STATE BOARD OF EQUALIZATION
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December 13, 2016

Re: State Assessment Jurisdiction – Solar Electric Generating Facility
Assignment No.: 16-278

Dear Ms. :

This is in response to your request for our opinion regarding whether Solar, LLC (Solar) is subject to property tax assessment by the State Board of Equalization (Board) pursuant to section 19 of article XIII of the California Constitution or by the local county assessor. You explain that Solar is building a solar electric generating facility that sells 100 percent of its energy output to a single corporate customer, , Inc. (Customer), for its exclusive private use. As explained below, in our opinion, Solar' solar electric generating facility is not dedicated to public use; thus, Solar is not a public utility subject to assessment by the Board.

Facts

You provide the following factual background in your request:

> Customer Inc. ("Customer") has a publicly-stated goal of powering its operations using 100% renewable energy. In pursuit of that goal, Customer issued a request for proposals seeking a long-term supply of renewable energy. Solar chose to respond to Customer's request for proposals and then elected to enter into exclusive negotiations with Customer to provide renewable energy from a solar electric generating facility on terms and conditions, including price that were specific to the proposed transaction with Customer. Solar and Customer subsequently agreed upon a 25-year power purchase agreement ("PPA"). Upon execution of that PPA, Solar committed to building the facility and selling 100% of the facility's electricity output to Customer for ultimate use by Customer and its affiliates, all in accordance with the terms of the PPA.[fn omitted] Accordingly, Solar is now building a new 130 megawatt alternating current solar electric generating facility on land leased from X Corporation in County, California.

In a subsequent telephone conversation, you indicated that Solar is not required to hold a Certificate of Public Convenience and Necessity (CPCN) issued by the California Public Utilities Commission (CPUC).

Law and Analysis

Revenue and Taxation Code[1] section 721.5 and Property Tax Rule[2] 905 require the Board to annually assess electric generation facilities with a generating capacity of 50 megawatts or more that are owned or operated by an electrical corporation as defined in Public Utilities Code section 218.[3] This requirement stems from California Constitution article XIII, section 19, which states in relevant part:

> The Board shall annually assess (1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and *companies transmitting or selling gas or electricity*. This property shall be subject to taxation to the same extent and in the same manner as other property.

(Emphasis added.)

In *Independent Energy Producers Association, Inc. v. State Board of Equalization* (2004) 125 Cal. App.4th 425 (*IEP*), the Court of Appeal performed a historical review of article XIII, section 19 (and its predecessor article XIII, section 14) and concluded that "despite what appears to be the clear language of section 19, it has always been interpreted as giving assessment jurisdiction to the Board only over public utilities." (*Id.* at p. 437.) The *IEP* court further held that the Board's assessment jurisdiction extends to all entities that can be considered "public utilities" under California Constitution article XIII, section 19, regardless of whether they are regulated by the CPUC. (*Id.* at p. 449.) This is consistent with the Board's determination of its own jurisdiction. (See State Bd. of Equalization, Property Taxes Com., Formal Issue Paper No. 98–032 (Nov. 13, 1998).) Therefore, although section 721.5 and Rule 905 contain no explicit requirement that an electric generation facility be a public utility, it has been the Board's longstanding position that it has assessment jurisdiction only over electric generating facilities that are public utilities.

Article XII, section 3 of the California Constitution defines public utilities as follows:

> Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage *directly or indirectly to or for the public*, and common carriers, are public utilities subject to control by

[1] All statutory references are to the California Revenue and Taxation Code unless otherwise specified.
[2] All references to Property Tax Rules or Rules are to title 18 of the California Code of Regulations.
[3] Public Utilities Code section 218, subdivision (a) provides that an "electrical corporation" includes every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others.

> the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.[4]

(Emphasis added.)

Although not expressly contained in article XII, section 3, the California Constitution requires a "dedication to public use" to transform a private business into a public utility. (*IEP, supra,* 125 Cal. App.4th at p. 442.) The mere sale of goods is not sufficient to constitute a dedication to public use. (See *Thayer, supra, 164 Cal. at pp. 126-128* [merely selling water does not result in dedication of water rights to public use]; *Nevada-California Power Co. v. Borland (1926) 76 Cal.App. 519, 523-524* [generating electricity alone does not constitute dedication to public]; *Richfield Oil, supra, 54 Cal.2d at pp. 438-440* [selling natural gas does not alone establish dedication to public]; *Story, supra, 186 Cal. at p. 167* [merely selling electricity does not establish dedication].) The *IEP* court, citing an earlier case, set forth the test to determine whether a public dedication has occurred:

> The test for determining whether dedication has occurred is "whether or not [a person has] held himself out, expressly or impliedly, as engaged in the business of supplying [a service or commodity] to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as an accommodation or for other reasons peculiar and particular to them."

(*IEP, supra,* 125 Cal.App.4th at p. 442–43, citing *Van Hoosear v. Railroad Commission* (1920) 184 Cal. 553, 554.) The *IEP* court continued:

> [W]hether or not dedication has occurred is a factual issue, to be determined on a case-by-case basis. Courts caution that "[t]o hold that property has been dedicated to a public use is 'not a trivial thing,' [citation] and such dedication is never 'presumed without evidence of unequivocal intention.'" [Citations omitted.] However, such dedication may be inferred from action and need not be explicit. [Citations omitted.] (*Id*., at p. 443.)

The *IEP* court also cited an earlier California Supreme Court case stating that "[t]he essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character." (*IEP*, *supra,* 125 Cal.App.4th at p. 439, citing *Story v. Richardson* (1921) 186 Cal. 162*,* 167, quoting *Thayer v. California Development Co.* (1912) 164 Cal. 117, 128.)

> Further, if the public nature of the business activity is established, it matters not that sales are to only a few customers or that the entity only indirectly serves the public by making sales to a utility: "[A] utility that has dedicated its property to public use is a public utility even though it may serve only one or a few customers or a utility that in turn serves the public . . . a public utility that has been serving the public directly remains such even though it turns its distributing system over

[4] The Public Utilities Code is similar, providing that "'Public utility' includes every . . . electrical corporation . . . where the service is performed for, or the commodity is delivered to, *the public or any portion thereof*." (Emphasis added.) (Pub. Util. Code, § 216, subd. (a).)

> to a publicly or privately owned utility and thereafter limits its own business to supplying the utility that directly serves the public." [Citations omitted.]

(*IEP, supra,* 125 Cal.App.4th at p. 445.)

IEP involved the Independent Energy Producers Association, Inc. (IEPA), a trade association representing the interests of independent electric generating facilities that were divested by public utility companies following the deregulation of the energy market in California in 1996. IEPA sought declaratory relief that the independent electric generating companies were not subject to the Board's jurisdiction because they were not "public utilities" under article XIII, section 19 of the California Constitution. The Court of Appeal, however, held that because the independent electric generating companies supplied electricity to the general public, as distinguished from providing electricity to only particular individuals as an accommodation or with contracts peculiar to those individuals, they met the test for public dedication and were therefore considered public utilities subject to the Board's jurisdiction. (*IEP, supra,* 125 Cal.App.4th at pp. 443-445; compare with *Thayer v. California Development Co.*, *supra,* 164 Cal. 117 [no public dedication of water company where water was sold only to a few customers selected by the owner]; and *Story v. Richardson, supra*, 186 Cal. 162 [no public dedication where an electrical plant designed primarily and pre-eminently to supply service to tenants and to select occupants of an adjoining building].)

Here, based upon the representations made and a review of its power purchase agreement, unlike the electric generating facilities in *IEP*, Solar does not hold itself out as engaged in the business of supplying renewable energy to any portion of the public other than Customer and its affiliates. Not only will Solar serve only one customer, more importantly, it was developed from its outset to serve only a single, select, pre-determined customer for its own use and not for sale to the public. Solar responded specifically to Customer's requests for proposals to meet its goal of powering its operations with 100 percent renewable energy, after which Solar entered into exclusive negotiations with Customer to provide renewable energy from a solar electric generating facility under terms and conditions specific to the proposed transaction with Customer. The 25-year PPA resulting from those exclusive negotiations restricts and limits Solar to providing 100 percent of the energy from its solar electric generating facility to Customer and its affiliates.[5] Solar is confined to serving a select, privileged customer at fixed prices under the terms of its PPA and planned the building of the solar energy production facility based on its providing 100 percent of the energy output to that single customer. Therefore, in the same way that a solar electric generating facility built by Customer solely for its own use would not be a public utility, Solar' provision of renewable energy capacity to Customer for Customer's use alone under negotiated terms and for no other purpose, in our view, does not make Solar a public utility. Finally, Solar does not hold a CPCN. Although the absence of a CPCN does not preclude an entity from falling under the Board's assessment jurisdiction, if an entity is required to obtain a CPCN, it would indicate that the CPUC considers that entity to be a public utility.[6] (See Pub. Util. Code, §§ 216, 701 and 1001.)

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[5] Of course, if at any time, whether during or after the expiration of the 25-year term of the PPA, Solar solicits electricity sales to the public, regardless of the number of customers that ultimately purchase its electricity, our opinion at that time may differ.

[6] Such a requirement, of course, would be weighed heavily in determining whether an entity was considered to be a public utility for purposes of assessment by the Board.

Therefore, for the reasons discussed above, we do not believe Solar' property's exclusive provision of 100 percent of its renewable energy output to Customer and its affiliates constitutes a dedication to public use that would transform it into a public utility subjecting it to state assessment under article XIII, section 19 of the California Constitution. Accordingly, Solar' property is appropriately assessed by the local county assessor.[7]

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ *Leslie Ang*

Leslie Ang
Tax Counsel

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cc: Honorable
County Assessor

Mr. Dean Kinnee (MIC:63)
Mr. Richard Reisinger (MIC:61)
Mr. David Yeung (MIC:61)
Mr. Todd Gilman (MIC:70)

[7] Because the threshold issue here is whether Solar' solar electric generating facility is dedicated to public use, we need not opine on the question of whether Solar would qualify as an "electrical corporation" under section 721.5 and Rule 905 and Public Utilities Code section 218.