

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 879 Unlawful Acquisition of Utility Services
SPONSOR(S): Justice Appropriations Subcommittee; Burgess, Jr.
TIED BILLS: None. **IDEN./SIM. BILLS:** CS/CS/SB 776

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy & Utilities Subcommittee	14 Y, 0 N	Voyles	Keating
2) Justice Appropriations Subcommittee	11 Y, 0 N, As CS	Smith	Gusky
3) Commerce Committee			

SUMMARY ANALYSIS

Section 812.14, F.S., establishes a variety of crimes involving the theft of utility services. A violation of any of the provisions in s. 812.14, F.S., triggers the criminal penalties in the general theft statute, s. 812.014, F.S.

The bill revises s. 812.14, F.S., relating to utility theft as follows:

- Requires a court to include certain specified amounts in its order for civil damages or criminal restitution related to the theft of electricity:
 - Costs to repair or replace damaged property owned by a utility, including reasonable labor costs.
 - Reasonable costs, including labor costs, for the use of specialized equipment to investigate or calculate the amount of unlawfully obtained electricity services.
 - The amount of unlawfully obtained electricity services.
- 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, and provides specified criteria to determine, the estimated start date of the theft and the estimated daily or hourly use of electricity.
- Provides 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 a utility's property or for the theft of electricity for criminal offenses that are casually connected to the theft of electricity.

The Criminal Justice Impact Conference (CJIC) met on March 31, 2017, and determined the bill would have a no impact on prison beds.

The bill does not appear to impact local government revenues or expenditures.

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 the theft of electricity.

This bill provides an effective date of October 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Theft of Utility Services

Section 812.14, F.S., establishes a variety of crimes involving the theft of utility services. In particular, it is unlawful for a person to:

- Willfully tamper with any meter or other device belonging to a utility to cause loss or damage, prevent any meter installed for registering electricity, gas, or water from properly registering service, or knowingly use electricity or gas or water passing through any such meter or other device after it has been tampered with;
- Connect with any wire, main, service pipe or other pipes, appliance, or appurtenance without the consent of the utility and to take any service or any electricity, gas, or water, without such service being measured or reported for payment; or
- Use, or receive the direct benefit from the use of, a utility service with the knowledge, or under circumstances that would induce a reasonable person to believe, that such use resulted from tampering with any connection, wire, conductor, meter, pipe, conduit, line, cable, transformer, amplifier, or other device owned, operated, or controlled by the utility, for the purpose of avoiding payment.¹

Section 812.14, F.S., applies the criminal penalties in the general theft statute, s. 812.014, F.S., to these offenses. The offenses involving property valued at \$300 or more are considered grand theft.² Section 812.014, F.S., provides that if the stolen property is valued at:

- \$100,000 or more, the offense is a first degree felony;³
- \$20,000 and \$100,000, the offense is a second degree felony;⁴
- \$300 and \$20,000, the offense is a third degree felony;⁵
- \$100 and \$300, the offense is a first degree misdemeanor;⁶ and
- \$100 or not otherwise specified in s. 812.014(2), the offense is a second degree misdemeanor.⁷

Section 812.14, F.S., establishes criminal liability for a person or entity that owns, leases, or subleases a property and permits a tenant or occupant to use utility services while knowing, or under such circumstances as would induce a reasonable person to believe, that the utility services have been connected in violation of any of the above stated provisions.⁸ The law establishes certain elemental facts that provide prima facie evidence of a violation by the owner, lessor, or sublessor.

¹ s. 812.14(2)(a)-(c), F.S.

² Section 812.014(2)(d), F.S., establishes that it is a third degree felony if the property stolen is valued at \$100 or more, but less than \$300, and is taken from a dwelling or from the unenclosed curtilage of a dwelling. If the stolen property is valued between \$100 and \$300, the offender commits petit theft of the first degree. Theft of any property not specified in s. 812.014(2), F.S., is considered petit theft of the second degree and a second degree misdemeanor. ss. 812.014(2)-(3), F.S.,

³ s. 812.014(2)(a), F.S. A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

⁴ s. 812.014(2)(b), F.S. A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

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

⁶ s. 812.014(2)(e), F.S. A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

⁷ s. 812.14(3)(a), F.S.

⁸ s. 812.14(5) and (7), F.S.

Section 812.14(8), F.S., provides that theft of utility services for the purpose of facilitating the manufacture of a controlled substance is a first degree misdemeanor.⁹

Calculation of Damages

In a civil action, if a person is found in violation of s. 812.14, F.S., they are liable to the utility involved for an amount equal to 3 times the amount of services unlawfully obtained or \$3,000, whichever is greater.¹⁰ The law does not provide a methodology for calculating the amount of service unlawfully obtained.

For purposes of providing an administrative remedy, the Public Service Commission's rules state that "[i]n the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used."¹¹ The rule allows the utility to retroactively charge the customer for a reasonable estimate of the electricity used but not metered due to meter tampering. The utility need not demonstrate who tampered with the meter, only that the meter was tampered with, and that the customer of record benefitted from the electricity. An estimation of the energy used is dependent on the retroactive billing period and the estimated average use during that period.

Effect of Proposed Changes

Theft of Utility Services

The bill amends s. 812.14(9)(c), F.S., adding that it is prima facie evidence of a person's intent to violate s. 812.14(8), F.S., if a person "should have known" of a presence of the controlled substance and materials for manufacturing the controlled substance in the dwelling or structure. The additional language potentially lowers the standard of proof in determining a person's intent to violate the statute.

Damages Recovered in a Civil Action

The bill establishes mechanisms for determining a defendant's liability for civil damages or criminal restitution for the theft of electricity. The bill first identifies criteria and elements that must be included when determining a defendant's liability and requires the amount of civil damages or a restitution order to include all of the following:

- 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 electricity services, including reasonable labor costs; and
- The amount of unlawfully obtained electricity services.

The bill also establishes criteria for the methodology used to estimate losses in order to make a prima facie showing of the amount of unlawfully obtained electricity services. The bill provides this prima facie showing may be based on any methodology reasonably relied upon by a utility to estimate such loss. The methodology may consider the estimated start date of the theft and the estimated daily or hourly use of electricity. The bill provides that once this prima facie showing has been made, the burden shifts to the defendant to demonstrate that the loss is other than that claimed by the utility.

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

⁹ s. 893.02(4), F.S., defines "controlled substance" as any substance named or described in Schedules I-V of s. 893.03, F.S.

¹⁰ s. 812.14(10), F.S.

¹¹ Rule 25-6.104, F.A.C.

- The date of an overload notification from a transformer, or the tripping of a transformer, which the utility reasonably believes was overloaded as a result 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 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 dwelling or structure using unlawfully obtained electricity services the utility or a law enforcement officer reasonably believes to have been grown in the dwelling or 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 dwelling or structure or the date a law enforcement officer or an employee or contractor of a utility observed such suspicious activity.
- The date when a utility observed 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 electricity services.
- Any other fact or data reasonably relied upon by the utility to estimate the start date of a theft of electricity.

These techniques may serve as an accurate way to pinpoint a beginning date for the violation and allow prosecutors and judges to have more certainty when assessing potential restitution.

The bill provides that 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 electricity 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 fact or data reasonably relied upon by utilities to estimate the amount of unlawfully obtained electricity services.

The bill provides that a court order requiring a defendant to pay restitution for damages to the property of a utility or for the theft of electricity need only be based on a conviction for a criminal offense that is causally connected to the damages or losses and bears a significant relationship to those damages or losses. The bill specifically details that a conviction for a violation is not a prerequisite for a restitution order. Under this bill, criminal offenses that bear a significant relationship and are causally connected to a violation can result in a defendant being ordered to pay restitution for damages.

The bill adds that the amount of restitution that a defendant may be ordered to pay is not limited by the monetary threshold of any criminal charge on which the restitution order is based. This provision would allow the restitution for damages to go beyond the monetary threshold ranges that are associated with the criminal charge of theft of utilities.

The bill creates a presumption, through the use of the phrase “prima facie showing,” favoring the calculations of losses by the utilities if the utility relies on a methodology detailed above to estimate their losses. Once the amount of the loss the utility incurred is established through the methodology, the burden shifts to the defendant to demonstrate that the loss is something other than the amount calculated by the utility.

While there is not current state case law to support the permissibility of presumptions in the restitution context, there is the basis that evidentiary presumptions are often allowed in civil lawsuits, but not criminal. Since restitution proceedings are not fully civil or criminal, the permissibility of presumptions in the restitution context could be subject of future legal challenges.

Clarification of Language

The bill clarifies s. 812.14, F.S., by removing archaic language, simplifying overly long sentences containing substantive information, and eliminating use of passive voice.

B. SECTION DIRECTORY:

Section 1. Amends s. 812.14, F.S., relating to theft of utility services.

Section 2. Provides an effective date of October 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.
2. Expenditures: The Criminal Justice Impact Conference (CJIC) met on March 31, 2017, and determined the identical Senate companion bill would have no impact on prison beds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.
2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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 the theft of electricity.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill replaces the term “marijuana” with the term “cannabis,” which is not defined in this section or chapter. “Cannabis” is defined elsewhere in the Florida Statutes. The bill could be clarified by providing a cross-reference to the definition.

The bill creates a presumption, through the use of the phrase “prima facie showing,” that appears to favor the calculations of losses by a utility if the utility relies on a methodology detailed in the bill or any other methodology reasonably relied upon by utilities. Once the amount of the loss is established, the burden shifts to the defendant to demonstrate that the loss is something other than the amount calculated by the utility. The bill appears to provide utilities with broad discretion to establish the basis for a prima facie showing of the amount of damages, though a utility must demonstrate that the methodology used for its calculations, if not detailed in the bill, is one reasonably relied upon by utilities.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 17, 2017, the Justice Appropriations Subcommittee adopted one strike all amendment and reported the bill favorably as a Committee Substitute (CS). The CS is identical to the Senate companion bill, and differs from the original bill in that the CS:

- Replaces “Permissive Interference” with “Prima Facie Evidence”;
- Removes language that would reclassify any violation of s. 812.14, F.S. as grand theft, therefore removing a positive fiscal impact;
- Replaces the term “grow house” with “dwelling”;
- Changes the effective date from July 1, 2017 to October 1, 2017;
- Makes other technical and language changes to conform the bill to the Senate companion.

This analysis is drafted to the CS as passed by the Justice Appropriations Subcommittee.