

**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.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: SB 776

INTRODUCER: Senator Baxley

SUBJECT: Unlawful Acquisition of Utility Services

DATE: March 20, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Jones	Hrdlicka	CJ	<b>Pre-meeting</b>
2.			CU	
3.			ACJ	
4.			AP	

**I. Summary:**

SB 776 provides that the crime of utility theft is a grand theft, punishable as a third degree felony in s. 812.014, F.S. This results in the repeal of the misdemeanor offenses of utility theft (valued under \$300).

The bill also:

- Replaces the term “prima facie evidence” with the term “permissive inference.”
- 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 or the diversion and the estimated daily or hourly use of electricity.
- Provides specified criteria to determine the estimated start date of the theft or the diversion 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 or diversion of electricity for criminal offenses that are causally connected to the utility theft or diversion.

The bill may have a positive indeterminate fiscal impact on public and private utilities. The bill may also have a positive (increase) prison bed impact. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2017.

## II. Present Situation:

### Theft of Utilities and Marijuana

As the cost of electricity increases, the rate of theft of electricity goes up.<sup>1</sup> The utility industry estimates that energy theft losses are \$6 billion a year.<sup>2</sup> 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.<sup>3</sup>

A man in Tampa was arrested for growing marijuana and stealing over \$4,500 in electricity over a three-month period. Authorities discovered an illegal tap was supplying the unmetered power to the house where the man was growing marijuana.<sup>4</sup> In Brookville, 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.<sup>5</sup>

### 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

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

<sup>2</sup> 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).

<sup>3</sup> *Supra* note 1.

<sup>4</sup> 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).

<sup>5</sup> REALNEWSREALFAST, *Three Charged in Large Marijuana Grow Operation, Nearly \$60K in Stolen Power*, Tom Lemons, (June 23, 2016) <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.<sup>6</sup>

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.<sup>7</sup>

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

Any theft punishable as a felony is referred to as a *grand* theft. A theft punishable as a misdemeanor is referred to as a *petit* theft.<sup>13</sup>

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.<sup>14</sup>

<sup>6</sup> Section 812.14(2)(a), F.S.,

<sup>7</sup> Section 812.14(2)(b) and (c), F.S.

<sup>8</sup> 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.

<sup>9</sup> 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.

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

<sup>11</sup> Section 812.014(2)(e), F.S. 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>12</sup> 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.

<sup>13</sup> Section 812.014, F.S.

<sup>14</sup> Section 812.14(3), F.S.

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 reasonable person would believe that the utility services have been connected in one of the above listed ways.<sup>15</sup> There 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.<sup>16</sup>

***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.<sup>17</sup> 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;<sup>18</sup>
- 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.<sup>19</sup>

***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.<sup>20</sup> 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.<sup>21</sup>

<sup>15</sup> Section 812.14(5), F.S.

<sup>16</sup> Section 812.14(6), F.S.

<sup>17</sup> Section 812.14(8), F.S.

<sup>18</sup> 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.

<sup>19</sup> Section 812.14(9), F.S.

<sup>20</sup> My Florida, Public Service Commission, *The PSC's Role*, available at <http://www.psc.state.fl.us/> (last visited March 16, 2017).

<sup>21</sup> 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 3 times the amount of the services unlawfully obtained or \$3,000, whichever is greater.<sup>22</sup>

### *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.<sup>23</sup>

## III. Effect of Proposed Changes:

### **Theft of Utilities**

The bill provides that the crime of utility theft is a **grand** theft, punishable in s. 812.014, F.S. This results in the repeal of the misdemeanor offenses of utility theft (valued under \$300).<sup>24</sup>

The bill replaces the term "prima facie evidence" with the term "permissive inference." This replacement does not change the effect of portions of s. 812.14, F.S., where this replacement occurs.

The bill provides that there is a permissive inference of the intent of a **person acting on the behalf of an owner, lessor, or sublessor** to violate s. 812.14(5), F.S., if certain conditions are present. However, the bill does not amend s. 812.14(5), F.S., to include **person acting on the behalf of an owner, lessor, or sublessor** in the list of persons to which it applies.

The bill also adds the phrase a **person acting on the behalf of an owner, lessor, or sublessor** to subsection (7). Subsection (7) provides that a violation of subsection (5) is a first degree misdemeanor. However, the bill does not amend s. 812.14(5), F.S., to include a **person acting on the behalf of an owner, lessor, or sublessor** in the list of persons to which it applies.

### ***Theft of utility services for the purpose of facilitating the manufacture of a controlled substance***

The bill amends the following permissive inference condition to include that the:

- 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.

<sup>22</sup> Section 812.14(10), F.S.

<sup>23</sup> Section 775.089(6)(a), F.S.

<sup>24</sup> A person could be charged with petit theft for stealing utility services under s. 812.014, F.S.

### *Civil Damages and Restitution in Criminal Case*

The bill requires a court to include the following amounts in its order for civil damages or restitution:

- 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 any applicable taxes.
- The amount of unlawfully obtained electric services.

The bill 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. The methodology may consider the estimated start date of the theft or diversion and the estimated daily or hourly use of electricity.

The estimated start date of a theft or diversion 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 or diversion 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 account holder.
- 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 grow house or other 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 grow house or other structure.
- 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 grow house or other 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 or diversion 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 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 or diversion 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 grow house or other structure if the theft or diversion 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 July 1, 2017.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **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 grow house or other structure if the theft or diversion 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:**

The bill 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 a positive indeterminate fiscal impact on private utilities.

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

The bill makes the offense of utility theft a third degree felony. The Criminal Justice Impact Conference has not determined the prison impact of this bill, however it may have a positive (increase) indeterminate prison bed impact.



## VI. Technical Deficiencies:

The bill provides there is a permissive inference of the intent of a *person acting on the behalf of an owner, lessor, or sublessor* to violate s. 812.14(5), F.S., if certain conditions are present. However, the bill does not amend s. 812.14(5), F.S., to include a *person acting on the behalf of an owner, lessor, or sublessor* in the list of persons in which it applies. If the intent is to include a *person acting on the behalf of an owner, lessor, or sublessor* in subsection (5), then subsection (5) needs to be amended. If this is not the intention then this phrase should be removed from subsection (6).

The bill also adds the phrase *person acting on the behalf of an owner, lessor or sublessor* to subsection (7), which provides that a violation of subsection (5) is a first degree misdemeanor. If the intent is to include a *person acting on the behalf of an owner, lessor or sublessor* in subsection (5), then subsection (5) needs to be amended. If this is not the intention then this phrase should be removed from subsection (7).

## VII. Related Issues:

The bill replaces the term “prima facie evidence” with the term “permissive inference.” This is likely because of a Florida Supreme Court case that found that the “prima facie evidence” provision in s. 812.14(3), F.S., is constitutional because it creates a “permissive inference.”<sup>25</sup> This replacement is not necessary because the court found s. 812.14(3), F.S., constitutional and could be confusing since the term “permissive inference” is only used in one other place in the Florida Statutes whereas the term “prima facie evidence” is used throughout the Florida Statutes.

The bill repeals the misdemeanor offenses of utility theft. However, the bill does not repeal the misdemeanor offenses for the theft of utility services for the purpose of facilitating the manufacture of a controlled substance.

The bill provides for restitution for the theft or *diversion* of electricity. The bill removes the one reference of a *diversion* from s. 812.14, F.S. It is unclear how a person can be liable for restitution for the *diversion* of electricity when s. 812.14, F.S., does not criminalize such behavior or define it.

Section 812.14, F.S., uses the terms “dwelling” and “structure” in reference to the places that controlled substances could be located or manufactured. The bill uses the term “grow house” to refer to structures where cannabis is found and does not define the term. For consistency purposes, the terms “dwelling” and “structure” could be used.

The bill requires the amount of taxes be included in a court’s restitution order. It is unclear why this inclusion is necessary because taxes are paid to the state.

The bill allows for the maturity of a cannabis crop or the number of cannabis crops that could have reasonably been grown to be used to determine the start date of the utility theft. It is unclear how this is a reasonable determination of the start date of a theft of utilities.

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<sup>25</sup> *Marcolini v. State*, 673 So.2d 3, 6 (Fla. 1996).

The bill makes numerous changes to the offense of utility theft. An October 1, 2017, effective date may be appropriate to provide notice of the proposed changes.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 812.14 and 812.014.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**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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