Senate Bill 639 (Hertzberg)
Date: 03/23/17
Program: Property Tax
Sponsor: First Solar
Revenue and Taxation Code Section 721.5
Effective: Upon enactment.

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Summary: Adds facilities producing power from other than conventional power sources that are also exempt wholesale generators (EWG) to the types of facilities excluded from state assessment.

Purpose: To allow local assessment of the specified facilities, which, for solar facilities, permits application of the solar new construction exclusion.

Fiscal Impact Summary: No immediate revenue impact.

Existing Law: **State-assessed electrical generation facilities**. The law requires the BOE to annually assess every electric generation facility with a generating capacity of 50 megawatts or more that is owned or operated by an electrical corporation, as defined.[1] An "electric generation facility" does not include (1) a qualifying small power production facility, as defined, and (2) a qualifying cogeneration facility, as defined.[2]

Locally-assessed solar new construction exclusion. In the case of locally-assessed property, the law generally provides that newly constructed active solar energy systems are excluded from assessment as new construction until there occurs a change in ownership. At that time the law requires the solar project to be reassessed at its full cash value as of the change in ownership date.[3] This exclusion applies to a facility with a generating capacity of any size but does not apply to state-assessed property.[4]

Conventional power sources. The law defines conventional power sources as nuclear, hydropower greater than 30 MW, and the combustion of fossil fuels (unless using cogeneration technology).[5]

Exempt wholesale generators. Federal law defines EWG's as "any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates . . ., and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale."[6]

Proposed Law: This bill excludes a third type of electric generation facility from state-assessment: facilities producing power from other than a conventional power source that is an exempt wholesale generator, as defined.

In General: The California Constitution authorizes the BOE to annually assess companies that transmit or sell electricity.[7] The BOE's longstanding practice is to assert assessment jurisdiction only over those entities that are public utilities.

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[1] Public Utilities Code (PUC) Section 218 (a) and (b).
[2] Revenue and Taxation Code (RTC) Section 721.5
[3] RTC 73
[4] Proposition 13's change in ownership and new construction assessment provisions do not apply to state-assessed property. *ITT World Communications, Inc.* v. *City and County of San Francisco* (1985) 37 Cal.3d 859.
[5] PUC Section 2805; BOE Annotated Correspondence 610.0088 opines that power from solar facilities are "other than conventional" since it is not listed in PUC 2805.
[6] Public Utility Holding Company Act of 2005 (PUHCA 2005)
[7] Article XIII, Section 19.

County assessors typically assess "nonconventional" facilities (e.g., solar, wind, geothermal) regardless of rated capacity. The BOE typically assesses nonconventional facilities only if they are owned by rate-regulated utilities and, if so, includes its value in the annual unitary state assessment set by BOE.

The law provides a new construction exclusion for active solar energy systems, but it only applies if the county assessor assesses the property (i.e., is locally-assessed). The California Supreme Court ruled that Proposition 13's (Article XIII A) assessment rollback, its 2% limit on annual assessment growth, and its limit on current market value assessment only upon a change in ownership or new construction do not apply to state-assessed property.

In 1980, the voters modified Proposition 13 to create a new construction exclusion for active solar energy systems.[8] This property tax benefit is not a real property tax "exemption" but a new construction "exclusion." The exclusion/exemption distinction is important for several reasons:

- The exclusion terminates if there is a transfer of the property resulting in a change in ownership (i.e., there is a reappraisal event);
- The exclusion extends only to the solar system itself, while the land and other non-solar related improvements remain taxable.
- The exclusion is inapplicable to state-assessed property such that facilities that produce power from nonconventional power sources would be fully taxable.

Differences between State and Local Assessment. The following table notes key differences between state and local assessment.

	State-Assessed	**Locally-Assessed**
Value Standard	Real Property (Including Fixtures) Fair Market Value Personal Property Fair Market Value	Real Property (Including fixtures) Acquisition Value Based with Max 2% CPI annual adjustment (unless Fair Market Value is lower) Personal Property Fair Market Value
Appraisal Unit	Unitary or Separate Depending on Property	Separate Appraisal Unit
Reassessment Triggers	Annually Every January 1	Limited Change in Ownership or New Construction
New Construction Exclusions including Solar	No	Yes
Change in Ownership Exclusions or Base Year Value Transfers	No	Yes
Value Setting	BOE Members	County Assessor
Appeals	BOE Members	Assessment Appeals Board
Court Review	Trial *de novo*[9]	Legal Issue – Trial *de novo* Factual Issue[10] – Administrative Record Review

[8] Proposition 7, implemented via RTC Code Section 73.

[9] RTC Section 5170. With trial *de novo*, a court can receive and hear new evidence and is not restricted to a review of the administrative record.

	State-Assessed	Locally-Assessed
Basic Tax Rate	1%	1%
Revenue Allocation: Generally	Unitary Base + "County Wide" Incremental Growth Unless Special Provisions are enacted.	Situs-Based (local tax rate area)
Exception: **Electric Generation Facilities**	Situs-Based RTC 100.9(a)(3)	Situs-Based
Exception: **Public Utility Owned Facilities Built After 1/1/07**	Hybrid RTC 100.95	N/A
Disaster Relief - Post Lien Date	No	Yes

Background. After the 1996 deregulation of the electric industry and subsequent energy crisis, the BOE examined its assessment jurisdiction over certain companies owning generating facilities and selling electricity. Consequently, during this timeframe the assessment jurisdiction over some facilities between the BOE and county assessors changed, and then switched back, as noted below (Original Rule 905 and Amended Rule 905). Additionally, as a result of BOE's rulemaking activities, RTC Section 721.5, the section this bill seeks to amend, was added[11] to codify Amended Rule 905. AB 81 also addressed property revenue allocation from these plants, an issue outside BOE purview. Both measures require the BOE to assess the same facilities, and provide the same exceptions to that state-assessment mandate. Ultimately, Amended Rule 905 and Section 721.5 were litigated and upheld in *Independent Energy Producers v. State Board of Equalization* (2004) 125 Cal.App.4th 425.

A brief history on state assessment v. local assessment of electric generation facilities follows:

- Before 1999:
  - BOE assessed electric generation facilities owned by rate-regulated public utilities.
  - Assessors assessed other facilities, including wind, solar, geothermal, and co-generation facilities.
- Between 1999 and 2002: (Original Rule 905)
  - The BOE transferred assessment jurisdiction over 22 divested public utility generation facilities and certain new facilities to be constructed post-deregulation.
  - BOE limited its assessment jurisdiction to electric generation facilities still owned by rate-regulated public utilities. That is, facilities constructed pursuant to a certificate of public convenience and necessity (CPCN) issued by the California Public Utilities Commission.
  - Assessors continued to assess wind, solar, geothermal, and co-generation facilities.
- Beginning 2003: (Amended Rule 905 and RTC 721.5)
  - BOE reasserted assessment jurisdiction over those facilities over 50 MW and owned by electric corporations.
  - The Legislature mandated BOE-assessment of these same facilities.

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[10] Questions of law versus fact: In a refund action for locally-assessed property taxes, where the issue is a question of law, the taxpayer has a right to a trial *de novo*, with the court being able to receive and consider new evidence. When the issue is a question of fact, the court is restricted to a review of the county assessment appeal board's findings and decisions (i.e., the administrative record).

[11] Stats. 2002, Ch. AB 81, Migden

- Assessors continued to assess wind, solar, geothermal, and co-generation facilities.

Since 2003, no assessment-jurisdiction changes to Section 721.5 and Rule 905 have been proposed. However, legislation has been enacted related to the allocation of property tax revenues from certain new state-assessed electric generation facilities. [AB 308 in 2010; SB 1317 in 2006; and AB 2558 in 2004.]

Commentary:

1. **Effect of bill.** This bill adds certain facilities that produce power from nonconventional power sources to the list of facilities that the BOE is not required to assess. This allows the facilities to be locally assessed. In the case of solar facilities, local assessment allows the facility to qualify for the new construction exclusion.
2. **Issue.** The proponents note that it is not currently clear that renewable projects that sell to private electric service providers are exempt from RTC Section's 721.5 state-assessment mandate. The proponents seek to update the law's expressly listed exceptions to include this emerging class of non-public utility renewable generators in the wake of the State's Renewable Portfolio Standard Program and environmental commitment. The tax treatment uncertainty over these facilities hampers their ability to develop and build these facilities because the associated property tax obligations are not clear.
3. **Electrical corporations.** For nonconventional power facilities of 50 MW or more, whether the owner is an "electrical corporation" under the PUC cross-referenced definition[12] is critical to whether the facility must be state assessed. Under this bill, it would not be necessary for the BOE to examine whether the facility's owner meets the "electrical corporation" definition. Instead, the type of power being used and EWG status provide a bright line to determine assessment jurisdiction and relieves the BOE from making assessment jurisdiction decisions on a case-by-case basis. It also removes this element of uncertainty for the BOE, assessors, and facility owners.
4. **Using and selling power.** As larger-scale projects are built, the way the power produced from these facilities is used and sold may evolve. The PUC cross-referenced definition of “electrical corporation” on which the property tax law depends generally excludes facilities generating power consumed onsite, power consumed on an immediately adjacent site, power sold to another electrical corporation, and power sold to a state or local agency. This new exception for nonconventional power generating facilities makes irrelevant to whom power is sold for purposes of the state-assessment mandate of Section 721.5.
5. **EWG Status.** Seeking EWG status is optional. EWG status is significant because it provides exemptions or waivers of certain requirements under the federal Public Utility Holding Company Act of 2005 (PUHCA).[13]
6. **BOE Assessment Jurisdiction.** It has been the BOE’s longstanding position that it has assessment jurisdiction only over electric generating facilities that are public utilities. A recent BOE Legal staff opinion found that a solar electrical generating facility built to sell 100% of its energy to one customer for its exclusive use, not to the public, is appropriately assessed at the local level because the facility is not dedicated to public use and is not a public utility. Based on Section 721.5, the BOE does not assert assessment jurisdiction over solar facilities when they are not “electrical corporations” as defined in PUC 218 (a) and (b). But Section 721.5 does not exclude from state assessment facilities producing power from nonconventional power sources, including solar, when the facility is an “electrical corporation” as defined in PUC 218 (a) and (b). To date, all renewable energy projects (solar, wind, and geothermal) not owned by a public utility have been locally assessed since none have met the definition of “electrical corporation” or have been determined not to be a public utility.

[12] PUC Section 218 (a) and (b).
[13] See Federal Energy Regulatory Commission (FERQ) EWG website.

7. **This bill deletes reference to any pre-existing contradictory BOE regulation.** This obsolete language relates to the period of time when BOE assessment jurisdiction was in a state of flux, as explained in the Background.

Costs: The BOE will not incur any costs related to this bill.

Revenue Impact: This bill provides that the BOE is not required to assess the specified facilities. To date, the BOE has not assessed electric generating facilities producing power from nonconventional power sources. Thus, this bill has no immediate revenue impact.