

# Belgian Power Company Continues Fight Against Nuclear Tax

Posted on Sep. 27, 2011

Earlier this month, Electrabel, Belgium's main provider of electricity and the second largest supplier of gas, announced that it would commence proceedings before the court of first instance to reclaim the nuclear tax it paid in 2008, 2009, and 2010. It is not clear on what basis the company will reclaim the taxes, as the legality of the tax has been confirmed.

## The Nuclear Tax

The Belgian energy market was liberalized in two steps at the beginning of the century. The market for industry and business was liberalized in 2000, and the market for domestic consumers was liberalized in Flanders in 2003 and a year later in the rest of the country. Belgium currently has nine energy producers that are supervised by the Commission for Regulation of Electricity and Gas (CREG). In particular, CREG must approve any increase in the prices charged to customers.

CREG is also involved in the debate over what to do about the huge gains made from Electrabel's nuclear power stations. Electrabel emerged from the regrouping of the three original electricity and gas companies, Intercom, Ebes, and Unerg. Electrabel is now a fully owned subsidiary of the French holding company Suez and is still by far the major provider of electricity in the country and the second largest supplier of gas.

Electrabel inherited a quasi-monopoly over the country's three nuclear power plants after the costs of the reactors were written off and paid for by consumers. The nuclear reactors were intended to be closed, but in 2008 the federal government decided to postpone the closure until 2025. An agreement was signed with Electrabel to extend the use of the reactors by 10 years in return for a new contribution from electricity producers of €250 million per year. This contribution was introduced in the form of a tax that was renewed in 2009 and 2010. The majority of that tax is paid by Electrabel.

There is, however, mounting consensus that the tax is too low, as the company is making larger profits than initially anticipated. CREG recently called for increasing the tax, arguing that Belgium's nuclear power stations have been entirely amortized, meaning that the costs have been paid for by consumers while Electrabel was the monopoly supplier. In other words, Electrabel is producing nuclear energy using tools paid for by taxpayers, and consumers have seen little or no decrease in the price of electricity. Moreover, the operation of the plants, at virtually no capital cost, is a substantial competitive advantage in an energy market that is now liberalized.

The federal government sees an opportunity to recoup more of the huge profits that are flowing into Electrabel's French-owned coffers. The debate is over the actual size of Electrabel's profits. Electrabel claims that its profits from nuclear power amount to no more than €652 million for 2007. CREG puts the figure substantially higher, somewhere around €2 billion. The government asked the National Bank to look into the matter. It presented its own calculations, which leaned toward Electrabel's figures. It is likely that the nuclear tax will be doubled to about €500 million.

## Legal Battle

Electrabel had no alternative but to pay the €250 million annual nuclear tax. However, in 2009, Electrabel and two minor producers, EDF and SPE, contested the legality of the nuclear tax before the Constitutional Court. Electrabel argued that the nuclear tax was disproportionate and discriminatory for producers of nuclear energy, and therefore unconstitutional. The appeal also contested the retroactive nature of the tax law.

In March 2010 the Constitutional Court rejected the appeal and argued that the burden imposed by the state was not excessive and that it did not fundamentally affect the financial situation of the companies concerned (Decision 32/2010, Mar. 30, 2010<sup>1</sup>). The Court agreed with the government's argument that nuclear power stations generate sizable profits, which should benefit the country and contribute to the state budget.

Marc Quaghebeur, partner, De Broek Van Laere & Partners

### FOOTNOTE

<sup>1</sup> Available at [www.const-court.be](http://www.const-court.be).

END OF FOOTNOTE