

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 Appropriations Subcommittee on Criminal and Civil Justice

BILL: CS/CS/SB 776

INTRODUCER: Communications, Energy, and Public Utilities Committee; Criminal Justice Committee;
and Senator Baxley

SUBJECT: Unlawful Acquisition of Utility Services

DATE: April 12, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Jones</u>	<u>Hrdlicka</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Caldwell</u>	<u>Caldwell</u>	<u>CU</u>	<u>Fav/CS</u>
3.	<u>McAuliffe</u>	<u>Sadberry</u>	<u>ACJ</u>	<u>Favorable</u>
4.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 776 revises provisions relating to utility theft as follows:

- Requires a court to include certain specified amounts in its order for civil damages or restitution related to the theft and labor costs.
- Allows the state to make a prima facie showing of the estimated losses of unlawfully obtained electric services based on any methodology reasonably relied upon by utilities.
- Allows the methodology to consider the estimated start date of the theft and the estimated daily or hourly use of electricity.
- Provides specified criteria to determine the estimated start date of the theft and the estimated daily or hourly use of electricity.
- Requires that once the state has made a prima facie showing the burden shifts to the defendant to demonstrate that the loss is something other than that claimed by the utility.
- Allows the court to order a defendant to pay restitution for damages to the property of a utility or for the theft of electricity for criminal offenses that are causally connected to the utility theft.

The bill may have a positive fiscal impact on public and private utilities to the extent that additional restitution is made to those utilities relating to theft of utilities.

The bill is effective October 1, 2017.

II. Present Situation:

Theft of Utilities and Marijuana

As the cost of electricity increases, the rate of theft of electricity goes up.¹ The utility industry estimates that energy theft losses are \$6 billion a year.² In Canada, the majority of electricity theft comes from the indoor cultivation of marijuana. The United States and Florida in particular are seeing an increase in indoor marijuana grow operations.³

A man in Tampa was arrested for growing marijuana and stealing over \$4,500 in electricity over a 3-month period. Authorities discovered an illegal tap was supplying the unmetered power to the house where the man was growing marijuana.⁴ In Brooksville, Florida, the Withlacoochee River Electric Cooperative informed the Hernando County Sheriff's Office of three different locations where irregular power usage had been detected. The sheriff's office executed search warrants and found extensive marijuana grow operations at all three locations. The cooperative approximated that its total loss due to the theft and labor costs for all three locations was over \$143,000.⁵

Section 812.14, F.S., Theft of Utilities

A utility is any person, firm, corporation, 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 telecommunication service.

Section 812.14(2), F.S., makes it a crime to:

- Willfully alter, tamper with, injure, or knowingly cause to be injured any meter, meter seal, pipe, conduit, wire, line, cable, transformer, amplifier, or other apparatus or device belonging to a utility line service which causes loss or damage or to prevent any meter installed for registering from registering the quantity used;
- Alter the index or break the seal of any meter;
- Hinder or interfere with any meter or device; or
- Knowingly use, waste, or cause the waste of electricity or gas or water passing through any meter, wire, pipe, or fitting, or other appliance or appurtenance connected with or belonging

¹ dTechs Electrical Profile Management, *Power Theft*, available at <http://www.dtechsepm.com/power-theft> (last visited March 16, 2017).

² myPalmBeachPost, *Smart meters help FPL catch more electricity thieves*, Susan Salisbury, (May 8, 2016) available at <http://www.mypalmbeachpost.com/business/smart-meters-help-fpl-catch-more-electricity-thieves/QyE2N4vDV4Mm0WwjQukoXL/> (last visited March 16, 2017).

³ *Supra* note 1.

⁴ Tampa Bay Times, *Man charged with trafficking, growing marijuana using stolen electricity*, (March 20, 2016), available at <http://www.tampabay.com/news/publicsafety/crime/man-arrested-for-trafficking-growing-marijuana-using-stolen-electricity/2270101> (last visited March 16, 2017).

⁵ REALNEWSREALFAST, *Three Charged in Large Marijuana Grow Operation, Nearly \$60K in Stolen Power*, Tom Lemons, (June 23, 2016), available at <http://www.rnrfonline.com/three-charged-in-large-marijuana-grow-operation-nearly-60k-in-stolen-power/> (last visited March 16, 2017).

to any utility, after the meter, wire, pipe or fitting, or other appliance or appurtenance has been tampered with, injured, or altered.⁶

It is also a crime to:

- Make or cause a connection to be made with any wire, main, service pipe or other pipes, appliance, or appurtenance without the consent of the utility and take any service or electricity, gas, or water without the service being measured and reported for payment; or
- Use or receive the direct benefit from the use of a utility with the knowledge, or under such circumstances that would induce a reasonable person to believe, that such use resulted from tampering, altering, or injuring any connection, wire, conductor, meter, pipe, conduit, line, cable, transformer, amplifier, or other apparatus or device owned, operated, or controlled by the utility, for the purpose of avoiding payment.⁷

The penalties for the above-described crimes are based on the value of theft. A theft of utilities valued at:

- \$100,000 or more is a first degree felony;⁸
- \$20,000 or more but less than \$100,000 is a second degree felony;⁹
- \$300 or more but less than \$20,000 is a third degree felony;¹⁰
- \$100 or more but less than \$300 is a first degree misdemeanor;¹¹ and
- Under \$100 is a second degree misdemeanor.¹²

When a person who is in actual possession of property where a device or alteration affecting the registration or reporting of the use of utility services to avoid payment is present, it is prima facie evidence of a violation of s. 812.14, F.S. This presumption does not apply unless the:

- Presence of the device or alteration can be attributed to a deliberate act in furtherance of an intent to avoid payment for utility services;
- Person charged has received the direct benefit of the reduction of the cost of the utility services; and
- Customer or recipient of the utility services has received the direct benefit of the utility service for at least one full billing cycle.¹³

It is a first degree misdemeanor for a person or entity that owns, leases, or subleases property to allow a tenant or occupant to use utility services knowing, or under such circumstances that a

⁶ Section 812.14(2)(a), F.S.

⁷ Section 812.14(2)(b) and (c), F.S.

⁸ Section 812.014(2)(a)1., F.S. A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

⁹ Section 812.014(2)(b)1., F.S. A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁰ Section 812.014(2)(c), F.S. A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. Sections 775.082, 775.083, and 775.084, F.S.

¹¹ Section 812.014(2)(e), F.S. A first degree misdemeanor is punishable by up to 1 year in jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

¹² Section 812.014(3)(a), F.S. A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

¹³ Section 812.14(3), F.S.

reasonable person would believe, that the utility services have been connected in one of the above listed ways.¹⁴ It is prima facie evidence of a person's intent to violate this provision if:

- A controlled substance and materials for manufacturing the controlled substance intended for sale or distribution to another were found in a dwelling or structure;
- 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 that owned, leased, or subleased the dwelling or structure knew of, or under such circumstances believed, that there was a controlled substance and materials for manufacturing a controlled substance in the dwelling or structure, regardless of whether the person or entity was involved in the manufacture or sale of a controlled substance or was in actual possession of the dwelling or structure.¹⁵

Theft of Utility Services for the Purpose of Facilitating the Manufacture of a Controlled Substance

Theft of utility services for the purpose of facilitating the manufacture of a controlled substance is punishable as a theft under s. 812.014, F.S.¹⁶ There is prima facie evidence of a person's intent to violate this provision if:

- The person committed theft of utility services that resulted in a dwelling or structure receiving unauthorized access to utility services;¹⁷
- A controlled substance and materials for manufacturing the controlled substance were found in the dwelling or structure; and
- The person knew of the presence of the controlled substance and materials for manufacturing the controlled substance in the dwelling or structure, regardless of whether the person was involved in the manufacture of the controlled substance.¹⁸

Public Service Commission Rule 25-6.104, F.A.C.

The Public Service Commission regulates the utilities in Florida through market oversight, monitoring the safety, reliability, and services of the utilities and rate base, and economic regulation.¹⁹ The Public Service Commission rules allow a utility to bill a customer in the event of unauthorized or fraudulent use, or meter tampering. The utility may bill for a reasonable estimate of the energy that was used.²⁰

¹⁴ Section 812.14(5), F.S.

¹⁵ Section 812.14(6), F.S.

¹⁶ Section 812.14(8), F.S.

¹⁷ Section 810.011, F.S., defines "dwelling" as a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof; and a "structure" as a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof. ("Curtilage" means the area of land occupied by a dwelling and its yard and outbuildings actually enclosed or considered as enclosed.)

¹⁸ Section 812.14(9), F.S.

¹⁹ My Florida, Public Service Commission, *The PSC's Role*, available at <http://www.psc.state.fl.us/> (last visited March 16, 2017).

²⁰ Rule 25-6.104, F.A.C.

Civil Damages

In a civil action, any person who is found to have committed an offense in s. 812.14, F.S., is liable to a utility involved for an amount equal to three times the amount of the services unlawfully obtained or \$3,000, whichever is greater.²¹

Restitution in a Criminal Case

Section 775.089, F.S., requires a court to order a defendant to make restitution to the victim for:

- Damage or loss caused directly or indirectly by the defendant's offense; and
- Damage or loss related to the defendant's criminal episode.

When a court determines whether to order restitution and the amount of restitution, it must consider the amount of the loss sustained by the victim because of the offense.²²

III. Effect of Proposed Changes:

The bill provides that prima facie evidence includes:

- Person knew *or should have known* of the presence of the controlled substance and materials for manufacturing the controlled substance in the dwelling or structure.

The bill requires a court to include the following amounts in its order for civil damages under s. 812.14(10), F.S., or criminal restitution for theft of electricity:

- The costs to repair or replace damaged property owned by a utility, including reasonable labor costs.
- Reasonable costs for the use of specialized equipment to investigate or calculate the amount of unlawfully obtained electric services, including reasonable labor costs.
- The amount of unlawfully obtained electric services.

The bill allows the state or a utility to make a prima facie showing of the estimated losses of unlawfully obtained electric services based on any methodology reasonably relied upon by utilities. The methodology may consider the estimated start date of the theft and the estimated daily or hourly use of electricity.

The estimated start date of a theft may be based upon one or more of the following:

- The date of an overload notification from a transformer, or the tripping of a transformer, that the utility reasonably believes was overloaded because of the theft of electricity.
- The date the utility verified a substantive difference between the amount of electricity used at a property and the amount billed to the accountholder.
- The date the utility or a law enforcement officer located a tap or other device bypassing a meter.
- The date the utility or a law enforcement officer observed or verified meter tampering.
- The maturity of a cannabis crop found in a dwelling or structure using unlawfully obtained electric services or the number of cannabis crops the utility or a law enforcement officer reasonably believes to have been grown in the dwelling or structure.

²¹ Section 812.14(10), F.S.

²² Section 775.089(6)(a), F.S.

- The date the utility or a law enforcement agency received a report of suspicious activity potentially indicating the presence of the unlawful cultivation of cannabis in a dwelling or structure or when a law enforcement officer or an employee or contractor of a utility observes such suspicious activity.
- The date when a utility observes a significant change in metered energy usage.
- The date when an account with the utility was opened for a property that receives both metered and unlawfully obtained electric services.
- Any other facts or data reasonably relied upon by utilities to estimate the start date of a theft of electricity.

The estimated average daily or hourly use of the electricity may be based upon any, or a combination, of the following:

- The load imposed by the fixtures, appliances, or equipment powered by unlawfully obtained electric services.
- Recordings by the utility of the amount of electricity used by a property or the difference between the amount used and the amount billed.
- A comparison of the amount of electricity historically used by the property and the amount billed while the property was using unlawfully obtained electricity.
- A reasonable analysis of a meter that was altered or tampered with to prevent the creation of an accurate record of the amount of electricity obtained.
- Any other facts or data reasonably relied upon by utilities to estimate the amount of unlawfully obtained electric services.

Once the state or a utility has made a prima facie showing, the burden shifts to the defendant to demonstrate that the loss is something other than that claimed by the utility.

The bill allows the court to order a defendant to pay restitution for damages to the property of a utility or for the theft of electricity for criminal offenses that are causally connected to the damages or losses and bear a significant relationship to those damages or losses. A conviction for theft of utilities is not required for the court to issue a restitution order.

The bill specifies the criminal offenses that bear a significant relationship and are causally connected to a violation of s. 812.14, F.S., include, but are not limited to, offenses relating to the unlawful cultivation of cannabis in a dwelling or structure if the theft of electricity was used to facilitate the growth of the cannabis.

The monetary threshold of any criminal charge does not limit the restitution amount that a defendant may be ordered to pay.

The bill is effective October 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or

municipalities have to raise revenues in the aggregate as such authority existed on February 1, 1989; or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill specifies that criminal offenses that bear a significant relationship, and are causally connected, to a violation of s. 812.14, F.S., include, but are not limited to, offenses relating to the unlawful cultivation of cannabis in a dwelling or structure if the theft of electricity was used to facilitate the growth of the cannabis. Section 775.089, F.S., requires, in a restitution hearing, the state to prove the causal relationship between the defendant's offense and the damages or losses. In *J.S.H. v. State*, 472 So.2d 737, 738 (Fla. 1985), the Florida Supreme Court found that the offense charged does not have to describe the damage done for restitution to be ordered, but that the "damage bear a significant relationship to the convicted offense." If the bill allows restitution to be ordered for the theft of utility services when these requirements are not met, it may be found unconstitutional.

Section 775.089(7), F.S., requires that the state prove the amount of loss sustained by a victim by the preponderance of the evidence. The bill specifies that once the state has made a prima facie showing the burden shifts to the defendant to demonstrate that the loss is something other than that claimed by a utility. If this provision shifts the burden to the defendant without the state having to prove the amount of loss by the preponderance of the evidence, and if the bill treats these defendants differently than any other defendant in a restitution hearing, the bill could be found unconstitutional.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/CS/SB 776 allows the state to seek restitution for utilities for criminal offenses that are causally connected to the damages or losses and bear a significant relationship to those damages or losses. This may result in an indeterminate positive fiscal impact on utilities.

The bill allows utilities to estimate losses of unlawfully obtained electric services based on any reasonably used utility methodology. Utilities could use a methodology that results in the largest estimate of loss, which could have an indeterminate positive fiscal impact on those utilities.

C. Government Sector Impact:

The bill allows the state to seek restitution for utilities in criminal offenses that are causally connected to the damages or losses and bears a significant relationship to those damages or losses. This may result in a positive indeterminate fiscal impact on public utilities.

The bill allows utilities to estimate losses of unlawfully obtained electric services based on any reasonably used utility methodology. Utilities could use a methodology that results in the largest estimate of loss, which could have an indeterminate positive fiscal impact on public utilities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In several instances, the bill provides certain criteria for a prima facie showing that can be used to prove start date of theft or estimated use. Those criteria are “that the utility reasonably believes²³” and “reasonably relied upon by utilities.²⁴” This standard suggests that if the utility believes the evidence is reasonable, such evidence meets the prima facie showing. This standard is different from a more general standard of whether it is reasonable for the utility to rely on such evidence or that the court finds to be reasonable. While all are subjective, the latter standards are less so.

VIII. Statutes Affected:

This bill substantially amends section 812.14 of the Florida Statutes.

IX. Additional Information:

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

CS/CS by Communications, Energy, and Public Utilities Committee on March 28, 2017:

The committee substitute reverts the penalty from grand theft back to current law.

CS by Criminal Justice on March 21, 2017:

The committee substitute:

²³ Section 812.14(11)(b)1.a. and (11)(b)2.e., F.S., of the bill.

²⁴ Section 812.14(11)(b)1.i., F.S., of the bill.

- Removes the references “of a diversion” because s. 812.14, F.S., does not criminalize such behavior or define it.
- Replaces the term “grow house” with the terms “dwelling” and “structure” to provide consistency throughout s. 812.14, F.S.
- Deletes proposed changes that would have included a person acting on the behalf of an owner, lessor, or sublessor as a person who could violate s. 812.14(5), F.S.
- Deletes the proposed change that replaced the term “prima facie evidence” with the term “permissive inference.”
- Provides that theft of utility services for the purpose of facilitating the manufacture of a controlled substance is a grand theft punishable under s. 812.014, F.S.
- Removes the requirement that the amount of taxes be included in a court’s civil damages or restitution order.
- Deletes the proposed change that allowed the number of cannabis crops that could have reasonably been grown to be used to determine the start date of the utility theft.
- Makes technical and stylistic changes.

Changes the effective date from July 1, 2017, to October 1, 2017.

B. Amendments:

None.