'll speak a bit about the safe transition and just transition principles, which are distinct, especially in terms of their diagnosis of different problems. They overlap a great deal when it comes to the solutions for dealing with each of them. Safe transition is about striking a balance between safety in the near term and also in the more distant future. So in the near term, it would not be safe to suddenly shut off someone's gas when they're relying on it for heating and for cooking and then to expect them to figure out and pay for the installation of some kind of not-emitting alternative. Even to do that on a relatively short timeframe is not going to ensure the safety of those individuals. And another example of safety concerns is any hazard approach to shutting down elements or pushing people off of gas means that you're going to have a very complicated and potentially dangerous situation with respect to maintaining the pressurization of different elements of your gas distribution system. So the goal here with the principle of safe transition is to strike this balance between one that is swift but not hasty.

Justin Gundlach: As for just transition, this one is really all about costs and who should bear those costs. Costs are going to result from installing new non-emitting solutions that is devices but also new infrastructure. And it's also going to result from repurposing or decommissioning the outmoded devices and infrastructure. And when I say devices, there's also this intermediate category of building systems. So the building that I live in has a boiler in the basement and a steam pipe system and radiator system that I imagine was put in when the building was built back, I think in 1905. Dealing with that if it is no longer used is potentially going to be costly even just to make sure that it's safe and won't create any problems.

Justin Gundlach: In addition to that, if you're going to supplant it with electrical alternatives, not only do people maybe need to buy induction stoves and buy heat pumps to provide heating and cooling, but they need to install those heat pumps. And on my building, again, the facade is I'm sure subject to historic preservation requirements. So you need to figure out how to put the outer portion of the heat pump on the side of the building that is not subject to those requirements. Installation is going to cost you something. All of these costs are maybe small on individual basis, but for some people they are prohibitive. And of course, they add up quite a lot. And so not only are you talking about a scale issue, so just a lot of costs to deal with, but an allocation issue because up to now cost allocation has



brokered between individuals and utilities. Those relationships are going to change when you're talking about different solutions. And so figuring out the allocation of this very substantial rising tide of costs is important to do so that you can have a just transition.

Elizabeth Stein: Justin has really focused on the cost to the customer of accomplishing the transition at the level of the building, which is absolutely a part of the just transition challenge. But the flip side of the just transition challenge and the part that really goes more to the utility perspective is that because making the transition at the building level, among other things, because making the transition at the building level is costly, there is a potential future that we need to avoid where the customers who are least able to bear the costs of transitioning their individual building winds up being the only people left using the natural gas system. And because of the way utilities pass through costs to their customers, there's a risk that they could wind up being asked to shoulder the cost of maintaining the system absent customers who are normally able to bear costs better. So the utility side of the equation could also have very worrisome consequences.

Justin Gundlach: Absolutely. And you can see how these two sides are inextricable. The entities are completely different in not just their interests, but the approach that they take and the way that approach is implemented. But those efforts are going to need to be coordinated very closely if you're going to have a smooth transition and one that doesn't saddle people who can't defect to electric solutions with the cost of maintaining, not just the capillaries of the system that serve them, but the big arteries as those arteries serve fewer and fewer customers.

Caitlin McCoy: Yeah. I'm really glad that you all use these principles as your framing as you move into the possible approaches to reform. So let's move into that final section of the paper. And so you talk about regulatory changes, statutory changes, and also combinations of the two. And in your discussion, you're mindful of both the relative challenges and advantages of either one of these approaches and the hybrids. So we don't have time to go through all of that, and I suggest to the listener that they read through that section of the paper if they're interested in getting into some of these ideas that you all present. Would either of you or both of you explain one or two of these possible approaches to give us a taste of these approaches and maybe give us a little information about the upsides and the downsides?

Justin Gundlach: Yes. Thanks, Caitlin. And for those who want to jump right to the appropriate part of the article, it begins on page 251. If we're talking about particular recommendations that we have in there, I just want to mention some contextual features of adopting either a regulatory or a legislative approach. And of course, you mentioned hybrids, and hybrid approaches can deal with some of these issues. But it's worth flagging at the outset that if you are going to use regulation, there are a number of benefits. You don't have the same kind of political attention, you don't have the same kind of political work that needs to be done.



You don't need to get something through the legislature and deal with the interactions with the very general public that that necessarily entails. You can move possibly a bit faster in terms of developing proposals and getting them on the books and effective.

Justin Gundlach: On the other hand, if you adopt a regulatory approach, then you are going to need to justify the statutory basis for whatever your regulation is. You're going to need to say, yes, this is why we, the regulator, have the authority to do precisely this, and we are justified in taking this approach and not another one. And if what you're doing is especially ambitious, then you're almost certain to face some kind of legal challenge. And so on the one hand, maybe on the front end, it's a faster process, because, again, you don't need to deal with the political horse trading that's involved in most legislation. On the other hand, maybe it's a slower process because you are relatively more susceptible to litigation. And that litigation, even if it ultimately fails is probably going to slow down implementation of what it is that you're talking about. In the background for us with all of these is recognition that the clock is very definitely ticking both with respect to the statutory deadlines and also just with respect to reducing emissions. So speed is a priority.

Justin Gundlach: The one other point though to mention about the difference between regulatory and legislative solutions is when you legislate something, you provide a broader base for subsequent action. You can build a lot on a given regulation. It can last a long time, it can inform a lot of different things. But generally, it's going to be somewhat more contextual just because it needs to rest on a legislative basis and also respond to features of a particular context. And with legislation, you're just somewhat less confined and can in a sense establish a new context in which regulators now and in the future will implement whatever it is that you've put into law.

Elizabeth Stein: One of the reasons there's a really ripe regulatory opportunity here actually relates to something that we didn't discuss earlier in this conversation, which is that there's a regulation that expands the problematic sections of the public service law, notably section 31. And it's the one that gives as of right extensions to new customers and provides that 100 feet of those extensions should be socialized, which ultimately means subsidized, paid for by rate payers as a whole rather than by the requesting customer. There is a regulation that actually significantly expands that socialized cost. So there is an opportunity since that is a regulation that was promulgated by the Public Service Commission in, I want to say 1986, I think. Since that is a regulation that was promulgated by the commission, it's something that the commission has within its power to change. That regulation not only expands beyond, the statute contemplates 100 feet of infrastructure from the existing main to the property or to the customer's property that would be subsidized.

Elizabeth Stein: The regulation contemplates 100 feet of main and 100 feet of service line. But the bigger shift is that it imagines that a bunch of ... In effect, it makes that 100 feet into a per customer right that can be pooled. So a whole bunch of customers,



none of whom is anywhere close to 100 feet from a main, an existing main can pool their 100 feet and get a very lengthy extension also for free. So that is something that the commission promulgated and the commission has it in its power to change. Another regulatory opportunity would be to modify the way benefit cost analysis is done. The benefit cost analysis frameworks that are already used by entities that are regulated by the New York Public Service Commission have already begun in recent years to evolve taking decarbonisation needs into account.

Elizabeth Stein: For certain kinds of projects, it is appropriate already and required to quantify expected greenhouse gas emissions and to place a value on them, which is a step forward compared to past practice. But what we still don't have and could have is a more comprehensive framework that would make it possible to actually compare completely different types of projects. Right now, we have particular types of benefit cost analysis for evaluating, for example, non-wires alternatives on the electric system and for evaluating potential non-pipeline alternatives on the gas system. But if you want to compare gas and electric solutions to the same need, there isn't really a suitable framework in which to do that. And additionally, there's no obligation to actually look at fairly ordinary course projects through a lens that would require them to be pushed through the benefit cost analysis process and actually consider their relative merits.

Elizabeth Stein: And it would need to be something fairly granular. There exists a benefit cost analysis framework for evaluating potential non-pipeline solutions that has sometimes been used that does propose that you would compare them to electric solutions but in very gross terms. So to the extent that different electric solutions would actually themselves have very different results. For example, one might use less energy, but the other might use more energy but in a flexible manner that would allow it to actually become a flexible resource that would help integrate renewables and could actually have the impact of helping the electric system as a whole decarbonize. These are very attenuated effects, and the current benefit cost analysis frameworks just aren't capable of reaching them. And before I move on, Justin, would you want to add anything to that?

Justin Gundlach: The only point I want to add is not really an addition, it's more an emphasis, which is that ... I talked before about the big issue in just transition being one not only of recognizing costs of transition, but of allocating them. And a cost benefit analysis framework is going to be a very important tool for accomplishing or implementing that principle of just transition. It sounds simple to say, but identifying and characterizing all of the things that show up as costs or benefits and then figuring out how to reconcile the need for someone to pay for some so that others can benefit from those and others. This is something that you need a framework to do that is going to be self-consistent and is going to satisfy stakeholders as being a source of relatively neutral accounting. That even if they disagree about other things, they can agree about this. I don't have anything technical or substantive really to add to your point, Elizabeth, I just wanted to



emphasize that this is potentially a central feature of carrying out the principles that we think are indispensable.

Elizabeth Stein: Justin, I appreciate that. And I actually think it provides some helpful foundation for the legislative options that we also explored a little bit. Caitlin, would you like me to talk about the legislative options?

Caitlin McCoy: Yeah, that would be wonderful.

Elizabeth Stein: I think we've mentioned earlier in this conversation, sections 30 and 31 of the public service law. But before I describe the legislative modifications that we discussed, I think I need to reiterate what those are together because that's what we would be modifying. Section 30 is the one that provides for a continued right on the part of customers to continue receiving the utility service they have. And section 31 is the one that deals with line extensions and the subsidization of the first 100 feet of line extensions. So section 30, we envision could be modified so that it became instead of a right to the continuation of whatever utility service you have already, it could be re-envisioned as a right to energy more generally and potentially some kind of heating rather than committing today that you should continue to receive whatever fuel you've previously received for the rest of time.

Elizabeth Stein: Section 31, which is the one that provides for line extensions, there's a few things that one could do with section 31. For one thing, one could modify it so that you still have the line extensions but they're not free of charge. Thus, you would presumably continue to have some line extensions, but it would give customers or prospective customers pause before requesting those line extensions in a way that currently they can just expect to receive. Other than amending section 31 so that no amount of line extension was subsidized, the objection to that might be that prior customers, everyone up till now has gotten their free 100 feet of service, why can't a new customer also get 100 free feet of service? That could be re-imagined as a narrower thing. Like you could get 100 feet of, for example, one kind of energy but not all the different kinds of energy extended to you for free.

Elizabeth Stein: And we would imagine that in a universe where that's what section 31 said, probably most property owners would in fact choose electricity if they were only going to get one free infrastructure extension. And a more modest amendment to section 31 and one that I think ties back a little bit to what Justin was talking about before would be one that even if you retain the subsidization because of the perception that it would be somehow unfair to new customers to get treated differently from old customers, at least make it visible. The subsidized amount is never published anywhere, we're not even sure it really gets examined.

Elizabeth Stein: There are advocates who believe that the amount of that subsidization may actually be greater than the cost of a heating system that can be non-emitting, but there's no real way to show that yes or no. So an amendment to that section of the public service law that actually provided some transparency and shed some



light on the actual costs could go some distance to at least highlighting the need for change and potentially actually leading to different customer decisions.

Caitlin McCoy:

Well, this has been fantastic. I'm really glad that we got to this point where we really dug into some of the details here. And I remember reading the piece, and I was really intrigued by some of the ideas that you all proposed in that section like the one that you just mentioned, Elizabeth, under section 31, modifying it to say, well, you could have natural gas or electricity. And obviously when you read the article, you see that you all provide a lot more nuance than what I just said. And certainly of course, the article is filled with more nuance than what you'll find in the episode today. But I found a lot of these proposals really intriguing, and I could see them combined with a lot of other thoughtful elements that we see in the CLCPA and other approaches to climate to make sure that energy burdens are considered equitably and that rebates are provided for these types of, or even subsidies provided for these types of electric heating systems to make all of this eventually work really smoothly.

Caitlin McCoy:

So thank you so much both of you for making time to speak with me today, this has been wonderful. And I hope that everyone has received a nice preview into your article and is excited about reading the whole thing or just digging into these issues and learning more about what's happening under the CLCPA. And maybe even using this fantastic sort of lens that you all have created in this article and taking it to their state if their state is considering or has recently adopted a new climate law to take up the challenge that you all took up in New York, which is to dig around and uncover where might these points of tension be with some of these new exciting laws and some of the existing laws that we have, particularly those in the utility sector. So with that, I want to make sure that I ask you both, is there anything else that we want to discuss here today that I haven't yet asked you about?

Justin Gundlach:

Well, Caitlin, I had one thing in mind, but your closing there led me to think of another. So I have one and a half things that I wanted to cover. The first of them is just that I think it's useful to understand that what we're talking about in this article is not the whole change, not the whole process of transition. We're really focused on just departing from the current mode, which is expansionary. Right now, natural gas distribution utilities in most states that we've looked at and definitely in New York operate under rules that encourage them to expand. And so the various changes that we propose regulatory and legislative are geared mostly to altering that so that the expansion stops, and stops of course with an eye to eventual contraction and transformation. But the reason I'm emphasizing this is there is lots more to say about what transformation and potentially decommissioning is going to look like.

Justin Gundlach:

And we get at some of that, but we're mostly talking about just this first step. And I want to emphasize it because you would think that that first step would be modest, but it actually looks like it's going to require a lot of energy, political capital, and thought on the part of stakeholders and regulators, and possibly



legislators. And that's even before you get to that big transformational change that necessarily follows on from it. And the half that I wanted to say was, I don't know if you were thinking of Massachusetts when you alluded to other states. At this moment, I don't know if the governor of Massachusetts has yet signed the bill that's on his desk, but there is an exciting new legislative proposal that covers a lot of the ground in fact that we talk about in this article in some ways. And so my hope certainly is that the example of New York doesn't just inform action in New York but that other states can recognize that these gaps are going to need to be filled eventually. So why not do it in the first go?

Caitlin McCoy: I should mention that we are recording this on January 6th so that the listeners know that, yes, we've had a big week here in Massachusetts for climate legislation, and we're all waiting to see what Governor Baker will do. And hoping for his signature on this really incredible legislative package. Elizabeth, did you have anything that you wanted to mention before we close out here today?

Elizabeth Stein: Yeah. To build on what Justin was saying, I think it's very interesting when you take a good look at the existing statutes and regulations, just how deep the belief that the expansionary model was forever is embedded in the statute and the regulations. And a great example that isn't tremendously substantive, and we don't need to go into in any tremendous detail on this podcast, but we still both found it really fascinating is that when a new customer applies for a natural gas service in order to be eligible for the 100 feet for free, they have to make a showing that they will be a reasonably permanent natural gas customer. And what we realize is that under the CLCPA, the very idea of reasonably permanent fossil fuel customers should be beginning to recede.

Caitlin McCoy: Well, thank you both again so much for being with me today and for sharing a little bit about some of this fantastic article. I think I've already been pretty profuse with my praise, but I will just hammer home again that, Justin, as you noted that this is just a first step in understanding and starting to untangle existing law and new laws as they are adopted. But I think it's an important one. And I'm really thrilled that you both could share some of these ideas with us today and give our listeners some insights into what's happening in New York State at the moment as we continue to watch the transition unfold there and hopefully across other states across the country.

Elizabeth Stein: Thanks so much for having us.

Justin Gundlach: Thank you very much for the opportunity, it's been a pleasure.

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