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Authors:
[Gregory Dutton](#)
[Pierce Tomoki](#)
[Stevenson](#)

Kentucky Legislature Creates New Agency to Review Proposed Retirement of Utility Generation Facilities

The Kentucky legislature recently enacted Senate Bill (SB) 349, which creates a new agency, the Energy Planning and Inventory Commission (EPIC), and places new restrictions and obligations on the Kentucky Public Service Commission (PSC). SB 349 contains an emergency provision, making it effective immediately.

SB 349 Declared Public Purpose

SB 349 claims that electrification of the U.S. economy, combined with unprecedented federal regulatory pressures, have created an electric generation resource crisis, and that state and federal policies do not adequately address the Kentucky legislature's reliability and resource concerns. Additionally, SB 349 claims further retirement of fossil fuel-fired electric generating resources would harm Kentuckians, and that their health, happiness, and welfare will be promoted and protected by the continued operation of these legacy facilities.

EPIC Board Composition and Term

EPIC will be composed of an 18-member body ("Board") and a five-member Executive Committee ("Committee"). All members, except for ex officio nonvoting members and state government officials, will be appointed by the governor and confirmed by the Kentucky Senate. SB 349 directs some organizations to nominate EPIC members, though third-party nomination is not required for all members. Only the Kentucky legislature may reorganize or restructure EPIC via legislation. Tables charting the EPIC Board and Committee makeup are available in Figures 1 and 2 below. EPIC will be administratively attached to the University of Kentucky Center for Applied Energy Research but is otherwise independent from the

University of Kentucky and any Kentucky executive branch agency.

EPIC's Powers

Per SB 349, EPIC is authorized to take all necessary measures to effectuate its declared public purposes. Specifically, EPIC will examine the impacts of continual retirement of legacy generation assets, resource adequacy and grid reliability concerns, effects of federal energy policy, new and emerging electricity generating technologies, and Kentucky's ability to finance energy producers and participate in energy markets.

Utility Impacts

SB 349 will add an extra layer of compliance for any planned retirement, post-enactment, of legacy generation assets by a utility. Specifically, SB 349 prohibits a utility from retiring an existing coal, oil, or natural gas-fired power plant, or a generating unit within the plant, prior to submitting notice to EPIC and receiving the Committee's findings on the proposed retirement. A utility must submit notice of the proposed retirement to EPIC at least 180 days prior to submitting an application to the PSC to retire the plant or unit. Any retirement application to the PSC will not be deemed administratively complete unless it includes either the Committee's final report or evidence that more than 180 days have passed since notice was submitted to the Committee and no Committee report or determination has been provided to the utility.

Within 90 days of the Committee receiving notice from the utility of a proposed retirement, EPIC will hold a public hearing in the county in which the proposed retirement will occur for the purpose of receiving public comment.

Within 135 days of the Committee receiving notice from the utility of a proposed retirement, but after EPIC holds its public hearing, the Committee will issue a final report containing written findings and recommendations about the proposed retirement. Notably, the Committee will have standing to intervene in any case or other proceeding before the PSC. *SB 349 §1(8)*.

Building on Senate Bill 4

SB 349 contains supplementary language to the retirement provisions enacted as part of SB 4, passed during the 2023 regular legislative session. SB 4 amended KRS 278.264 by establishing a rebuttable presumption against the retirement of legacy electrical generating units unless the utility demonstrates in its retirement application to the PSC that generation capacity will not be impacted.

Specifically, SB 349 requires that a retirement application for an existing electric generating unit additionally show that the new generating unit has the “same or higher capacity value and net capability, unless the utility can demonstrate that such capacity value and net capability is not necessary to provide reliable service.” *SB 349 §4*. In addition, SB 349 contains further provisions apparently intended to delay a utility’s ability to retire or decommission an existing generating unit, based on the timing for completion of the replacement generating unit.

SB 349 also creates new statutory definitions for criteria required to rebut the presumption against the retirement of existing legacy generating units under KRS 278.264(2)(a). These newly defined terms are arguably aimed at curbing a utility’s replacement of fossil-fueled generating units with generating units powered by renewable energy. Specifically, SB 349 defines “dispatchable” as “a source of electric power generation that is available on demand, that is not intermittent, and that can be adjusted to increase or decrease its power output upon request of a power grid operator or otherwise upon demand or request, or that can have its power output adjusted in responses to market or system needs.” *Id.* For purposes of that “dispatchable” definition, “intermittent” is defined to include energy storage methods that are currently under development in support of renewable energy generation.

Conclusion

The Kentucky legislature’s enactment of SB 349 seeks to impact a utility’s ability to retire legacy electricity generation units through the creation of EPIC, with increased scrutiny toward renewable

electricity generation sources. As Kentucky’s utilities aim to retire their legacy generation fleets, EPIC will impose additional layers of regulatory compliance measures prior to the PSC approving those retirements.

At Frost Brown Todd, we pride ourselves on understanding each client’s objectives in the face of an evolving energy landscape. For more information on how these statutory changes could impact your business, please contact the authors or any member of Frost Brown Todd’s [Renewables](#) and [Utilities](#) teams.

Figure 1: EPIC Board Composition Chart

Energy Planning and Inventory Commission (EPIC)	Nominated By
Member representing a Kentucky investor-owned utility	None specified
Member representing a Kentucky generation and transmission cooperative	CEO of the Kentucky Association of Electric Cooperatives
Member representing Kentucky coal producers	President of Kentucky Coal Association
Member representing Kentucky oil and gas producers	Executive director of Kentucky Oil and Gas Association
Member representing an industry or business engaged in the transportation of coal	None specified
Member representing a business engaged in the transportation or distribution of natural gas	President of Kentucky Gas Association
Member with professional experience in the purchasing or sale of fossil fuels	President of Kentucky Coal Association
Member representing the nuclear electric generation industry	United States Nuclear Industry Council

Member representing businesses or entities engaged in activities related to the mining, milling, conversion, enrichment, or fabrication of nuclear fuel or involved in the remediation of past enrichment of nuclear fuels in Kentucky	None specified
Member representing commercial and industrial consumers of electrical power	Kentucky Industrial Utility Customers
Member representing Kentucky economic interests	CEO of Kentucky Chamber of Commerce
Member representing renewable electricity producers	None specified.
Member with experience in investment banking or utility finance	Kentucky Banker's Association
Member representing residential electricity consumers	None specified
Member of the Kentucky House of Representatives*	Speaker of the Kentucky House of Representatives
Member of the Kentucky Senate*	President of the Senate
Secretary of the Energy and Environment Cabinet, or designee	None specified
Secretary of the Cabinet for Economic Development, or designee	None specified

* Indicates ex officio nonvoting member

Figure 2: Executive Committee Composition Chart

Executive Committee

Director of Univ. Kentucky Center for Applied Energy Research

Member with the same level of education, training, and professional experience to serve as CEO or board member of a company engaged in coal production.

Member with the same level of education, training, and professional experience to serve as CEO or board member of a, investor-owned, cooperative, or municipal utility.

2 Members elected by the Energy Planning and Inventory Commission.

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