

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
 v.)
)
 COMMONWEALTH EDISON,)
)
 Defendant,) No. 20 CR 368
)
 and)
)
 TIMOTHY J. HUFMAN,)
)
 Third-party Movant.)

**MOTION FOR LEAVE TO APPEAR AND
ESTABLISH PROCEDURES FOR THE CALCULATION
AND AWARD OF RESTITUTION TO NON-FEDERAL VICTIMS**

Introduction

Movant, Timothy J. Hufman, through The Peacock Law Group and Joseph A. Stewart, and pursuant to 18 U.S.C. § 3771(d) of the Crime Victims’ Rights Act (CVRA), asks this court to protect his rights and to grant him relief, as described below, specifically, relief from the \$200,000,000 fund of money created by the deferred prosecution agreement (DPA) recently entered between the United States of America and Commonwealth Edison (hereinafter “ComEd” or “the criminal defendant”). Movant seeks to ensure that the fund created in this case can be devoted first to the statutory priority of victim restitution.

The DPA describes a bribery scheme that ComEd funded with millions of dollars provided by Illinois ratepayers. Although the DPA does not quantify the

bribe money that ComEd disbursed over the 9-year life of ComEd's criminal scheme, Movant estimates that amount at \$25 million as a placeholder for the sake of argument herein. Whatever the exact number and amount of bribes actually paid by ComEd, the collective value of ComEd's bribe payments typically sets the legal floor for the quantum of criminal restitution.

Ratepayers unknowingly funded ComEd's bribery scheme, which the DPA describes as extensive, and ComEd, through its bribes thus illegally dissipated millions of dollars in ratepayer money. A regulated utility may not spend any of its treasury on illegal payments, and "funding bribery" is, to say the least, not on the standard accounting matrix spreadsheet or a recognized expense in the parlance of standard accounting procedures. The DPA also alleges that ComEd intended its bribery scheme to net in excess of \$150 million dollars in favorable legislative treatment for ComEd, also to the further detriment of ratepayers, notwithstanding ComEd's myriad recent public relations statements.

The amount of ComEd's gain from its bribery scheme might be substantially larger than \$150 million: one local news organization has pegged ComEd's actual gain at many hundreds of millions of dollars.¹ Nonetheless, for the purposes of

¹ See "The True, High Cost We're All Paying for ComEd's Springfield Corruption" by Dan Mihalopoulos of WBEZ radio. (accessed (8/9/2020) (<https://www.npr.org/local/309/2020/07/24/895045124/the-true-high-cost-we-re-all-paying-for-com-ed-s-springfield-corruption>)).

argument, Movant relies on the lower amount stated in the DPA (\$150,000,000), which ComEd appears to accept with one hand and reject with the other.

Exacerbating further this enormous, illegally expedited transfer of wealth from ratepayers to ComEd the government and ComEd propose in the DPA that the ratepayers' loss should be *doubled*. The government and ComEd propose to allow ComEd to use *another* \$200 million of ratepayer money to fund the payment of a fine - during a global pandemic that is stressing most Illinois residents and businesses, many of whom rely on ComEd to light and cool their homes and businesses.

By statute, any fine paid by ComEd must be deposited in the General Fund of the United States Treasury - not the Crime Victims' Fund that ordinarily receives criminal fine money paid at the conclusion of a prosecution.² ComEd's "payment" of its fine thus will further injure ComEd's victim-ratepayers, including Movant.

Worse, despite ComEd's agreeing with "all" the facts laid out in the DPA, ComEd has, since its arraignment, changed its story. Through advertising and

² DOJ's Justice Manual explains in relevant part that:

When considering whether to enter into a non-prosecution or deferred prosecution agreement with the defendant, prosecutors should consider the interests of any victims and be aware that any fines collected under such agreements will *not be deposited into the Crime Victims Fund, but will rather go to the General Fund of the Treasury*.

Justice Department Manual at section 9-28.200 (citing § section 9-28-1400) (emphasis supplied) (accessed 8/9/2020 at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.200>)

other public-relations initiatives, ComEd appears to be flouting *all* the facts set forth in the DPA showing that Commonwealth Edison knowingly committed acts of bribery.

The court consequently should make ComEd's victims whole from past injury and protect them from additional imminent injury. In the parties' proposed resolution of this case, however, not a penny is going to alleviate *any* crime victim's losses, including the state of Illinois and ComEd ratepayers, who will be specific victims at least thrice over in this case should the DPA be executed and the fine paid to the Treasury. Ratepayers have borne the \$175 million cost to date of ComEd's crimes, but the parties to the DPA are asking the ratepayers to bear the additional costs of ComEd's \$200,000,000 fine.³

Notwithstanding the current posture of this case, multiple statutes provide that restitution owed non-federal crime victims in federal criminal proceedings is

³ The DPA purports to limit the source of the fine payment to funds whose expenditure will not be used as a basis for a tax deduction or sourced from a ratepayer surcharge to reimburse ComEd for such an expenditure. The DPA also allows Exelon, ComEd's parent, to be the source of funds (DPA at 10) but does not put any strictures on Exelon's source of funds. Movant fails to see how this prevents accounting magic to nullify these "impediments" and allow ComEd, *sub silentio*, to foist the burden of its fine on ratepayer-sourced funds. Moreover, while compliance in other matters is addressed, the DPA contains no provision that indicates the United States Attorney's Office has in place any agreed, due diligence measures it will undertake, and with which ComEd will cooperate, *e.g.*, providing for an audit of the source of funds ComEd used to make its fine payment and corresponding compliance provisions in the DPA itself. ComEd, therefore, can with impunity violate the DPA by using ratepayer-sourced dollars to pay, offset, or reimburse ComEd, for "properly sourced" fine money (that again is only ambiguously described in the DPA).

entitled to *absolute* and unconditional priority over any fine or restitution owed to the federal government. Thus, not only has the government created a situation where ratepayers are essentially paying ComEd's criminal fine, the government is compounding the victim's injury by taking the \$200 million *in derogation of the victim's priority right to full restitution*.

Illinois ratepayers and the State plainly are the non-federal crime victims of ComEd's bribery scheme. First, under Seventh Circuit law, the state of Illinois is a presumed victim of an 18 U.S.C. § 666 program bribery charge. Despite ComEd's advertisements to the contrary, bribery schemes are by nature *not* a victimless crime. Second, Illinois ratepayers have funded the \$150 million "benefit" defendant admits it sought as the *quid pro quo* for the multiple payoffs ComEd made in its bribery scheme.

It is noteworthy that the government had the opportunity to press restitution claims against ComEd, but it did not do so. By its inaction, and without lawful authority, the government apparently proposes to forfeit statutory restitution claims the non-federal victims have against ComEd, because the DPA provides not a cent for restitution. Essentially, the federal government is, without authority, monetarily preferring itself.

Absent the remedial action that Movant proposes, the government's proposed resolution will nullify the non-federal victims' priority restitution rights. To thwart the government's unauthorized preference for its fine to the detriment of all the non-federal victims, the Movant

- seeks the court’s leave to (i) appear in this case—aware that court’s primary goal is to adjudicate ComEd’s guilt or innocence in compliance with the Speedy Trial Act—for the limited secondary purpose of protecting the non-federal victims’ interest in the \$200 million restitution fund ComEd has created, and (ii) advocating for restitution in full to the non-federal victims of ComEd’s crimes, in compliance with just one of their heretofore overlooked rights - the “right to full and timely restitution as provided in law” as guaranteed by the federal Crime Victims’ Rights Act;
- seeks an immediate order: (i) enjoining ComEd from transferring any of the \$200 million to the United States Treasury’ General Fund and (ii) requiring ComEd to transfer the funds instead to the Clerk of Court, so the court can preserve and safeguard the fund for non-federal victims;
- seeks an order creating a fund (the “ComEd Restitution Fund”) from which judicially determined, non-federal restitution can be paid; and
- asks the court to determine the scope and magnitude of the losses and
- restitution owed to the non-federal victims and thereby account for and protect the restitution rights of the non-federal victims.

The Movant further seeks the appointment of a special master under 18 U.S.C. § 3664(d)(6) to investigate the restitution claims and to advise the court on the scope and magnitude of restitution. In further support of the relief that it seeks, Movant states as follows:

Parties

1. Movant is Timothy J. Hufman, Esq., a resident of the Northern District of Illinois. Prior to deactivating his law license, Mr. Hufman was an attorney representing indigent and low-income clients for nearly four decades at the Legal Assistance Foundation of Greater Chicago (n/k/a Legal Aid Chicago). Mr. Hufman is one of the many rate-paying non-federal victims of ComEd’s bribery

scheme: he pays not only ComEd's utility bill for his residence, but also pays ComEd's utility bill issued to his son, who also resides in the Northern District of Illinois.

2. Movant estimates the victim restitution claim against ComEd to be not less than \$175,000,000. Movant seeks to ensure that a fund is established for the benefit of any court-designated, non-federal victims, which includes the Movant as one of ComEd's ratepayers. Movant seeks an orderly process to adjudicate restitution claims. For himself, personally, Movant seeks to avoid paying even one cent of ComEd's fine. If allowed discovery from the government and ComEd, Mr. Hufman also wants to calculate exactly how much in bribe money ComEd paid over the course of ComEd's 9-year bribery scheme, so he can begin calculating the actual loss for restitution.

3. Movant will provide a copy of the instant motion to the Illinois Attorney General, Kwame Raoul, so that the Illinois Attorney General's Office is formally advised of their rights under the federal Crime Victim's Rights Act as that office is both the legal representative of the state of Illinois and the statutorily designated representative of utility ratepayers. On information and belief, the United States Attorney's Office neglected to provide the Illinois Attorney General with statutorily mandated notice of the numerous CVRA rights his office possesses in this case, as was the United States Attorney's legal obligation to do under the CVRA. In at least three respects, the United States Attorney violated the Crime Victims' Rights Act when he failed to advise the Illinois Attorney General of the

latter's rights to: "(A) "full and timely restitution as provided in law." (18 U.S.C. 3771(a)(6)); (B) "to be informed in a timely manner of any plea bargain or deferred prosecution agreement (*id.* at (9); and (C) "to be informed of the [victim's] rights under [the CVRA]" (*id.* at (10)).

4. Commonwealth Edison, as an organization, is described in the Information as the largest utility in Illinois, serving almost three-quarters of Illinois citizens. ComEd is wholly owned by Exelon Corporation, which

- is headquartered in Chicago
- provides energy services nationwide and in Canada
- had annual gross revenues of \$34 billion in 2019; and
- nationwide employs about 33,400 people.⁴

Should ComEd be convicted of this bribery charge, it faces a maximum penalty of a \$480 million fine for the one count (DPA at para. 9), along with any restitution liability to the victims, which Movant estimates may equal or exceed \$175 million.

5. The United States lodged an information against ComEd (dated July 17, 2020). Dkt. 1. The United States and ComEd entered a Deferred Prosecution Agreement (dated July 16, 2020). Dkt. 2. The information charges ComEd in one count with a wide-ranging bribery scheme that violated 18 U.S.C. § 666.

Jurisdiction

⁴ See Exelon Corporation's website (accessed 8/9/2020) (<https://www.exeloncorp.com/company/about-exelon>)

6. This Motion contemplates a *civil* proceeding with Movant as the designated proponent for restitution, which might be opposed by ComEd. In the proposed civil proceeding, the sole issues would be the total amount of ComEd's restitution liability, the priority of payment from the ComEd Restitution Fund, and the amounts to be disbursed to individual non-federal victims (ratepayers and the State).

7. The district court has jurisdiction over the underlying criminal case against ComEd—that, *inter alia*, will adjudicate ComEd's criminal restitution liability—under 18 U.S.C. § 3231 (providing “original jurisdiction . . . of all offenses against the laws of the United States”).

8. The district court has jurisdiction over the contemplated civil proceeding; the court routinely adjudicates criminal defendants' restitution liability as statutorily mandated under the Mandatory Victim Restitution Act, 18 U.S.C. §§3663, 3663A, and 3664 (principal sections of MVRA).

9. The court also has jurisdiction to hear claims with respect to violations of the Crime Victim's Rights Act (CVRA), 18 U.S.C. § 3771.

10. The court has *in rem* jurisdiction over the fund of money created by the DPA, and, therefore, ancillary jurisdiction to decide priority of restitution from that fund.

11. Furthermore, the court can award process to private victims to enforce any restitution award it enters. 18 U.S.C. § 3664(m)(1)(B) (authorizing clerk of court to issue abstract of judgment, “certifying judgment” for victim for amount

restitution order sets). The awardable process also includes prejudgment remedies (i.e., “intermediate relief”). *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 326 (1999) (generally, it is appropriate for the district court “to grant intermediate relief of the same character as that which may be granted finally”) (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945)).

12. The contemplated civil proceeding is intended to

- stop the transfer of \$200 million to the U.S. Treasury;
- direct ComEd to deposit the funds with the Clerk of Court so the Clerk may create and manage a fund to *first pay restitution until satisfied or the fund is exhausted*, with any residue paid to the United States Treasury (the “The ComEd Restitution Fund”); and
- create an orderly process that (i) obtains fact discovery as to restitution loss amounts, and (ii) determines victims’ entitlement to restitution under the Mandatory Victims Restitution Act, as well as any related issues, and thereafter to further determine that the judicially ascertained victims have priority to the fund over any claim of the United States.

13. Movant also seeks appointment of a special master under 18 U.S.C. § 3664(m)(1)(B) (allowing appointment to prepare “...proposed findings of fact and recommendations as to disposition [of restitution], subject to a de novo determination of the issue by the court...”).

14. Venue is proper in the Northern District of Illinois because this court already presides over the federal criminal case against ComEd and, by statute, restitution claims are adjudicated in the same case. 18 U.S.C. § 3664.

Background

The Underlying Criminal Case

15. The information accuses ComEd of a bribery scheme in violation of 18 U.S.C. § 666. Dkt. 1, Information.

16. The bribery scheme in which ComEd admits its participation is a mandatory restitution offense under federal law. The Movant estimates that, if convicted, ComEd's restitution liability will equal or exceed \$175,000,000.

17. The non-federal criminal victims' federal right to payment of restitution forms the basis for Movant's claim in this case, which is analogous to a "claim" under the Federal Debt Collection Procedures Act ("FDCPA"). 28 U.S.C. § 3301(3) (defining claim as "...a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured...").

The Deferred Prosecution Agreement

18. The DPA is dated July 16, 2020.

19. Attachment A to the DPA is an Agreed Statement of Facts to which the parties stipulated. At the August arraignment, the district court ascertained that the signatures on the DPA for ComEd were genuinely that of ComEd's legal representative, and that ComEd agreed to the DPA after consultations with the boards of directors of ComEd and its corporate parent, Exelon. DPA at p. 19.

20. The Agreed Statement of Facts is eight pages in length and details the sustained, nine-year scheme of bribery (2011-2019) meant to curry favor with

“Public Official A” and Public Official A’s political allies. Certain senior executives of ComEd, including those designated as “CEO-1” and “Senior Executive 1,” knew that the scheme’s multifaceted and complex payment structure was designed to conceal the illegal nature of the benefits extended to Public Official A’s associates (*e.g.*, awarding contracts to Public Official A’s associates and making monthly cash payments to others, giving jobs to students of favored officials, *etc.*). DPA, p. A-5.

21. Illinois ratepayers funded the charged criminal bribery scheme *and* funded the \$150 million or more profits that ComEd obtained as a result of its criminal conduct (DPA at para. 9(a)).

22. As a part of the DPA, ComEd has agreed to pay the federal government \$200,000,000 - denominated as a “fine” - which Illinois ratepayers apparently will fund, although federal law presumes the charged organization alone pays the fine—the only punishment that can be visited upon an organization. 18 U.S.C. § 3572(f) (entitled “Responsibility for Payment of Monetary Obligation Relating to [Criminal Defendant] Organization”). This brings the Illinois ratepayers’ estimated losses to more than \$350,000,000.

23. The words “ratepayer,” “victim,” or “restitution” appear nowhere in the Information and the DPA, including all attachments, even though commercial bribery, the essential charge against ComEd, almost never occurs without a “victim.” As the 7th Circuit recognizes, the total of bribes paid is “of course” a reliable “minimum estimate” of restitution loss “on the theory that no one would pay a bribe who didn’t anticipate garnering net additional revenue at least equal to

the amount of the bribes; and that additional revenue is, at least as a first approximation” the loss of the party whose agent was bribed. *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004). ComEd, however, disputes settled Seventh Circuit law and claims that *this* criminal defendant’s bribery scheme “didn’t anticipate garnering net additional revenue at least equal to the amount of the bribes.”

24. Despite ComEd’s cramped reading of precedent, it is practically axiomatic that a bribery conviction entails a third party suffering a pecuniary loss as a result of the bribery scheme, which is, by statute, the essential definition of a “victim” entitled to mandatory restitution. 18 U.S.C. § 3663A((a)(2)).⁵

The Arraignment Hearing

25. Movant listened in at the August 5, 2020 arraignment (held telephonically). Again, the parties did not mention the words “ratepayer,” “victim,” or “restitution.” Moreover, the parties asked the court to schedule the next status date three years hence, in August 2023, and intend to return to court to dismiss the case *without* paying restitution to the victims.

⁵ In relevant part the statute reads,

For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.

18 USCS § 3663A(a)(2).

26. The conclusion of the hearing and three-year stay of prosecution essentially guarantee that, absent Movant's intervention, restitution will *never* be raised in the ordinary course of this federal criminal prosecution. First, as the parties verified at the arraignment, a plea agreement will not be submitted to the court; absent a plea agreement, there is no vehicle for either the discussion of, or an agreement as to, restitution. Second, the procedural posture of this case also obviates preparation of a Pre-Sentencing Report ("PSR"), another procedural vehicle that, on information and belief, usually addresses restitution and the other financial penalties associated with a federal criminal conviction. Reinforcing that conclusion is the fact that, should ComEd default on its obligations under the DPA, and should the government resume prosecuting this case to conviction, the DPA lists all the financial obligations to which the criminal defendant may be exposed (*e.g.*, an increased fine payable to the United States), but restitution is *not* listed as among the possible financial consequences of the breached DPA.

27. In sum, given the next hearing date is three years hence and is intended by the parties to result in the dismissal of the criminal charges against ComEd without any restitution, victim restitution will never be considered in this case but for the Movant's intervention.

28. However, the DOJ's *Justice Manual* observes that DPAs can accomplish important objectives of corporate prosecution, "...like prompt restitution and other compensation for victims." DOJ *Justice Manual* at section 9-28-100. Section 9-28-200, which delineates issues prosecutors must consider when deciding

whether to enter into a deferred prosecution agreement with a defendant, states that “...prosecutors should consider the interests of any victims and be aware that any fines collected under such agreements will go into the general fund of the U.S. Treasury.” That section further identifies one principle consideration of DPA’s to be “restitution for victims.” That and other federal prosecution goals are again reiterated in *Justice Manual* section 9-28.300 and lists them specifically, including the following:

“7. [fostering] the corporation’s remedial actions, including, but not limited to, . . . pay restitution . . . (see JM 9-28.1000); and

“11. [fostering] the interests of any victims”

29. The DOJ’s Justice Manual section 9-28.1400 elaborates on the necessity of considering restitution to victims:

A. General Principle: In deciding whether to charge a corporation, prosecutors should consider the interests of any victims.

B. Comment: It is important to consider the economic and psychological impact of the offense, and subsequent prosecution, on any victims. Prosecutors should take into account such matters as the seriousness of the harm inflicted and the victim’s desire for prosecution. Prosecutors should solicit the victim’s views on major case decisions such as dismissals, plea negotiations, *and pre-trial diversion, in accordance with the Crime Victims’ Rights Act and Attorney General Guidelines for Victim and Witness Assistance.*”

Id. (emphasis supplied). These quotations from the Justice Manual are not provided as an actionable basis for the Movant’s relief but rather to illustrate what DOJ institutionally regards as a vision of complete justice in the context of deferred prosecution agreements, as informed by the relevant statutes. That

vision necessarily and plainly contemplates the award of restitution in the context of a DPA.

The Funds Transfer Pursuant to the DPA

30. The DPA contemplates that ComEd will pay a \$200 million criminal fine in two installments of \$100 million on or about August 16, 2020, and October 16, 2020. DPA at para. 10.

31. On information and belief, the U.S Attorney's Office has provided or will provide ComEd with wire transfer instructions, permitting ComEd to wire such amounts from its bank directly into the U.S. Treasury Fund.

32. With regard to the \$200 million payment, the United States has, as a species of property interests, a mere contract expectancy, one created by its agents' signature on the DPA. Most importantly the government's interest is an *unsecured* property interest. The putative nonfederal victim equally has an unsecured claim for restitution, but that claim is fortified by a statutory priority given to the non-federal victim's interest in the \$200 million fund.

The Legal Standard

A. ComEd's statutory liability for mandatory restitution and the absolute priority of non-federal victims' right to restitution

33. The 7th Circuit has specifically held that, in a § 666 prosecution, the total amount of money or value given over in a bribery scheme is a starting point in calculating the convicted defendant's restitution liability. And, when offered as the sole basis for the restitution amount, the total amount of money or value given over

in a bribery scheme is itself “exactly what the victim lost and thus is an appropriate award” under the MVRA. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005). In *Gee*, the court affirmed the award of restitution equal to the amount paid to the president of the Wisconsin state senate to “grease” the passage of favorable legislation, the same conduct in which the government accuses ComEd of participating (*i.e.*, bribing Public Official A, as the Speaker of the Illinois House). *See also Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004). (No one pays a bribe without anticipating additional revenue at least equal to the bribe.)

34. The enforcement scheme for federal criminal fines and restitution gives absolute, unconditional priority to the payment of non-federal victims, subordinating any interest of the federal government in the payment of fines and restitution.

35. Section 3612(c) provides in full:

(c) Responsibility for collection. The Attorney General shall be responsible for collection of an unpaid fine or restitution concerning which a certification has been issued as provided in subsection (b). . . . **Any money received from a defendant shall be disbursed so that each of the following obligations is paid in full in the following sequence:**

- (1) A penalty assessment under section 3013 of title 18, United States Code [18 USCS § 3013].
- (2) **Restitution** of all victims.
- (3) All other **fin**es, penalties, costs, and other payments required under the sentence.

18 USCS § 3612(c) (emphasis supplied). Payment of criminal fines to the United States thus is always subordinated to the payment of federal or non-federal restitution.

36. If federal and non-federal restitution creates a conflict as to payment priority, the law prioritizes the non-federal victim over the government. In relevant part, § 3664, provides that:

In any case in which the United States is a victim, **the court shall ensure that all other victims receive full restitution before the United States receives any restitution.**

18 U.S.C. § 3664(i) (emphasis supplied).

37. Federal law also mandates that the sentencing court not impose on a criminal defendant a fine-payment obligation that would “impair” the defendant’s ability to pay restitution.⁶ The DOJ also has a policy of making restitution payments (remedial relief extended to victims) a priority over punishment in the form of forfeitures. DOJ’s internal guidelines specify that any property the government seeks to forfeit must be devoted first to unpaid restitution before it is finally forfeited. See “*Guidelines and Procedures for Restoration of Forfeited Property to Crime Victims via Restitution in lieu of Remission*” located at DOJ

⁶ 18 U.S.C. 3572 entitled, “Fine Not to Impair Ability to Make Restitution,” provides, “if, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty **only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.**”

Forfeiture Policy Directive 02-1 and set forth in Chapter 13 of the DOJ Asset Forfeiture Policy Manual.

B. The framework for enforcing victim rights under the CVRA

38. The government lawyer has a legal obligation to assert and prove the full extent of a victim's financial loss for purposes of establishing ComEd's restitution liability. 18 U.S.C. § 3664(e). There is nothing in the public record of this case, however, indicating that the parties, and especially the duty-bound government lawyer, gave consideration to the losses victims in this case have already suffered, losses actually compounded by the DPA because of the absence of restitution.

39. To ensure that crime victims receive the restitution to which they are entitled, Congress passed the Crime Victims' Rights Act in 2004 (CVRA). 18 U.S.C. § 3771. Subsection(a) lists out the many rights federal law accords a victim.⁷ The

⁷ 18 U.S.C. § 3771. Subsection (a) provides that "[a] crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the

district court is charged with enforcing the CVRA. *Id.* at § 3771(b)(1) (“In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)...”). An attorney for the government or for the victim can assert the victim’s CVRA rights by motion made in the court in the district where the crime occurred. *Id.* at § 3771(d)(3).

40. Once the government formally charges a criminal defendant, the CVRA’s protections for crime victims become operative. *See, e.g., In re Wild*, 955 F.3d 1196, 1219 (11th Cir. 2020). *Wild* held that “the CVRA does not apply before the commencement of criminal proceedings,” and thus affirmed the lower court disposition holding that the “30 women [MVRA restitution claimants]—girls, really—who were victimized by notorious sex trafficker and child abuser Jeffrey Epstein” were barred from recovering restitution because the government never formally charged Epstein with a crime in the district court. In this case, however,

Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims’ Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims’ Rights Ombudsman of the Department of Justice.”

18 U.C.S. § 3771(a) (emphasis supplied).

the government has formally charged ComEd, so the CVRA protections have become operative and provide ComEd's victims with numerous rights to facilitate their statutorily entitled participation in this prosecution, including the right to notice of many matters and an opportunity to be heard in court on many issues, including whether the district court should award restitution

41. In this case, the victims have already been denied at least the following three CVRA rights: "(A) [t]he right to full and timely restitution as provided in law." (section 3771(a)(6)); (B) "[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement (*id.* at (9)); and (C) "[t]he right to be informed of the [victim's] rights under [the CVRA]" (*id.* at (10)). The victims further have a right under the CVRA to seek mandamus relief in both the district court and appellate courts to challenge any denial of their rights under the CVRA. 18 U.S.C. § 3771(d)(3).

C. The DPA in this case is prejudicial to the victims' rights

42. The DPA has caused and continues to cause the victims of ComEd's crime legal prejudice to their rights under the CVRA. Among other injurious defects, the DPA in this case:

- fails to provide for mandatory restitution;
- unlawfully prefers the payment of a criminal fine over restitution;
- denies the victims the federal forum and civil procedure necessary to adjudicate restitution claims in the captioned criminal case;
- fails to provide the victim with procedural protections afforded by the CVRA and other federal law; and

- exacerbates the victims' initial \$175 million injury—forced funding of the bribe scheme and the increased rates produced by “greased” legislation—by requiring the ratepayer-victims to come up with yet another \$200 million to pay the criminal fine—a result that could have been avoided by forcing ComEd to pay any fine out of its profits rather than by relying on the ratepayer “cash machine” ComEd used in first place.

43. With regard to the denial of a federal forum (*supra* para. 42, bullet 3), the Seventh Circuit has observed that the district court's administration of victim restitution in a federal criminal proceeding is “fundamentally a civil remedy” exercised in the context of the criminal process exclusively for the “convenience” of the victims of the offense of conviction. *United States v. Sawyer*, 521 F.3d 792, 797 (citing *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005)). By failing to provide for a restitution hearing, the victims in this case have been relegated to filing needless state court and federal court class action litigation.⁸ In such class-action litigation, ComEd can be as uncooperative and obstructive as it pleases because its DPA does not contain a stipulation - one that on information and belief is a standard provision in other DPAs and plea agreements - that requires a criminal defendant to demonstrate acceptance of responsibility for his crime by

⁸ For information about one state court suit see Chicago Tribune article dated July 28, 2020, entitled “ComEd battles on two fronts: Class-action lawsuit demanding refunds, federal court appearance on bribery scheme. (accessed August 11, 2020) (<https://www.chicagotribune.com/news/ct-comed-bribery-class-action-lawsuit-reimburse-customers-20200728-hn3bb2lczhqhntjvawmd7s2gy-story.html>). For information about one federal court action, see case entitled *Potter v, Commonwealth Edison Company and Michael Madigan*, Case Number 20 C 4675, filed August 11, 2020 (ND Ill) (alleging the two named plaintiffs and others operated a RICO conspiracy).

paying restitution to his crime victims. ComEd - the criminal defendant here - does not need to show acceptance of responsibility by making its victims whole.

44. The victims relegated to class-action litigation in state and federal court also have none of the rights set forth in federal law to protect federal crime victims, including the panoply of CVRA rights. A defendant's conviction usually bars him under statutory issue-preclusion rules from contesting facts adjudicated in the federal criminal proceeding in subsequent litigation with a victim (18 U.S.C. § 3664 (l)).⁹ Because the instant case has not resulted in a conviction, this significant procedural benefit is also denied to ComEd's victims. Moreover, the DPA could have included - but failed to include - a compliance term that, like the statute, bars the defendant from contesting the facts ComEd "agreed to" in the DPA.

D. The district court's legal authority to grant relief

45. The district court is empowered to grant the Motion's requested relief further specified below. As previously established (*supra*, at para. 10), under 18 U.S.C. § 3664(m)(1)(B), the court can award a private victim *final*, post-judgment process to enforce any restitution award the court may enter. District court process

⁹ Section 3664 provides in relevant part:

A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

18 USCS § 3664 (l)

to enforce criminal restitution orders also includes comparable pre-judgment remedies. *Id.* Thus, the private victim, exercising its judgment-creditor rights, can obtain a citation to discover assets to initiate a garnishment process to restrain the transfer of assets and maintain the status quo to allow interested parties to stake a claim to the property for the district court's final adjudication. The same type of garnishment proceeding and relief, initiated prior to the entry of judgment, can freeze assets whose loss imperils the eventual enforceability of an anticipated judgment. Ordering ComEd and the government to arrange for the deposit of the \$200 million into the court's registry is, therefore, well within the scope of this court's ordinary power.

46. The power to order a criminal defendant to post the payment of a fine, or comparable security for a fine, is specifically established in Title 18 in comparable circumstances, *i.e.*, security for a stay pending appeal. 18 U.S.C. § 3572(g). Section 3572(g) establishes the rule for security for a stayed fine and provides:

If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)—

- (1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;
- (2) require the defendant to provide a bond or other security to ensure payment of the fine; or
- (3) restrain the defendant from transferring or dissipating assets.

18 USCS § 3572(g). The Movant objects, therefore, to any order the court might make that merely compels ComEd to not dissipate assets under subparagraph 3, as that could severely prejudice collection.

47. Accordingly, given the Movant's specific interest in the fund (as established by federal priority statutes), it may request that the court order ComEd to post \$200 million in fine money, or sufficient security (*e.g.*, a letter of credit) for the \$200 million.

Relief Sought

Creation of "ComEd Victims'-Restitution Fund."

48. Movant realleges and incorporates by reference paragraphs one through 47 above.

49. On information and belief, ComEd will imminently pay some or all of a \$200 million fine to the government. Once that transfer is completed, the prejudice to the victims' restitution rights will be essentially irrevocably complete because, likely, the government will refuse to refund the money once it is deposited into the U.S. Treasury's General Fund. As a result, the victims will lose their priority in *those* funds.

50. The fund can be preserved, however, by ordering the parties to:

- (i) deposit the putative fine payment with the Clerk of Court's registry for safekeeping pending the court's adjudication of claims;
- (ii) create a specially designated fund (The ComEd Victims' Restitution Fund) out of the putative fine payment to fund

payment of claims; and

- (iii) enter appropriate orders providing for determination of the priority of payment in the ComEd Victims' Restitution Fund and its distribution upon the entry of a final judgment.

The Movant, therefore, requests that the district court enter an order or orders enjoining ComEd to pay its putative fine to the Clerk of Court, creating the ComEd Victims' Restitution Fund, and specifying a process for disbursement of the monies in that Fund.

Appointment of a special master and establishment of discovery and other civil procedures to administer restitution claims

51. Movant realleges and incorporates by reference paragraphs one through 44 above as paragraph 51 of this Request.

52. The United States has forfeited any right to pursue a restitution recovery or to act in its usual statutory role as a proponent of victim restitution.

53. The district court is authorized on its own motion or otherwise to appoint a special master to advise the court on restitution issues so that the district court can fulfill its role in protecting the victim's right to restitution. 18 U.S.C. § 3664(d)(6).¹⁰

¹⁰ Section 3664(d)(6) provides that:

The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

54. The Movant requests that the district court enter an order appointing a special master to assist the court in adjudicating claims to the ComEd Victim's- Restitution Fund.

A determination of the validity, priority, and amounts of claims to paid from ComEd Victims'-Restitution Fund

55. Movant realleges and incorporates by references paragraphs one through 54 above as paragraph 55 of this Request III.

56. Movant asserts that restitution is due to non-federal victims of ComEd's bribery scheme and that those claims, by law, must be paid in full before any residue may be paid over to the United States.

57. The Movant requests that the district court enter judgment in favor of the victims on their restitution claims and against ComEd and further order the claims be paid from ComEd Restitution Fund on a priority basis unceasingly until the restitution liability is satisfied or until the fund is exhausted to be followed

with complete satisfaction of the liability coming from other sources.

Date: August 13, 2020

Respectfully submitted,

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