

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA



FILED
12-03-09
04:59 PM

In the Matter of the Application of
Speedypin Prepaid, LLC for
Registration as an Interexchange
Carrier Telephone Corporation
Pursuant to the Provision of Public
Utilities Code Section 1013.

Application 09-05-021
(Filed May 22, 2009)

**REPLY OF THE CONSUMER PROTECTION AND SAFETY DIVISION
TO SPEEDYPIN'S RESPONSE TO CONSUMER PROTECTION SAFETY
DIVISION'S MOTION TO COMPEL RESPONSES TO DATA REQUESTS**

I. INTRODUCTION

Pursuant to Rule 11.1(f) of the Commission's Rules of Practice and Procedure, the Consumer Protection and Safety Division (CPSD) submits the following reply to Applicant Speedypin Prepaid LLC's (Speedypin) response to CPSD's Motion to Compel¹. On November 24, 2009, Speedypin concurrently provided partial answers and ongoing objections and non-responses with its Response to CPSD's Motion to Compel.

This Reply seeks to correct an inadvertent typographical error in the Motion to Compel, as well as to address the insufficiency of the partial answers provided by Speedypin to some of the questions in CPSD's Data Request at issue.

II. TYPOGRAPHICAL ERROR

In its Motion to Compel, CPSD cites to the California Code of Civil Procedure (CCP) 2031.310(h), which is incorrect. The correct citation is to CCP 2031.310(d), which reads as follows:

¹ On December 1, 2009, CPSD received permission from ALJ Bemserfer to file this Reply.

(d) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

Speedypin's Response points out that CPSD's reference is incorrect, and instead addresses CCP 2031.310(e), which is not relevant to this proceeding. CPSD apologizes for the confusion this typo caused.

III. FAILURE TO RESPOND TO QUESTION 1(e) AS POSED

Speedypin submitted answers to CPSD's Data Request on the same day it filed the Response to the Motion to Compel. Speedypin's response to CPSD Data Request Question 1(e) changes the question posed, from "indicate the amount of revenue generated in that state (Illinois, Florida, Texas)", to "indicate whether Speedypin is being investigated or has been sanctioned" in any other state. Speedypin does not answer the original question posed, and CPSD does not accept the answer to the replacement question as sufficient to address its concerns. Moreover, Speedypin's response does not address all of the rationales set forth by CPSD in its Motion to Compel, that among other things, CPSD has broad discovery rights that cannot be limited merely by objecting to discovery as "irrelevant" and that CPSD has good cause to wish to verify the location of the rest of the \$188,340 in phone card sales reported by Speedypin.

Also, Speedypin objects that it would be burdensome to produce such data because it does not track it in the ordinary course of business, and should not have to "conduct a special study to do so." However, Speedypin acknowledges that it is possible to produce the data, and does not explain why it would be overly burdensome to conduct a computer query to obtain the data (or whatever special study it did to calculate California revenue). Indeed, in its Response to the Amended Protest Speedypin states that it has already prepared such a report for the State of Texas (Speedypin's Response to the Amended Protest, Exhibit 1 at pp.15-16.), pursuant to a request by regulators there.

IV. SANCTIONS

Speedypin's Response questions not only whether the Commission may impose fines for discovery abuses, but also whether the Commission may look to the Code of Civil Procedure for guidance in assessing whether to impose fines for discovery abuses. However, the Commission has already answered both of those questions in the affirmative. The Commission may impose fines under the proper circumstances for discovery abuses, and the Commission may (and often does) seek guidance from the California Code of Civil Procedure in discovery matters generally.

A. The Commission May Look To the Code of Civil Procedure for Guidance

Speedypin claims that the Code of Civil Procedure (CCP) is not directly applicable, and it is true that the Commission is not strictly bound to follow the CCP. No one argued that it is. However, the Commission has on occasion looked to the CCP for guidance. Most recently, in fining a utility \$5,000 for discovery abuses relating to failing to provide data to DRA, the Commission said:

The discovery process is a critical underpinning of the evidentiary hearing. It is the device used by one party to obtain facts and information about the case from the other party, in order to assist the party's preparation for trial. Discovery in Commission proceedings is conducted almost wholly through the use of data requests with occasional depositions. Commission proceedings are less formal than a court and may also differ procedurally from the proceedings at other administrative agencies. The California Code of Civil Procedure provides a guideline for the Commission, but is not strictly applied. For Commission proceedings, the discovery process is governed by Article 10 of the Rules of Practice and Procedure (Rules). (Emphasis added. D.09-04-035.)

B. Under The Appropriate Circumstances, Fines for Discovery Abuses Are Appropriate

Thus, if the circumstances warrant it, a fine for unnecessarily delaying discovery and asserting inappropriate objections in opposition to a Motion to Compel is authorized by the CCP, which the Commission may look to for guidance. Speedypin claims that the only time the Commission may impose a fine is when a party fails to comply with an order granting a motion to compel. (Speedypin Response, p.4.) This is unsupported by

any rule, case, or statute. Nor is it supported by the plain language of CA Code of Civil Procedure 2031.310(d), which states “(t)he court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel . . .” Although this language is mandatory, the Commission is not bound by it; the language is merely a guideline.

Thus, the CCP contemplates fines if a party 1) opposes a motion to compel; and 2) the party opposing the motion acted without “substantial justification” or, 3) other circumstances make the imposition of a sanction just; and 4) the party opposing the motion is unsuccessful. CPSD believes that all criteria are present: Speedypin has opposed the Motion, unsuccessfully (in that it has provided partial answers to questions it previously refused to produce, and if the ALJ orders Speedypin to fully respond to Question 1(e) will have unsuccessfully opposed the Motion), with additional aggravating circumstances described below that would make imposition of a sanction “just”.

Speedypin’s Response says that Speedypin’s mere “assertion of objections to a discovery request” is not sanctionable. However, Speedypin’s behavior has gone well past the point of merely asserting objections, and constitutes serious aggravation and delay. In attempting to avoid answering Question 1(d) “State whether any of the “Phonecard Sales” of \$188,344.10 were in California,” Speedypin has offered the following arguments:

- Speedypin cannot distinguish between intra and interstate revenue, and thus cannot answer the question (this is false, evidenced by its latest responses offered by its new counsel showing California revenue);
- Speedypin does not sell physical cards, only electronic PINs, and thus CPSD lacks jurisdiction to ask the question (this is false, as shown by its own website which offers both “Hard Cards” and “PINs”; see Exhibit 7 to Amended Protest);
- Speedypin’s revenue is not derived in California but from states where it is already licensed, such as Illinois (Speedypin refused to provide licensing information from

other states, but CPSD's investigation has turned up no proof of operating authority in Illinois;²)

- the Commission's jurisdiction does not extend to sales of international calling cards, thus CPSD is improperly asserting jurisdiction to ask the question (this is false pursuant to D.09-01-017);
- and most importantly, that Speedypin's phonecards are blocked from making intrastate calls, and because of that CPSD has no jurisdiction (this is false, as proven by CPSD's investigator who was able to make intrastate calls using Speedypin's calling cards; see Exhibit 1 to the Amended Protest).

V. CONCLUSION

Speedypin continues to refuse to answer Question 1(e) as originally posed and has attached several ongoing qualifications and objections to its other answers. This has caused a great deal of delay, hassle, and nuisance. It has also led to a series of email exchanges which have become quite rancorous, and the ALJ has rightly attempted to curb such correspondence. None of this would have happened but for the numerous meritless objections, some of which were based on falsehoods. This situation is clearly a case of discovery abuses on the part of Speedypin, and the fact that its new counsel has provided partial answers does little to address the protracted struggle that has gone on prior to his substitution in as counsel for Speedypin. CPSD respectfully requests that Speedypin be ordered to remove all objections from its answers and to answer the original Question 1(e) as posed. In addition, the long struggle to address inappropriate objections justifies imposition of a discovery fine.

² Speedypin's Response to the Amended Protest notes that its application for operating authority in Illinois was rejected several times, and was not resubmitted until November 2, 2009. (See p. 6 of Exhibit 1 of the Response to the Amended Protest.)

Respectfully submitted

/s/ TRAVIS T. FOSS

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December 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **“REPLY OF THE CONSUMER PROTECTION AND SAFETY DIVISION TO SPEEDYPIN’S RESPONSE TO CONSUMER PROTECTION AND SAFETY DIVISION’S MOTION TO COMPEL RESPONSES TO DATA REQUESTS in A.09-05-021** to each party of record on the official service list in via electronic mail.

Parties who did not provide an electronic mail address, were served by U.S. mail with postage prepaid listed on the official service list.

A copy has been e-mailed on all known parties of record who have provided e-mail addresses. In addition, all parties have been served by first-class mail.

Executed in San Francisco, California, on the **3rd** day of **December, 2009**.

/s/ HALINA MARCINKOWSKI

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