

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 236

INTRODUCER: Judiciary Committee, Criminal Justice Committee, and Senators Dean and Aronberg

SUBJECT: Utility Services/Unlawful Use/Controlled Substance

DATE: March 5, 2009                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Treadwell</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

The bill increases the penalty from a first-degree misdemeanor to a third-degree felony for using utility services without the services being reported for payment or without allowing the electricity, water, or gas to pass through a meter for measurement by the utility company. The bill also includes a rebuttable presumption of a person's intent to use utility services without the services being reported for payment if specified facts are established relating to the manufacture of controlled substances.

The bill also creates a new third-degree felony for theft of utility services for the purpose of facilitating the manufacture of a controlled substance. In addition, the bill specifies what evidence constitutes prima facie evidence of a person's intent to commit theft of utility services.

This bill substantially amends section 812.14, Florida Statutes.

## II. Present Situation:

### Prevalence of Indoor Grow Operations (“Marijuana Grow Houses”)

In the 2007 Indoor Grow Report, the Florida Department of Law Enforcement (FDLE) provides:

In 2007, the reported seizures of marijuana from Indoor Grow Eradication Sites continued to outpace the seizures from Outdoor Grow Eradication Sites. Indoor Grow cultivators continue to develop innovative techniques and schemes to avoid detection by law enforcement.

Despite these innovative techniques and schemes, county and local law enforcement agencies in 45 of Florida’s 67 counties reported the detection and dismantling of 944 Indoor Grow sites, resulting in the eradication of 74,698 marijuana plants. This represents twice the number of plants eradicated in 2006. Some of the reported Indoor Grow sites were small and simple, while others were more complex and highly organized. DEA [The U.S. Drug Enforcement Administration] eradicated 941 plants at one site in Marion County. Both the Miami-Dade Police Department and the Seminole County Sheriff’s Office eradicated sites having over 850 plants.

Miami-Dade County led the state in marijuana plants eradicated with 26,019 reported. This is a 65 percent increase over the number reported for 2006 . . . .

In addition, law enforcement reported the arrests of 971 cultivators. This is nearly double the number of arrests reported in 2006. Law enforcement also reported the seizure of 188 firearms in 2007. Both state and federal prosecutions of cultivators resulted pursuant to these arrests.

Current intelligence information indicates that marijuana cultivators continue to move their operations indoors to avoid detection and to increase the quality of the marijuana being produced. The sterile and climate controlled environments enable cultivators to utilize sophisticated techniques to increase  $\Delta$ -9 Tetrahydrocannabinol (THC), the primary psychoactive ingredient of marijuana. Indoor Grow sites also allow cultivators to artificially induce as many as four growing seasons per year, as opposed to the single season imposed by nature on Outdoor Grow sites.<sup>1</sup>

### Impact on Utility Companies, Homeowners, and Neighborhoods from Electricity Theft and Marijuana Grow House Operations

The statewide economic impact of electricity theft, including theft by grow house operators, has not been estimated. According to a September 22, 2008, article in the *Tampa Tribune*, “[n]ationwide, the industry estimates people steal about \$6 billion worth of electricity each year.” The newspaper reports that “[t]he biggest and best power thieves” are the grow house

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<sup>1</sup> Florida Department of Law Enforcement, *2007 Indoor Grow Report* (Feb. 2008).

operators. The newspaper further reports that “honest customers are footing the bill for that stolen power because most utilities are guaranteed a certain rate of return and are allowed to increase their rates to cover losses resulting from theft.”<sup>2</sup>

Grow houses also have significant costs to the homeowner who unknowingly rents his or her house to a grow house operator, and grow houses can pose a safety hazard to, and negatively impact the property values of, a neighborhood in which a grow house operates.

The Niagara Regional Police Service in the province of Ontario has studied utility theft in the context of the manufacturing of marijuana and noted that:

[t]o make a house suitable for cultivating marijuana, significant changes are made to the home’s structure. High intensity lighting is needed to grow the plants (which is costly), so many home grow operations by-pass the electricity illegally putting the neighborhood at risk of fire and electrocution. Combined with construction to provide water and ventilation for the grow operation, the house becomes uninhabitable for future residents. Unless major repairs are made, the house is ruined and the property value of other homes in the area is lowered.<sup>3</sup>

Marijuana home grow operations also promote risks of increased violence and residual crime in neighborhoods with this illegal activity.<sup>4</sup>

Last month in Florida, the Levy county Sheriff’s Office discovered an underground bunker housing a high-grade marijuana grow operation.<sup>5</sup> Over 193 marijuana plants were seized at an approximate value of \$868,500. In addition to the manufacturing charges, officials allege that the operators of the grow house diverted and stole power from Central Florida Electric for more than two years to power the illegal operation.

### **Theft and Other Offenses Relating to Utility Services**

Section 812.014, F.S., is Florida’s general theft statute. The degree of punishment under this statute is primarily based upon the dollar value of the stolen property,<sup>6</sup> with punishments graduating upward as that dollar value increases, though the theft of certain items<sup>7</sup> or the presence of certain conditions relating to the theft<sup>8</sup> can also result in increased penalties. There is

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<sup>2</sup> Ray Russell, *Power ‘Police’ On The Hunt For Electricity Thieves*, TAMPA TRIBUNE, Sept. 22, 2008. All quoted remarks in this paragraph are from this source.

<sup>3</sup> Niagara Regional Police Service, Ontario, Canada, *Marijuana Home Grow Operations*, <http://www.nrps.com/community/marijuana.asp> (last visited Feb. 11, 2009).

<sup>4</sup> *Id.*

<sup>5</sup> Lise Fisher, *2 arrested in underground grow house raid*, THE GAINESVILLE SUN, Jan. 28, 2009, available at <http://www.gainesville.com/article/200901281007/news/901281007> (last visited Feb. 11, 2009).

<sup>6</sup> If the stolen property is valued at \$100,000 or more, the offense is a first-degree felony. If the stolen property is valued at between \$300 and \$20,000, the offense is a second-degree felony. If the stolen property is valued between \$100 and \$300, the offense is a first-degree misdemeanor. If the stolen property is under \$100, the offense is a second-degree misdemeanor.

<sup>7</sup> For example, firearms, a will, a fire extinguisher, citrus fruit, a stop sign, emergency medical equipment, and law enforcement equipment. Section 812.014(2)(c), F.S.

<sup>8</sup> For example, theft during a state of emergency, use of a motor vehicle, damage to property during the course of the theft, and theft of cargo in interstate commerce. Section 812.014(2)(c), F.S.

no specific provision regarding theft of utility<sup>9</sup> services in the general theft statute. As a result, absent one of the other exceptions, the criminal penalties for theft of utility services would be based on the cost of the power stolen.

Current law provides criminal penalties for certain activity related to utility services. Currently, s. 812.14, F.S., provides that a person commits a first-degree misdemeanor<sup>10</sup> if the person:

- Willfully alters, tampers, or injures a meter, meter seal, pipe, conduit, wire, line, cable, transformer, amplifier, or other device belonging to a utility as to cause loss or damage; to prevent the meter from registering the actual quantity of electricity, gas, or water used; or to knowingly use electricity, gas, or water that passed through an altered meter, wire, pipe, or fitting.
- Makes or causes to be made a connection with a wire, main, service pipe or other pipes, appliance, or appurtenance to use electricity, water, or gas without the consent of the utility.
- Uses or receives the direct benefit from a utility if the person knows, or should have known, that the utility services were obtained by the direct result of tampering, altering, or injuring a wire, conductor, meter, pipe, conduit, line, cable, transformer, amplifier, or other apparatus.<sup>11</sup>

### **Civil Liability**

Existing law provides that a person who unlawfully obtains utility services under s. 812.14, F.S., is subject to civil liability for three times the amount of utility services unlawfully obtained or \$1,000, whichever is greater.<sup>12</sup>

### **Controlled Substance Offenses Relevant to Marijuana Grow House Operations**

Various controlled substance offenses may be applicable to marijuana grow house operations. For example, it is a third-degree felony for a person to own, lease, or rent “any place” or structure, or part thereof, with the knowledge it will be used for:

- the purpose of trafficking in a controlled substance, as provided in s. 893.135, F.S.;
- the sale of a controlled substance, as provided in s. 893.13, F.S.; or
- the manufacture<sup>13</sup> of a controlled substance intended for sale or distribution to another.<sup>14</sup>

<sup>9</sup> Section 812.14(1), F.S., defines “utility” as “any person, firm, corporation, or association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas, electricity, heat, water, oil, sewer service, telephone service, telegraph service, radio service, or telecommunications service.”

<sup>10</sup> A first-degree misdemeanor is punishable by up to one year in jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>11</sup> Section 812.14, F.S., does not apply to licensed and certified electrical contractors performing usual and ordinary service in accordance with recognized standards.

<sup>12</sup> Section 812.14(5), F.S.

<sup>13</sup> Section 893.02(14)(a), F.S., which defines the term “manufacture,” includes “cultivating” within that definition. Section 893.02(5), F.S., defines “cultivating” as “the preparation of any soil or hydroponic medium for the planting of a controlled substance or the tending and care or harvesting of a controlled substance.”

<sup>14</sup> Section 893.1351(1), F.S.

It is a second-degree felony for the person to knowingly be in actual or constructive possession of any place, structure, or part thereof, for the purpose of drug trafficking, controlled substance sales, or controlled substance manufacturing, as previously described.<sup>15</sup> However, if the person knew or should have known that a minor was present, the possession is a first-degree felony.<sup>16</sup>

### III. Effect of Proposed Changes:

#### Obtaining or Using Unauthorized Utility Services

The bill amends s. 812.14, F.S., to increase the penalty from a first-degree misdemeanor to a third-degree felony for using utility services without the services being reported for payment or measured by a meter provided by the utility service.<sup>17</sup> More specifically, any person who causes any connection with any wire, main, service pipe or other pipes, appliance, or appurtenance without the consent of a utility and without such use being reported for payment, or a person who causes electricity, gas, or water to be supplied without passing through a meter provided by the utility, is guilty of a third-degree felony.

Any prosecution for unlawfully using utility services does not bar additional prosecution for the crime of theft of utility services created under the bill, or prosecution under the general theft statute.

#### Rebuttable Presumption

The bill creates a rebuttable presumption of a person's intent to unlawfully use utility services without the services being reported for payment if all of the following facts are established:

- A controlled substance<sup>18</sup> and materials for manufacturing the controlled substance intended for sale or distribution to another were found in a structure or dwelling;<sup>19</sup>
- Materials or equipment for manufacturing the controlled substance have been in the structure or dwelling for a least one year;
- The dwelling or structure has been visibly modified to accommodate the use of equipment to grow marijuana indoors, including, but not limited to, the installation of equipment to provide additional air conditioning, equipment to provide high-wattage lighting, or equipment for hydroponic cultivation; and
- The person or entity who owned, leased, or subleased the structure or dwelling knew or should have known, through the exercise of due diligence, of the presence of the controlled substance and materials for manufacturing the controlled substance in the

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<sup>15</sup> Section 893.1351(2), F.S. “[P]roof of the possession of 25 or more cannabis plants constitutes prima facie evidence that the cannabis is intended for sale or distribution.” Section 893.1351(4), F.S.

<sup>16</sup> Section 893.1351(3), F.S.

<sup>17</sup> A third-degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>18</sup> The bill does not define “controlled substance.” If it is the intent of the Legislature to include the controlled substances named or described in Schedules I-V of s. 893.03, it may wish to expressly cross-reference the definition of “controlled substance” contained in s. 893.02(4), F.S.

<sup>19</sup> The bill does not define “structure or dwelling” in this portion of the bill. However, the bill later cross-references the definition of “structure” and “dwelling” in s. 810.011, F.S., for purposes of the bill’s new third-degree felony for theft of utility services.

structure or selling, regardless of whether the person or entity was involved in the manufacture or sale of the controlled substance or was in actual possession of the structure or dwelling.

A mandatory rebuttable presumption<sup>20</sup> “requires a fact finder to assume the existence of a presumed or ultimate fact after certain basic or preliminary facts have already been established” unless the defendant offers sufficient evidence to rebut the fact.<sup>21</sup> Under the bill, once the prosecuting authority establishes all of the enumerated facts, the fact finder can presume that the defendant had the intent to commit the crime unless the defendant introduces sufficient evidence to demonstrate he or she did not have the requisite intent to commit the crime. In effect, if a prosecuting authority can introduce the requisite facts establishing the manufacture of a controlled substance in the dwelling or structure, as well as facts sufficient to establish that the defendant manufactured controlled substances in the dwelling or should have known through reasonable diligence that controlled substances were being manufactured in the dwelling, a jury could presume that the defendant had the requisite intent to unlawfully use utility services.

### **Theft of Utility Services**

The bill also creates a new third-degree felony for theft of utility services for the purpose of facilitating the manufacture of a controlled substance.<sup>22</sup>

### **Prima Facie Evidence**

The bill provides that it is prima facie evidence of a person’s intent to commit theft of utility services for the purpose of facilitating the manufacture of a controlled substance if:

- The person committed theft of utility services, and the dwelling or structure received unauthorized access to utility services;
- A controlled substance and materials for manufacturing the controlled substance were found in the structure or dwelling; and
- The person knew of the presence of the controlled substance and materials for manufacturing the controlled substance in the structure or dwelling, regardless of whether the person was involved in the manufacture of the controlled substance.

### **Effective Date**

The bill takes effect on October 1, 2009.

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<sup>20</sup> Courts critically examine presumptions in criminal actions. If a mandatory rebuttable presumption relieves the state of the burden of persuasion on an element of the offense, it may violate the Due Process Clause. *State v. Brake*, 796 So. 2d 522, 529 (Fla. 2001).

<sup>21</sup> *Ibarrondo v. State*, 2008 WL 5352101 (Fla. 5th DCA 2008).

<sup>22</sup> “Controlled substance” is not defined in this portion of the bill.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

To the extent that the bill decreases marijuana grow houses, it will benefit homeowners and neighborhoods since remediation of a house used as a grow house is costly and property values in the neighborhood might be affected; benefit law enforcement and utility companies because fewer resources will be expended on eradicating grow house and there will be fewer instances of utility theft; and benefit utility customers if the utility's practice is to pass through the costs of utility theft to its customers.

## C. Government Sector Impact:

Regarding the third-degree felonies created by the bill, the Florida Department of Corrections states:

Since the bill does not rank these offenses in a specific severity level, they automatically default to a level 1.

Since the bill creates new felonies, the Department of Corrections is unable to provide data from its current offender population to assist in gauging the impact the bill will have on the prison and probation population.<sup>23</sup>

The Criminal Justice Impact Conference (CJIC) analyzed the similar House bill (HB 29) and determined that the bill would have an insignificant prison bed impact.<sup>24</sup>

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<sup>23</sup> Florida Department of Corrections, Legislative Affairs, *Analysis of SB 236* (Dec. 17, 2008) (on file with Senate Committee on Judiciary).

<sup>24</sup> Office of Economic and Demographic Research, *2009 Criminal Justice Impact Conference Results*, HB 29 (Feb. 25, 2009), available at <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (last visited March 5, 2009).

**VI. Technical Deficiencies:**

On line 81 of the bill, a rebuttable presumption of “a person’s *or entity’s*” intent to unlawfully use utility services is referenced. It is not necessary to include “or entity’s” because a reference to a “person” in Florida Statutes is broadly construed to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries and corporations.<sup>25</sup>

The title provides that prosecution for the new theft of utility services provision is in lieu of the other existing theft statute. However, the bill provides that prosecution for unlawfully using utility services does not bar additional prosecution for the crime of theft of utility services created under the bill, or prosecution under the general theft statute.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on March 4, 2009:**

The committee substitute:

- Provides that the increased criminal penalty applies solely to violations of existing law that include using utility services without the services being reported for payment or without allowing electricity, water, or gas to pass through a meter provided by the utility company;
- Creates a rebuttable presumption of a person’s intent to unlawfully use utility services without the services being reported for payment if specified facts relating to the manufacture of a controlled substance are established; and
- Revises the effective date to October 1, 2009.

**CS by Criminal Justice on January 14, 2009:**

The committee substitute removes a provision relating to the charging of utility theft.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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<sup>25</sup> See s. 1.01(3), F.S.