

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

Investigation in New England Telephone and)
Telegraph Company's (NET's) tariff filing re:)
Open Network Architecture, including the)
unbundling of NET's network, expanded)
interconnection, and intelligent networks in re:)
Phase II, Module 2: Cost Studies)

Order entered: 6/16/98

ORDER RE: BELL ATLANTIC MOTIONS TO COMPEL AND TO ADMIT

On April 17, 1998, New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont ("BAVT," "Company," or "Bell Atlantic") filed a motion to compel¹ AT&T Communications of New England, Inc. ("AT&T") to produce a document (referred to as the "Hansen Paper") that it had requested during the technical hearing on December 18, 1997, and which was, BAVT argues, responsive to an earlier discovery request. Bell Atlantic also asked that the document be admitted into the evidentiary record during this module of the docket. AT&T objected to the motion in a filing of April 21st. Oral argument on the motion was held the next day. On May 1, 1998, in compliance with my instructions, Bell Atlantic filed a renewed motion with a supporting offer of proof, to which AT&T responded on May 12th. On May 18th, BAVT filed a reply to AT&T's memorandum. Today's order grants Bell Atlantic's motion to compel production of the Hansen paper² and grants also the Company's motion to admit the document into evidence.

A. Background

Last fall, Bell Atlantic served upon AT&T discovery request BA-ATT 1-52, which read as follows:

1. The motion was dated April 15, 1998, but was received at the Board two days later. Additional supporting documentation for the motion was received at the Board on April 16th, under cover letter of the same date.

2. Although this is, as a practical matter, moot, since the Company already possesses a copy of the Hansen paper, which had been produced in another jurisdiction.

Produce all documents and data that members of AT&T or Hatfield Associates, or those individuals who worked in conjunction with AT&T or Hatfield Associates, *reviewed, wrote or relied upon in establishing the default inputs and/or engineering assumptions contained in the Hatfield Model Releases 3.1, 4.0, or 5.0.* This production should include, but is not limited to, the same documents AT&T was ordered to produce in the Washington Generic Cost Proceeding and the Pennsylvania Universal Service Proceeding.

(Emphasis added.) The Company argues that the Hansen paper, “on its face, discusses the rationale for reducing network operations expense by 50%, a reduction first increased [*sic*] in Hatfield Model 3.1 and which remains in Hatfield Model 4.0 presented by AT&T in this proceeding. The document plainly should have been produced in response to BA-ATT 1-52.”³ Alternatively, BAVT argues that the document should certainly have been produced in response to the December 18, 1997, record request (Record Request #8), although it does not concede that there was a basis for its exclusion from the discovery response.⁴

Bell Atlantic then argues that the Hansen paper should now be admitted into evidence. The Company asserts that the paper “was authored by an AT&T employee in the ordinary course of his duties and is fully admissible under Rule 803(6) of the Vermont Rules of Evidence. The document is a business record of AT&T, and as such is completely admissible.”⁵ BAVT insists that the paper is relevant to this proceeding.⁶ Lastly, the Company argues that admitting the document into the record is an appropriate “corrective action” for AT&T’s failure to meet its discovery obligations.⁷

AT&T counters that BAVT has failed to comply with the two elements of my April 22nd instructions—first, to establish the factual basis for the assertion that the Hansen paper should have been produced and, second, a foundation for the document’s admission into evidence—and therefore the motion should be denied.⁸

In the first instance, AT&T contends that the Hansen paper “was not responsive to the prior discovery requests, because the undisputed facts show that it is not a document that any individual at AT&T or Hatfield Associates either ‘reviewed, wrote, or relied upon *in establishing the default*

3. BAVT Renewed Motion, 1/5/98 at 2.

4. *Id.* at 1-2.

5. *Id.* at 6.

6. *Id.* at 7.

7. *Id.* at 8.

8. AT&T Response, 5/12/98, at 1.

inputs and/or engineering assumptions contained in the Hatfield Model.”⁹ AT&T concedes that the author of the document, Paul Hansen, is an employee of AT&T, but that his responsibilities with respect to the development of the Hatfield Model’s inputs is “merely administrative.”¹⁰ Mr. Hansen stated that he drafted the document “to collect information from various experts and sources within AT&T as far as support for the network operations expense factor.”¹¹ AT&T asserts that, because the document was drafted *after* the development of the model’s inputs, it was not responsive to the discovery request and need not have been produced.¹²

As to the question of the paper’s admissibility, AT&T asserts that the Hansen paper is not admissible, because it does not satisfy the standards for exceptions to the hearsay rule, as set out in Rule 803(6).¹³ AT&T contends that “the undisputed facts show that Mr Hansen did not have knowledge regarding the true basis for the network operations expense factor used in the Hatfield model, and that the document is not trustworthy because it is inaccurate in all material respects.”¹⁴

B. Discussion

The tempest surrounding this dispute exaggerates its import. AT&T’s decision¹⁵ to not produce the Hansen paper in response to discovery request BA-ATT 1-52 may arguably be justified by a narrow reading of the request; however, in the general spirit of the discovery process, AT&T probably should have submitted the document, along with a detailed explanation as to why it was not particularly relevant or useful. Certainly, the paper should have been quickly produced in response to Record Request #8, which made specific reference to the production of documents in a New Jersey proceeding: the Hansen paper had been at issue during a hearing in that state on October 23, 1997, nearly two months before the hearings in this case.¹⁶ I find AT&T’s protestations as to its

9. *Id.* at 1-2.

10. *Id.*; see also exh. D to BAVT’s Renewed Motion (deposition of Paul Hansen, 11/24/97, Docket Nos. 96-310TC and 97-334-TC, New Mexico Corporation Commission) at 5-8.

11. Exh. D to BAVT’s Renewed Motion at 8.

12. AT&T Response at 4.

13. *Id.* at 5.

14. *Id.*

15. Or *unwitting failure*: I make no conclusions as to motives.

16. BAVT Renewed Motion, 1/5/98, at 4, citing *New Jersey Board of Public Utilities*, Generic Case Dkt. No. TX95120631, tr. 10/23/97 at 72.

inability to locate the document unpersuasive. By December, it should have been able to easily produce the paper. Its failure to ever do so is disturbing.

There is little doubt that the Hansen paper is admissible. Rule 402 of the Vermont Rules of Evidence provides that all relevant evidence is admissible, unless otherwise precluded by constitutional requirements, statute, or rule. Although its accuracy may be in dispute, the Hansen paper is clearly relevant to the issues in this proceeding (specifically, the appropriate methods and models to be relied on in determining network costs).

Although hearsay evidence is generally not admissible,¹⁷ V.R.E. 803(6), having to do with the “records of regularly conducted activities,” states that Rule 802, prohibiting admission of hearsay, does not apply to:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”

The deposition of Mr. Hansen taken in New Mexico establishes that he is an analyst in the local markets division of AT&T, where since August 1996 he has been working primarily with the Hatfield Model and its developers.¹⁸ The paper was written to record information and opinions associated with a regularly conducted business activity—in this case, the testing of the Hatfield Model, including Version 4.0 which is under consideration in this docket. AT&T’s argument that certain of the statements made in the Hansen paper are incorrect is irrelevant to the question of whether the paper is admissible;¹⁹ if admitted, the accuracy of its statements will be taken into account when determining its probative value.

17. I note that the Hansen paper may not even qualify as hearsay (and thus would be admissible), as it may constitute an admission by a party-opponent under V.R.E. 801(d)(2)(D) (“a statement by [a party’s] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship”). However, the parties did not address this issue, and I need not decide it given my ruling pursuant to V.R.E. 803(6), below.

18. Exh. D to the BAVT Renewed Motion at 5-8.

19. AT&T Response, 5/12/98, at 5.

Although the document is clearly admissible, there still remains the question of whether, under the circumstances of this case, it should be admitted. AT&T suggests that admitting the paper would be prejudicial to its (AT&T's) interests.²⁰ Conversely, Bell Atlantic argues that not admitting the document would be prejudicial to its interests.²¹ Vermont Rule of Evidence 403 states that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This rule is designed to give trial judges sufficient discretion to assure the impartial examination (generally, by a jury) of an incident or act; there is much less need for an administrative tribunal, possessing independent expertise in the issues over which it has jurisdiction and therefore less likely to be misled, to invoke the rule. The Hansen paper examines technical matters with which the Public Service Board is well acquainted. On these grounds, therefore, there is no reason to exclude the document.

Moreover, the factual circumstances present in this case counsel for admission of the Hansen paper. AT&T failed to produce it in response to Record Request #8 and arguably failed to produce it in response to the original discovery request. AT&T's failure to provide relevant information in a timely manner may have prejudiced BAVT in the preparation of its case; not admitting the document now would unfairly perpetuate that disadvantage to the Company.

For all these reasons, therefore, I grant Bell Atlantic's motion to admit the Hansen document into evidence.²² I note, however, that, when considering the weight to be given the paper, I shall bear in mind the representations of counsel for AT&T, who states that the Hansen paper was only a first draft and that it contains errors.²³

SO ORDERED.

DATED at Montpelier, Vermont, this 16th day of June, 1998.

20. AT&T Opposition to Motion, 4/21/98, at 7; AT&T Response, 5/12/98, at 6.

21. BAVT Renewed Motion at 7.

22. It shall be designated as the "Hansen Paper" for purposes of identification.

23. AT&T Response, 5/12/98, at 3 and exh. A to the Response.

s/ Frederick W. Weston

Frederick W. Weston, III
Hearing Officer

OFFICE OF THE CLERK

FILED: June 16, 1998

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made.