STATE BOARD OF EQUALIZATION
PROPERTY AND SPECIAL TAXES DEPARTMENT
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0064
916 274-3350 ● FAX 916 285-0134
www.boe.ca.gov

January 17, 2012

State Board of Equalization
INTERESTED PARTIES MEETING
450 N Street, Room 122, Sacramento
January 26, 2012 9:30 a.m. – 12:00 p.m.
NOTICE AND AGENDA

Staff of the State Board of Equalization (BOE) will hold an Interested Parties Meeting regarding the "Guidelines for Active Solar Energy Systems New Construction Exclusion" (*Guidelines*).

Interested parties are encouraged to attend and p articipate in the development of language for the *Guidelines*.

Background

An interested parties process was initiated by BOE staff on October 13, 2011 when a draft of the proposed *Guidelines* was distributed via Letter To Assessors 2011/039. The objective of these *Guidelines* is to provide county assessors' staff, assessment appeals board members, taxpayer representatives, and others interested in the administration of property taxes in California with information regarding the new construction exclusion for active solar energy systems.

Purposes

The purpose of the meeting is to provide a forum where BOE staff can discuss the proposed language of the *Guidelines* with interested parties, and to determine if there are any additional topics that should be included in the *Guidelines*. Please see the attached matrix which arrays comments received to date on the draft *Guidelines*. All documents regarding this project are posted on the BOE website at www.boe.ca.gov/proptaxes/gase.htm.

Contact

You may contact Sherrie Kinkle at sherrie.kinkle@boe.ca.gov or at 916-274-3363 for further information regarding this meeting. If you would like to participate by teleconference, use 1-877-214-5010. The participant pass code is 217747.

If you are unable to attend but would like to provide input for discussion at the meeting, please feel free to email your suggestions to Ms. Kinkle prior to January 25, 2012. Whether or not you are able to attend the interested parties meeting, you may submit written comments and suggestions to Ms. Kinkle (mailed to the above address) for consideration by February 17, 2012. Please do not include any confidential information,

as a copy of the material you submit may be provided to other interested parties and/or posted to the Internet.

The meeting location is accessible to people with disabilities. Please contact Ms. Kinkle at 916-274-3363, or email sherrie.kinkle@boe.ca.gov, if you require special assistance.

Posted: January 17, 2012

/s/ Dean R. Kinnee

Dean R. Kinnee, Chief
County-Assessed Properties Division
Property and Special Taxes Department

Attachment

GUIDELINES FOR ACTIVE SOLAR ENERGY SYSTEMS NEW CONSTRUCTION EXCLUSION

Unless specified otherwise, all statutory references are to the Revenue and Taxation Code.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
1	2	Various	Law Office of Peter Michaels	**Comment:** The DRAFT guidelines should be revised to include meaningful descriptions and examples of key terms, including: • "system" (page 2, line 18) • "storage devices" (page 2, line 28) • "power conditioning equipment" (page 2, line 28) • "transfer equipment"' (page 2, line 29) The guidelines should explain the scope and limitations of "parts related to the functioning of those items." (page 2, line 29) The guidelines should distinguish excluded from non-excluded "spare parts" • parts specifically "purchased ... for installation in that system" • parts specifically "designed ... for installation in that system" • parts specifically "fabricated ... for installation in that system" (page 3, line 2)	No suggested text provided. Discussion item.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
2	2	17	First Solar	**Comments**: The Guidelines describe an active solar energy system based on the language of Section 73 to include "storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items," and further provide that such a system includes "only equipment used up to, but not including, the stage of transmission or use of the electricity." In this regard one of the critical issues in a commercial System is determining where the System ends and where the stage of transmission begins. In this regard it would be very helpful for the Guidance to address this issue, rather than to leave the issue up to each assessor to decide for him or herself. The answer to this issue can be found in the federal definition of *solar energy property*, which is subject to the 30% federal investment tax credit under Internal Revenue Code ("Code) §48 or in the alternative the 30% federal grant under ARRA3 §1603. The federal definition of solar energy property is virtually identical to the California definition of active solar energy system. For example, under the federal definition, solar energy property "includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items." Also, virtually identical to the California definition, solar energy property includes "only equipment up to (but not including) the stage that transmits or uses electricity." Thus, for federal purposes, the issue of where the solar energy property ends and where the transmission property begins is a critical issue, just as it is in the case of the Section 73 exclusion. US Treasury made great strides in resolving the issue of where generation ends and where transmission begins earlier in 2011 when they released a general counsel memorandum considering this very issue. Essentially, Treasury concluded that the entire on-site substation of a commercial System was energy property, while all equipment after the on-site substation (i.e., the gen-tie line) was transmission equipment. Treasury's position is generally consistent with the industry, and we understand consistent with how most assessors approach the issue for California Section 73 purposes. Thus, we recommend that the Guidance clarify that, in general, equipment up to and including the on-site sub-station will not be considered to be equipment for the transmission of electricity (and thus eligible for the exemption under Section 73 if such equipment otherwise meets the requirements for exemption) while, in general, equipment after the on-site substation will be considered to be equipment for the transmission or use of electricity (and thus ineligible for the exemption under Section 73).	No suggested language provided. Discussion item.
3	3	--	Law Office of Peter Michaels	**Comment:** The guidelines should clarify that underlying "land" is treated as a separate appraisal unit as to which fee owner is liable for associated property tax. The guidelines should emphasize that the exclusion is based on the 'intent' of the taxpayer and the extent of installation, regardless of whether active solar energy system property is removable or replaceable.	No suggested language provided. Discussion item.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
4	3	3	Law Office of Peter Michaels	**Revise sentence:** Such a system includes only equipment used up to, but not including, the stage of ~~transmission~~ conveyance or use of the electricity.[2]	Accepted
5	3	4	Law Office of Peter Michaels	**Comment:** The guidelines should clarify differences between, and include examples of, "pre-conveyance" and "post-conveyance" equipment, since the exclusion is limited to "equipment used up to, but not including, the stage of conveyance or use of the electricity."	Not accepted Would be determined on a case-by-case basis.
6	3	5	Law Office of Peter Michaels	**Comment:** The guidelines should include descriptions and examples of "auxiliary" equipment.	Not accepted Current text already includes two examples.
7	3	7	Law Office of Peter Michaels	**Comment:** The guidelines should include descriptions and examples of "dual-use" equipment.	Not accepted Current text already includes two examples.
8	3	16	CleanReit Partners	**Revise paragraph**: ~~A typical active solar energy system is considered a fixture, and thus real property, if it meets the tests outlined above.~~[5] California Civ. Code, § 1013 states that: "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter, belongs to the owner of the land, unless he chooses to require the former to remove it or the former elects to exercise the right of removal provided for in Section 1013.5 of this chapter." Thus, when a typical solar energy system is owned by a third-party required to remove said system at the end of a financing transaction, or upon demand, then the intent of the parties is such that solar is personal property, not subject to the exclusion. Otherwise, a typical active solar energy system is considered a fixture, and thus real property, if it meets the tests outlined above. Additionally, ~~T~~the exclusion is not applicable to portable active solar energy systems since they are items of personal property. [5] ~~For more information, see Assessors' Handbook Section 504, Assessment of Personal Property and Fixtures.~~	Not accepted. Property Tax Rule 122.5 defines *fixture*: "A fixture is an item of tangible property, the nature of which was originally personalty, but which is classified as realty for property tax purposes because it is physically or constructively annexed to realty with the intent that it remain annexed indefinitely."

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
9	3	--	First Solar	**Comments:** ***See Attachment A***	Not accepted. Comments restate the definitions in section 218 of the Public Utilities Code and included in the *Guidelines* at pages 3 through 5.
10	6	25	Nextera Energy Resources	**Comments:** The Draft Guidelines discuss a change in ownership in 'New Construction' beginning on page 6, lines 25-27. We would like to have further clarification regarding a change in ownership in terms of a change in ownership of the company as well as the sale of physical assets. **SBE Rewrite:** This exclusion remains in effect until a change in ownership of the system occurs. In the event of a partial change in ownership, that portion of the system that changed ownership would be assessable. [FN] [FN] For a complete discussion of change in ownership provisions, see Assessors' Handbook Section 401, *Change in Ownership*.	Not accepted See SBE Rewrite
11	6	28	First Solar	**Comments**: Given the Legislature's confirmation of the broad application of the Section 73 exclusion, we recommend you make clear in the Guidance, including the First Buyer Exclusion section of such Guidance, that the exclusion applies to all Active Solar Energy Systems, regardless of whether it is newly constructed on a new building or existing building, on a parking lot or similar canopy or structure, or if the System is a freestanding ground-mounted system.	Not accepted Section 73(e)(1) states that the first purchaser exclusion is available to the first purchaser of a new building.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
12	7	7	Nextera Energy Resources	**Comments**: The Draft Guidelines contain a 'builders' exclusion' section on pages 7-8. In this section three examples are listed on page 8, lines 5-30. In addition, on page 19 within the frequently asked questions and answers section Question 10 addresses the issue regarding the builders' exclusion. In each of these items, the Draft Guidelines clarify the relationship between the lien date and sale date as it relates to the exclusion. We would like further clarification regarding this issue. We understand the Draft Guidelines currently read that the purchaser of a property can lose the exclusion of the active solar energy system if the property is not purchased prior to the first lien date that the project is complete, despite the builder of the property having no intention of owning, using or occupying the structure. Under the guidelines, the exclusion to the original user is simply a function of the date of sale. In addition to that clarification, does this then mean that if a purchaser buys a property (from a builder with no intention of owning, using or occupying) on January 2nd, the day after the lien date (for a project completed in December 31st of the previous year), that the taxable value of the property does not receive the benefit of the exclusion? If this is the case, does the property then immediately lose market value because of the loss of that exclusion and the property tax increase associated with losing the exclusion?	The builder's exclusion, set forth in section 75.12, excludes builders from supplemental assessments if all requirements of that section are met. On the annual lien date (January l), completed new construction and incomplete construction in progress is assessed at full value pursuant to sections 50 and section 71. Section 73(e)(1) provides that the exclusion can only be conveyed to the first purchaser if the new building is purchased prior to that building becoming subject to reassessment to the owner-builder, as described in section 75.12(d).
13	9	17	CleanReit Partners	**Revise paragraph**: Systems that are installed on leased land or leased building rooftops are also subject to the new construction exclusion, and are not assessable until: ~~a change in ownership of the system occurs.~~ a. Solar System ownership transfers, in whole or in part, to the Real Property Owner upon whose property the solar was constructed (whether that transfer occurs explicitly or implicitly pursuant to Civ. Code, § 1013); or b. the system reaches the end of its useful life; or c. the underlying Real Property upon whose property the solar was constructed is sold; or d. the Solar System is upgraded, replaced or removed from the Real Property by its financial investor/owners.	Not accepted Section 73(f) states: "Notwithstanding any other law, the exclusion from new construction provided by this section shall remain in effect only until there is a subsequent change in ownership."

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
14	9	18	SolarCity, SunEdison	**Delete sentence**: ~~When the lease involves government-owned land or buildings, a taxable possessory interest in the real property is created. Although the active solar energy system is not assessable, the possessory interest must be valued and assessed.~~ **SBE Rewrite**: When the lease between a private entity and a governmental agency involves government-owned land or buildings, a taxable possessory interest in the real property is created. Although the active solar energy system is not assessable, the possessory interest must be valued and assessed. [FN] [FN] Property Tax Rule 20, *Taxable Possessory Interests*.	Not accepted See SBE rewrite.
15	9	22	SolarCity, SunEdison	**Revise paragraph**: ~~It~~This amendment added legislative intent language declaring that section 73 was enacted to encourage the building of active solar energy systems. ~~It also declared that:~~ **Add new section heading:** **SALE-LEASEBACK ARRANGEMENTS, AND OTHER TRANSACTIONS ELIGIBLE FOR FEDERAL TAX BENEFITS** ~~It~~ The amendment also declared the following:	Accepted
16	9	32	Duke Energy	**Revise sentence:** Thus, this legislation ~~ensures that newly constructed active solar energy systems transferred using sale-leaseback and similar arrangements that require the solar system itself, but not the real estate on which it is situated, to be sold or transferred to a third party, will continue to receive the property tax exclusion.~~ places the determining factor of applicability of the exclusion solely on whether a qualifying Active Solar Energy System is currently or has previously been excluded from assessment. Therefore, if a qualifying Active Solar Energy System has not received the exclusion, the manner or timing in which the current owner came to possess the Active Solar Energy System will not disqualify it from the exclusion.	Not accepted A qualifying active solar energy system automatically receives the new construction exclusion.
17	9	31	SolarCity, SunEdison	**Add paragraph**: The Legislature also declared that: Newly constructed active solar energy systems that are constructed as freestanding or parking lot canopies, or that are constructed as installations on existing buildings qualify for the exclusion from classification as newly constructed under Section 73 of the Revenue and Taxation Code, including active solar energy systems sold in sale-leaseback transactions.	Accepted Relocation of text. See item 22.
18	9	FN 14	SolarCity, SunEdison	**Revise footnote**: [14]Stats. 2011, ch 3 (~~Assembly Bill 1x~~ABx1 15), in effect June 28, 2011. **SBE rewrite:** [14]Stats. 2011, ch 3 (Assembly Bill ~~1x~~15 of the First Extraordinary Session [ABx1 15]), in effect June 28, 2011.	Accepted See SBE rewrite.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
19	10	3	Constellation Energy	**Revise paragraph:** Because the active solar energy system new construction exclusion was for the purpose of encouraging the building of active solar energy systems, and states explicitly that it covers "other transactions," the new construction exclusion should also be applied to active solar energy systems that are transferred during construction. A "transfer" during construction would include the acquisition of a controlling or non-controlling interest in a limited liability company or partnership that owns an active solar energy system, irrespective of whether the interest was acquired through the purchase of an undivided interest in the assets of the limited liability company or partnership and a contribution of those assets to a new limited liability company or partnership, or whether the interest was acquired through a contribution of cash and the active solar energy system to a new limited liability company or partnership in exchange for an interest in the new limited liability company or partnership. The exclusion is not lost on transfer until a taxpayer receives the exclusion on a system on which construction has been completed. Additionally, construction in progress on the lien date would also qualify for the exclusion. **SBE Rewrite**: Because the active solar energy system new construction exclusion was for the purpose of encouraging the building of active solar energy systems, and states explicitly that it covers "other transactions," the new construction exclusion should also be applied to active solar energy systems that are transferred during construction. A "transfer" during construction includes the acquisition of a controlling interest in a legal entity that owns an active solar energy system under construction. The exclusion is not lost on transfer until a taxpayer receives the exclusion on a system on which construction has been completed. Additionally, construction in progress on the lien date would also qualify for the exclusion.	Accepted. See SBE rewrite.
20	10	3	First Solar	**Comments:** We suggest the Guidance address the matter of whether the construction in progress of a System being constructed for the System owner by a contractor is properly eligible for the Section 73 exclusion, without jeopardizing the eligibility of the final, completed System for such exclusion under Section 73. Specifically, we believe the amount of any construction in progress ("CIP") of a System should be subject to the Section 73 exclusion, provided the System is being constructed for the owner by a contractor pursuant to a construction contract, and that the claiming of a Section 73 exclusion with respect to such CIP will not undermine the owner's ability to claim the exclusion under Section 73 for the full System, upon construction of such System.	Construction in progress is valued on the lien date or upon completion of construction. An active solar energy system under construction would be excluded during construction and at completion, unless a change in ownership of the system occurs. See item 19.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
21	10	6	SolarCity, SunEdison	**Revise sentence:** ~~The exclusion is not lost on transfer until a taxpayer receives the exclusion on a system on which construction has been completed.~~ Per section 1(b) of ABX1 15, the exclusion applies to newly constructed solar energy systems transferred pursuant to a sale-leaseback eligible for federal tax credits.	Not accepted See item 19.
22	10	9	SolarCity, SunEdison	**Relocate paragraph to page 9**: ~~The legislative intent also declared that:~~ ~~Newly constructed active solar energy systems that are constructed as freestanding or parking lot canopies, or that are constructed as installations on existing buildings qualify for the exclusion from classification as newly constructed under Section 73 of the Revenue and Taxation Code, including active solar energy systems sold in sale-leaseback transactions~~	Accepted Relocation of text. See item 17.
23	--	--	Solar Alliance	**Comments:** Need for Conformity with Federal Tax Law. Under federal law, an owner-builder is given 90 days from the time the solar energy system is placed in service to fully execute the financing arrangements with a purchaser and still receive the federal tax benefits (*e.g.*, investment tax credit).[FN] The Draft Guidelines should follow the lead of the Legislature and align with federal law on this issue and provide parties with a limited window (*i.e.*, 90 days) for the transfer of the system after its completion. A limited period of time mirroring federal law allows the owner-builder to arrange for and execute the transaction post-construction. The Legislature, knowing exactly which financing transactions occur, sought to exempt systems transferred under these various arrangements and accomplished this objective through ABx1 15. The Draft Guidelines should be amended to ensure conformity with federal tax law consistent with the above. [FN] See IRC § 50(d)(4) making Paragraphs (2) and (3) of IRC § 48(b) (relating to certain leased property); see American Recovery and Reinvestment Act of 2009 (" . . . such property shall be treated as originally placed in service not earlier than the date on which such property is used under the leaseback (or lease) . . .").	See item 24.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
24	10	18	SolarCity, SunEdison	**Add new section**: **SALE-LEASEBACKS** ABX1 15 specifically addressed sale-leasebacks and provided that solar energy systems transferred in a sale-leaseback eligible for federal tax benefits also qualify for the section 73 exclusion. Under federal law, the owner-builder is given three months from the time the solar energy system is placed in service to enter the sale-leaseback with a lessor and the lessor still receives the federal tax benefits (*e.g.*, renewable tax credit).[FN15] Following the lead of the Legislature and aligning with federal law on this issue, parties to sale-leasebacks are provided with a limited window (*i.e.*, three months) for the transfer of the system after its completion. A limited period (mirroring federal law) allows the owner-builder to arrange for and execute the sale-leaseback post-construction. [15] *See* IRC § 50(d)(4) making applicable the provisions of paragraphs (2) and (3) of IRC § 48(b) as in effect the day before enactment of the Revenue Reconciliation Act of 1990 (relating to certain leased property apply for specified energy property) (If property is ". . .sold and leased back by such person, or . . . leased to such person, within **3 months after the date such property was originally placed in service,** [then] such property shall be treated as originally placed in service not earlier than the date on which such property is used under the leaseback (or lease) . . .") (IRC 48(d)(2) and (3) as in effect prior to Revenue Reconciliation Act of 1990, emphasis added). **SBE Rewrite: SALE-LEASEBACKS** ABx1 15 specifically addressed sale-leasebacks and other transactions and provided that solar energy systems transferred in such transactions eligible for federal tax benefits also qualify for the section 73 exclusion. Under federal law, the owner-builder is given three months from the time the solar energy system is placed in service to enter the sale-leaseback (financing transaction) with a lessor and the lessor still receives the federal tax benefits (e.g., renewable tax credit).[FN] Following the lead of the Legislature and aligning with federal law on this issue, parties to such transactions are provided with a limited window (i.e., three months) for the transfer of the system after its completion. A limited period (mirroring federal law) allows the owner-builder to arrange for and execute the transaction post-construction. [FN] See IRC § 50(d)(4) making applicable the provisions of paragraphs (2) and (3) of IRC § 48(b) as in effect the day before enactment of the Revenue Reconciliation Act of 1990 (relating to certain leased property apply for specified energy property) (If property is "...sold and leased back by such person, or…leased to such person, within **3 months after the date such property was originally placed in service,** [then] such property shall be treated as originally placed in service not earlier than the date on which such property is used under the leaseback (or lease)...") (IRC 48(d)(2) and (3) as in effect prior to Revenue Reconciliation Act of 1990.) [Emphasis added.]	Accepted See SBE rewrite.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
25	10	19	Nextera Energy Resources	**Comments:** For 'Legal Entities' beginning on page 10, lines 19-28, you could have a 2% transfer of ownership or a 2% sale of the physical asset. For example, does a 2% sale of ownership of the company owning an active solar energy system equate to a 2% sale of physical assets? When does the 2% sale lose its exclusion? Is the exclusion lost under only the physical sale of assets or under both scenarios (a change in ownership of the company or an actual physical sale of the assets to another company)?	See item 26.
26	10	20	CleanReit Partners	**Revise paragraph**: Active solar energy systems owned by a legal entity, such as a corporation, limited liability company (LLC), or partnership, are also excluded from the definition of new construction, and are excluded from assessment. ~~There are two types of transfers involving legal entities that may trigger a change in ownership of real property:~~ • ~~A transfer of real property between an individual and an entity or between entities; and~~ • ~~A transfer of an interest in an entity.~~ A change in ownership between a legal entity that received Federal Tax Credits and/or 5-year MACRS accelerated depreciation (e.g., federal tax incentives that are more favorable than normal federal tax treatment for non-solar assets) and any other third party (not eligible for any such federal tax incentives), would terminate the new construction exclusion for the active solar energy system. Also transfer between such a legal entity and the underlying land or building owner would also terminate the new construction exclusion. **SBE Rewrite:** Consistent with ABx1 15, active ~~Active~~ solar energy systems owned by a legal entity, such as a corporation, limited liability company (LLC), or partnership, are also excluded from the definition of new construction, and are excluded from assessment. However, a change in ownership inconsistent with ABx1 15 would terminate the new construction exclusion for the active solar energy system. This section describes rules that are applicable to legal entities in general that may also apply to legal entities that own active solar energy systems. There are two types of transfers involving legal entities that may trigger a change in ownership of real property: • A transfer of real property between an individual and an entity or between entities; and • A transfer of an interest in an entity. ~~A change in ownership would terminate the new construction exclusion for the active solar energy system.~~	Not accepted See SBE Rewrite

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
27	11	8	San Diego County Counsel (de Lorrell)	**Comment**: The Assessor requests that the Guidelines be amended to address: (1) whether a change in control of an entity that owns an active solar energy system (or a partially constructed system) due to a "partnership-flip" causes assessment of the system (or partially constructed system); and, (2) whether the system should be assessed upon the "flip-back" due to a change in control of that entity. The Assessor has been presented with a partnership flip structure where only controlling interests in legal entities are being transferred, as opposed to a transfer of the system itself. (***See Attachment B*** for the complete text.) **SBE Rewrite:** Because the active solar energy system new construction exclusion was for the purpose of encouraging the building of active solar energy systems, and states explicitly that it covers "other transactions," the new construction exclusion should also be applied to active solar energy systems that are transferred during construction <u>and where a change in control of the legal entity owning the active solar energy system occurs as part of a partnership flip structure during or after construction. However, no exclusion should be granted upon the ownership of the legal entity "flipping back" to the builder/ developer or a third party</u>. The exclusion is not lost on transfer until a taxpayer receives the exclusion on a system on which construction has been completed. Additionally, construction in progress on the lien date would also qualify for the exclusion.	See SBE Rewrite – to be inserted on page 10, paragraph beginning on line 3
28	11	13	CleanReit Partners	**Revise paragraph**: <u>Except in the case of any financing transaction (defined as those transactions where the active solar system acquirer receives federal tax incentives subject to a federal safe-harbor[3])</u>, ~~However,~~ there are two exceptions to this general rule. First, when a *change in control* of the legal entity occurs, all real property owned by the entity will be reassessed.[1] Second, when a legal entity's *original co-owners*[2] cumulatively transfer more than 50 percent of their ownership interests in that legal entity, then the real property previously excluded from change in ownership, including the active solar energy system, will be reassessed. [3] Examples of such safe-harbors might include (a) Section VII of the Treasury Guidance for Section 1603 of the American Recovery and Reinvestment Action of 2009 and (b) Revenue Procedure 2007-65, among others. [1] Section 64, subdivision (c)(1). [2] Section 64, subdivision (d).	Not accepted See Item 26.
29	11	17	Constellation Energy	**Add sentence**: …including the active solar energy system, will be reassessed. <u>However, these exceptions will not apply to a change in control or transfer by original co-owners with respect to a legal entity that occurs during the construction of an active solar energy system owned by the legal entity.</u>	Not accepted See Item 26.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
30	11	19	Law Office of Peter Michaels	**Comments**: The DRAFT guidelines are based on the principle that "installation of a qualifying solar energy system will not result in either an increase or a decrease in the assessment of the existing property" *(New Construction,* Exclusions, page 6, lines 22 - 24) However, the *Decline in Value* section of the DRAFT guidelines appears to contemplate *increases* in the value of non-excluded improvements. Non-excluded improvements and fixtures typically decrease in value. Unlike land, improvements and fixtures rarely appreciate in value. Specifically, the DRAFT guidelines provide, for decline-in-value purposes, that an estimate is made "as if the *property* was *exposed for sale"* (page 11, line 25 emphasis added). The guidelines should differentiate what is meant by the property and "exposed for sale", as applied to*:* • residential electrical generating systems • commercial electrical generating systems • industrial electrical generating systems • active thermal systems • solar water heating systems • space conditioning systems • process heating systems The first step in the appraisal process is identifying the "appraisal unit". *(Assessors' Handbook 501,* Basic Appraisal, page 10). The guidelines should clarify, as to each solar energy system type, what is meant by "the entire property" (page 12, line 4; *see also,* Letter to Assessor 2009/024). The guidelines should also clarify what is meant by "exposed for sale" and enable assessors, assessment appeals boards, and taxpayers to apply "comparable sales", "replacement cost new less depreciation", and "capitalized earning ability" valuation methods in estimating "full cash value". Moreover, for decline-in-value purposes, the DRAFT guidelines should be modified to *exclude* "the current market value of the active solar system" from "the current market value for the entire property." (page 12, lines 3 - 4) In determining "full cash value" under Revenue and Taxation Code section 51, it is incorrect to value *excluded* property as if an ownership change occurred. Decline-in-value determinations should be based on recognition that *excluded* property will continue to be non-assessable, absent an ownership change. The exclusion should not be disregarded.	No suggested language provided. Discussion item.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
31	11	19	Nextera Energy Resources	**Comments:** The "Decline in Value" section, page 11, includes Example 4, which begins to provide an example of determining an active solar energy system's value for assessment purposes. This example does not fully develop into a usable example. It begins by listing the specific installation cost of an active solar energy system, but then goes no further in discussing the concluded assessment or showing a comparison between the factored base year value and the current market value. The example appears to discuss a system added to an already existing property and not a system installed as a stand-alone large scale solar generation system for the sale of electricity. We request that an example for both an annexed system and a stand-alone system be developed and resubmitted for review. Below we have provided an example for a stand-alone facility. (***See Attachment C*** for the Nextera proposed example.)	Discussion item.
32	14	4	First Solar	**Comments:** Page 14 of the Guidance includes just three sentences of discussion regarding commercial and industrial electric generating Systems, even though these systems represent the majority of investments covered by the Section 73 exclusion. We believe this discussion should be expanded and adjusted to address the following: 1. The Guidance refers only to Systems that "provide a significant amount of the daily energy requirement of the building on which they are installed." However, as properly explained elsewhere in the Guidance, the Section 73 exclusion is not limited to Systems where the energy will be consumed on-site. Thus, this statement is overly narrow and could be misleading. Instead, the Guidance addressing commercial and industrial Systems should reflect the full scope of the exclusion, including Systems where the electricity is expected to be used on-site, sold to an off-taker, or used in some other qualifying manner. 2. The commercial and industrial discussion refers only to Systems on "buildings." However, as stated and as re-confirmed by recent legislation, the exclusion applies to all types of Systems, whether they physically rest on a building or are on a free-standing (i.e., ground mounted) basis, or upon some other set up (such as on car ports). Given that so many commercial and industrial Systems are either free-standing or based on alternative structures (such as car ports), we suggest the Guidance expand its discussion to refer to these other Systems too, to ensure that there is no confusion regarding the proper scope of the Section 73 exclusion.	No suggested language provided. Discussion item.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
33	14	8	Law Office of Peter Michaels	**Comments:** The guidelines should include examples for treatment of non-excluded property, as applied to: • residential electrical generating systems • commercial electrical generating systems • industrial electrical generating systems • active thermal systems • solar water heating systems • space conditioning systems • process heating systems Particularly for large-scale commercial and industrial electrical generating systems (page 14, lines 4 - 8), as well as large photovoltaic systems, solar thermal electric systems, and solar mechanical energy, the guidelines should include attributes and examples of excluded and non-excluded "pre-conveyance", "post-conveyance", "auxiliary", and "dual-use" equipment, including substations, control buildings, storage facilities, boilers, pipes, ducts, fencing, and other improvements.	No suggested language provided. Discussion item.
34	17	14	SolarCity, SunEdison	**Revise response to question**: **3. A company has contracted with a local government agency to lease the roof of the agency's building, install an active solar electrical generating system, and sell the electricity to the agency. Is the solar energy system assessable?** No. The system is excluded from the definition of new construction and is, therefore, not assessable. ~~However, a taxable~~ Any possessory interest created through the lease is ancillary and incidental to the solar energy system and therefore (so long as the solar energy system qualifies under the new construction exclusion) any such possessory interest is not taxable. In the interest of promoting the use of publicly owned real property for solar energy projects, any such possessory interest in the roof area ~~may have been created when the lease was executed~~ is excluded from property tax. **SBE Rewrite:** No. The system is excluded from the definition of new construction and is, therefore, not assessable. However, a taxable possessory interest in the roof area may have been created when the lease was executed. [FN] [FN] Property Tax Rule 20, Taxable Possessory Interests.	Not accepted. See SBE Rewrite

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
35	18	14	SolarCity, SunEdison	**Revise response to question**: **7. A religious organization has leased a portion of its property to a for-profit entity for the installation of an active solar energy system. What is the status of their property tax exemption(s)?** ~~The portion of the religious organization's property that is leased for the solar energy system would not qualify for the church, religious, or welfare exemptions. However, disqualification of the exemption for the portion of the property leased for the~~Property leased by a tax exempt organization for a solar energy system does not, by itself, jeopardize the organization's qualification for exemption on the remaining portions of the property that are used exclusively for religious worship (church exemption), for religious worship and the operation of a school of less than collegiate grade (religious exemption), or for religious purposes (welfare exemption). The active solar energy exclusion would apply to the system, and it would not be assessable. The portion of the property leased by the religious organization is incidental to the solar energy exclusion and therefore is also excluded from property tax.	Not accepted. See Letter To Assessors 2008/054, *Cell Towers on Property of Religious Organizations*. While LTA 2008/054 pertains to cell towers, it embodies the same concepts, and the Board's position is the same for both cell towers and solar energy systems used by a religious organization.
36	--	--	Nextera Energy Resources	We suggest that the Board of Equalization (BOE) amend the Draft Guidelines and set forth two separate sections that distinguish between these types of assets: one to address annexed systems that cannot be easily removed from real property and the second to address stand-alone systems.	No suggested language provided. Discussion item.
37	--	--	Law Office of Peter Michaels	Comments: The guidelines should address treatment of future replacements of system components. For example, if 2001-vintage panels are replaced by 2011-vintage mirrors, how would the replacement panels be treated?	No suggested language provided. Discussion item.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
38	--	--	Nextera Energy Resources	Please provide clarification as to why the elements of an active solar energy system above the foundation are considered real property instead of personal property? In particular removable items that are part of the active solar energy system, specifically mirrors and photo voltaic panels ("PV Panels") appear to be treated as real property as part of the Draft Guidelines. During the life of an active solar energy system, mirrors and PV Panels can and will be exchanged for various reasons including all forms of obsolescence. Why are these mirrors and PV Panels considered real property? Should they be considered personal property as they can be relatively easily removed and exchanged from the physical structure that supports them?	Section 70 defines *new construction* as "(1) Any addition to real property, whether land or improvements, including fixtures, since the last lien date; and (2) Any alteration of land or of any improvement, including fixtures, since the last lien date that constitutes a major rehabilitation thereof or that converts the property to a different use." The term *new construction* is not applicable to personal property. If the elements of an active solar energy system were classified as personal property, they would not qualify for the new construction exclusion.

NO.	PAGE/LINE REFERENCE		SOURCE	PROPOSED LANGUAGE	SBE STAFF POSITION
39	--	--	Nextera Energy Resources	By forcing assets that are treated as personal property [FN] to be taxed as real property for ad valorem tax purposes, a gap is created between the assessable value and the fair market value of any non-excluded assets. In most cases personal property items decline in value over time due to economic, physical, and functional obsolescence. However, because the Draft Guidelines provide for the treatment of these assets as real property they are subjected to methodologies that create an artificial appreciation in value when comparing the Current market value and the Factored Base Year Value. It is important to note that the impact of this classification is deepest in regards to auxiliary equipment that is not considered to be active solar and are thus not included as part of the "new construction" exclusion for active solar. The Draft Guidelines do not provide any methodology to allocate the calculated current market value of the active solar energy system down to the non-excluded assets as part of a Decline in Value measurement, causing the Factored Base Year values of the assets to be higher than the actual fair market value for the non-excluded assets. This issue will be addressed further in the next section. [FN] Active market participants within the large scale solar industry treat many of the components that make up the mechanical apparatus that is used to generate electricity using energy collected directly from the sun or auxiliary components that are used to support those solar assets are treated as personal property.	Section 70 defines *new construction* as "(1) Any addition to real property, whether land or improvements, including fixtures, since the last lien date; and (2) Any alteration of land or of any improvement, including fixtures, since the last lien date that constitutes a major rehabilitation thereof or that converts the property to a different use." The term *new construction* is not applicable to personal property. If the elements of an active solar energy system were classified as personal property, they would not qualify for the new construction exclusion.

DEFINITIONS – ELECTRICAL CORPORATION:

The Guidance explains that the Section 73 exemption only applies to property subject to local, rather than State-level, assessment. In this regard a System that is at least 50 megawatts AND which is owned by an electrical corporation is subject to state, rather than local assessment. Thus, large commercial Systems (i.e., at least 50 MW) will only be subject to the Section 73 exemption in the event they are not owned by an electrical corporation. Therefore, the determination of whether an entity is an electrical corporation becomes critical in the context of larger commercial Systems.

The Guidance outlines the statutory definition of an electrical corporation under Section 218. In this regard, an electrical corporation excludes an entity "producing power from other than a conventional power source for the generation of electricity solely for … sale or transmission to an electrical corporation or state or local public agency, but not for sale or transmission to others unless the corporation or person is otherwise an electrical corporation.[7]" Thus, a solar electric generating facility will be subject to local assessment (and thus qualify for the Section 73 exemption) provided the following requirements are met:

1. The generation of electricity by an active solar energy system is considered the production of power from other than a conventional power source; and
2. Such power is sold or transmitted to an electrical corporation or state or local public agency entity.

It is well settled that solar power plants are non-conventional power sources[8] and in this regard we are unaware of any assessors that consider solar electric generation to represent a conventional power source. Therefore, we believe it would be helpful for the Guidance to confirm this understanding, by making clear that electricity generated by solar sources represents the production of power other than from a conventional power source[9]. Further, it should be noted that an electrical corporation also excludes any independent solar power producer[10]. For these purposes an independent solar power producer means a corporation or person employing one or more solar energy systems for the generation of electricity for any one or more of the following purposes:

1. Its own use or the use of its tenants; or
2 The use of, or sale to, not more than two other entities or persons per generation system solely for use on the real property on which the electricity is generated, or on real property immediately adjacent thereto[11].

[7] Section 218(b)(3)
[8] See public utilities code Section 2805, which defines conventional power sources as nuclear, large hydro, and the combustion of fossil fuels.
[9] See BOE letter #08-091 dated September 17, 2008 in which the BOE concluded that, because solar power is not listed as a conventional power source, it is therefore excluded from this definition and, thus, falls within the category of "other than a conventional power source" under Public Utilities Code section 218, subdivision (b).
[10] Section 218(e)
[11] Section 2868(b)

Below is the flip structure presented and attached are the referenced exhibits.

Parent Company has a wholly-owned subsidiary, Company A, which in turn owns two single member limited liability companies, LLC 1 and LLC 2. (See Exhibit 1.) LLC 2 will obtain a loan from the Department of Energy to finance the construction of the solar power system. The solar power system will be built in California and all of the real and tangible property will be owned by LLC 2 at the time the plant is placed in service as its first use.

Before the solar plant is placed in service, assume that LLC 1 enters into what is commonly referred to as a "partnership flip transaction" to monetize the federal income tax benefits generated by the solar plant. In the partnership flip transaction, it is contemplated that LLC 1 would enter into a partnership agreement with a third-party investor wherein the LLC would specially allocate 99% of the federal income tax benefits generated by the solar to the third-party investor. (See Exhibit 2.) Once the solar plant is placed in service, the third-party investor would be allocated those federal income tax benefits and some (possibly a great majority) of the cash flow from operations until the investor reaches a pre-determined target rate of return; at which point the allocations of taxable income and cash flows to the investor will "flip" to 5% and Company A will have an option to buy the investor's residual 5% interest at fair market value. (See Exhibit 3.)

The Assessor was not provided with a copy of the LLC operating agreements or the partnership flip agreement for the proposed transaction. However, we believe it is possible that as part of this "partnership flip transaction" the controlling interest in LLC 1 will temporarily change (say, for example, by a change in membership interests) in accordance with the 99% flip of the federal income tax benefits and the redirection of a large portion of the cash flow. This in turn would cause an indirect change in control of LLC 2 (the entity owning the system). Then, at some point, the controlling interest in LLC 1 acquired by the investor would "flip back" once the investor reaches the pre-determined target of return resulting in another change of control of LLC 1 and LLC 2. The system itself would always be held by LLC 2. Therefore, we are seeking clarity on how to apply the exclusion where a change of control of an entity holding the system occurs as part of a partnership flip transaction rather than a transfer of the system itself.

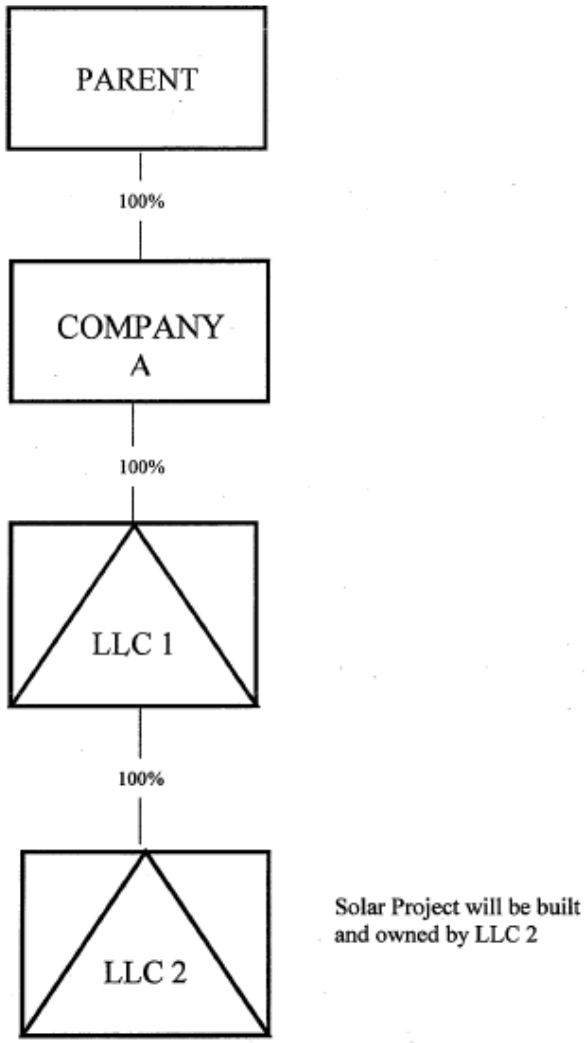
PARENT
100%
COMPANY A
100%
LLC 1
100%
LLC 2
Solar Project will be built and owned by LLC 2

EXHIBIT 1

SAN DIEGO COUNTY COUNSEL – Exhibit 2

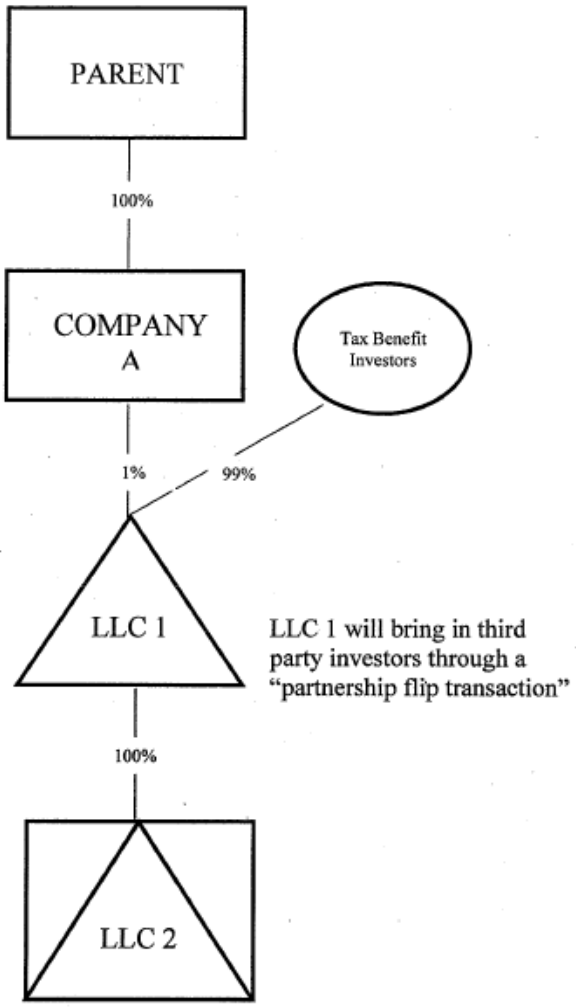

EXHIBIT 2

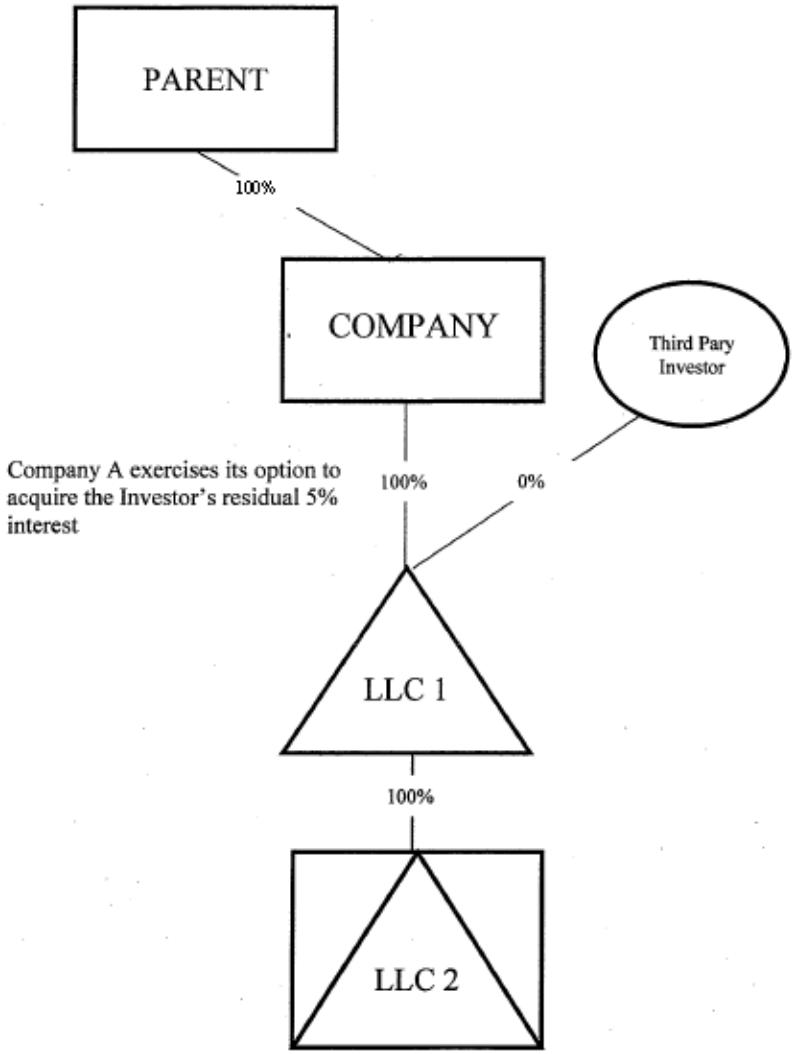
PARENT
100%
COMPANY
Third Pary Investor
Company A exercises its option to acquire the Investor's residual 5% interest
100%
0%
LLC 1
100%
LLC 2

EXHIBIT 3

Proposed Example
A property owner installs a qualified active solar energy system for $100 million dollars (also considered the base year value for this example). In this instance, the system includes auxiliary equipment that is considered non-solar and is not excluded under the current interpretation of the Draft Guidelines. A value of $5 million will be placed on the part of the solar facility that is not considered to be eligible for the exclusion. So, in this example we have $95 million of the original cost being excluded from assessment as "new construction" and $5 million of "new construction" not excluded. Five years from this point, the property owner still owns 100% of the property and is still operating it as an active solar energy system. At the lien date five years into the future, the county assessor reviews the property for a possible decline in value under Proposition 8.

The Draft Guidelines compare the factored base year value with the current market value, assuming no exclusions. According to the example provided "the county assessor would include the current market value of the active solar system in the current market value for the entire property. The current market value for the entire property would be compared to the enrolled value factored base year value, and the lesser of the two values enrolled" (Draft Guidelines; page 12, lines 3-6).

Using the fact pattern outlined above, we have conducted the following Decline in Value Test.

Step 1: When calculating the current market value according to the Draft Guidelines the assessors should value the active solar energy system as if it were available for sale on the open market. The current market value should include both excluded and non-excluded assets, as if the entire active solar energy system were made available for sale. As typical with most manufacturing businesses, the market values of active solar energy systems and other electrical plants are impacted by declines in output capabilities, market demand, prices of good produced (e.g. electricity), and other economic and/or obsolescence factors. The market value of an active solar energy system will fluctuate over time with a general downward trend as the facility ages. Assuming that the market value of the active solar energy system is estimated to be $100 million less 5 years of depreciation of $17 million, the plant's estimated current market value is $83 million. Then 5% of the current market value is allocated to the non-excluded assets which are equal to ≈$4.2 million.

Step 2: For comparative values, the factored base year value is calculated as $100 million plus a 2%[2] increase per year over 5 years or ≈$110.4 million. Then 5%[3] of the factored base year value is allocated to the non-excluded assets which are equal to ≈$5.5 million.

Comparison: The Draft Guidelines state that the assessed value should be the lower of the two values generated by the factored base year and current market value calculations. As can be seen above, Step 1 generated a value of ≈$4.2 million for the non -excluded assets and Step 2 generated a value of ≈$5.5 million for the non-excluded assets. The total assessed value for the non-excluded assets should be $4.2 million. See illustration below.

[2] For simplicity, we are assuming that the factor used to estimate factored base year value is 2% per year.
[3] When the assets were placed in service 95% were excluded and 5% were non-excluded. This example assumes that this allocation of value will remain constant throughout the life of the assets for ad valorem tax purposes.

Proposed Example as described above

Asset Value at Construction	**$100 Million**
Excluded New Construction	$95 Million
Non-excluded New Construction	$5 Million

Calculated Values (at year 5):

Current Market Value	**$83.3 Million**
Excluded New Construction	$79.1 Million
Non-excluded New Construction	$4.2 Million

Assumes depreciation on the solar energy system as solar plants more closely resembles Personal property and typically decline in value over time

Factored Base Year Value	**$110.4 Million**
Excluded New Construction	$104.9 Million
Non-excluded New Construction	$5.5 Million

Assumes a 2% annual increase for calculating the factored base year value of the $100 million Asset at year 5

Comparison (at year 5):

Current Market Value	**$4.2 Million**
Factored Base Year Value	**$5.5 Million**
Assessed Value	**$4.2 Million**

Observations of Current Practice: Based on the lack of detailed guidance provided by the Board of Equalization (BOE) both on an historical and more current basis, many assessors are comparing the factored base year values of the non-excluded assets to the current market value of the entire active solar energy system. Logic would dictate that in order to achieve comparability between Step 1 (current market value) and Step 2 (the factored base year value); assessors should allocate the calculated values to the non-excluded assets. See illustration below which displays what the comparison looks like when the calculated values are not properly allocated to the non-excluded assets.

Observation of Assessor Methodology

Asset Value at Construction	**$100 Million**
Excluded New Construction	$95 Million
Non-excluded New Construction	$5 Million

Calculated Values (at year 5):

Current Market Value	**$83.3 Million**
Factored Base Year Value	**$110.4 Million**
Excluded New Construction	$104.9 Million
Non-excluded New Construction	$5.5 Million

Assumes a 2% annual increase for calculating the factored base year value of the $100 million Asset at year 5

Comparison (at year 5):

Current Market Value	**$83.3 Million**
Factored Base Year Value	**$5.5 Million**
Assessed Value	**$5.5 Million**

Without further clarification of the guidance provided to date, including the underdeveloped example in the Draft Guidelines regarding the interaction between the factored base year value and current market value, there is too much room left for open interpretation and lack of consistency in the application of a decline in value test.