

provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

Toward this end, we proposed to amend the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to authorize the person conducting a proceeding to: (1) Require each party to provide all other parties and the person conducting the proceeding with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication; and (2) require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the person conducting the proceeding are able to transmit documents during the hearing. These proposed provisions (see proposed 7 CFR 1.144(c) (9) and (11), 1.173(d) (7) and (8), 47.11(c) (9) and (11), and 47.56 (g) and (h) and 9 CFR 202.118(a) (8) and (10)) regarding the exchange of exhibits prior to a hearing conducted by telecommunication and the ability to transmit documents during a hearing conducted by telecommunication are designed to ensure that all parties have a full opportunity to participate in the hearing, present oral or documentary evidence, and cross-examine witnesses.

We have retained these provisions in the final rule with one minor modification to correct an oversight in the proposed rule. As stated above, proposed 7 CFR 1.144(c)(11), 1.173(d)(8), 47.11(c)(11), and 47.56(h) and 9 CFR 202.118(a)(10) would authorize a person conducting a proceeding to require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the person conducting the proceeding are able to transmit documents during the hearing. We have amended 7 CFR 1.144(c)(11), 1.173(d)(8), 47.11(c)(11), and 47.56(h) and 9 CFR 202.118(a)(10) to authorize a person conducting a proceeding to require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the person conducting the proceeding are able to transmit and receive documents during the hearing.

3. Statutory Requirements

One commenter stated that the plain meaning of statutes that require hearings to be held "before the Secretary" is that face-to-face hearings are required. Therefore, any hearings under those statutes which are conducted by telecommunication would be inconsistent with those statutes.

Numerous hearings conducted under the rules of practice which this final rule amends are conducted pursuant to statutes that require hearings "before the Secretary." We fully examined whether hearings conducted by telecommunication in which some or all of the evidence is introduced at locations other than the location at which the person conducting the proceeding is situated would violate statutes that require hearings to be conducted "before the Secretary." We concluded that such hearings would not violate these statutes. The memorandum containing our analysis and findings was placed in the rulemaking record upon publication of the proposed rule.

A few courts have found that telephone hearings were insufficient due to language of the statute under which the hearings were conducted. For example, in *Purba v. Immigration & Naturalization Service*, 884 F. 2d 516 (9th Cir. 1989), the court held that a deportation hearing must be conducted in the physical presence of the immigration judge, absent the consent of the parties, because the statute under which the hearing was held required the hearing to be "before" the judge. The court found the plain meaning of the word "before" is "in the presence of," "in sight of," or "face-to-face with" a person and that conducting the hearing by telephone was not a hearing "before" the judge. However, the Supreme Court has recently held that where Congress has not decided, any alternative dictionary definition of a word that has a rational effect under a statute is a possibility for agency choice, and the courts are to defer to the agency's choice of the interpretation of the word, if it is reasonable. *National Railroad Passenger Corp. v. Boston and Maine Corp.*, ___ U.S. ___, 112 S. Ct. 1394 (1992).

The eleventh circuit, applying the rationale in *National Railroad Passenger Corp.*, found that a hearing conducted by telephone did not violate the Immigration and Nationality Act that provides that a "[d]etermination of deportability * * * shall be made only on the record in a proceeding before a special inquiry officer." *Bigby v. United States Immigration and Naturalization Service*, 21 F. 3d 1059 (11th Cir. 1994). (Emphasis added.) The eleventh circuit

explicitly rejected the argument that "before" was susceptible of only one meaning. The court found that the word "before" did not of necessity mean "in front of" or "in the presence of," thereby mandating that the special inquiry officer be physically present at a hearing required to be held "before" the special inquiry officer. The court found that "before" could be used in a jurisdictional sense and mean "to be judged or acted on by" or "under the official or formal consideration of." The court, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), held that "[i]n the absence of unambiguous congressional intent, we defer to an agency's reasonable interpretation of a statute it is charged with administering.

None of the statutes that require proceedings to be conducted "before the Secretary" under which hearings are conducted pursuant to the rules of practice amended by this final rule define the word "before" nor do these statutes provide any clear indication of congressional intent with respect to the meaning of the word "before" as used in these statutes. Therefore, it is reasonable for the Department to find that the word "before," as used in these statutes, is jurisdictional and means "to be judged or acted on by," "under the official or formal consideration of," or "under the cognizance or jurisdiction of."

4. Credibility Determinations

Seven commenters stated that hearings conducted by telecommunication negatively impact credibility determinations. Five commenters focused exclusively on the need for the judge to observe demeanor to determine credibility. One commenter stated that it is important for all participants to assess credibility of other participants. Four commenters raised the specter of witnesses reading prepared statements without the knowledge of all participants.

Hearings conducted by audio-visual telecommunication do not impact credibility determinations because the fact finder is able to see and hear witnesses in a hearing conducted by audio-visual telecommunication in much the same manner and to the same extent as the fact finder would see and hear witnesses in a face-to-face hearing. Hearings conducted by telephone may, but do not necessarily, negatively impact credibility determinations.

While we believe that the proposal provides the person conducting the proceeding with sufficient flexibility to tailor the manner in which a hearing is conducted so that credibility