

person conducting the hearing with credibility determinations.

Proposed 7 CFR 1.141(g), 1.168(f), 47.15(f), and 47.58(a) and 9 CFR 202.112(e) would have required each party to obtain written verified narrative statements of oral direct testimony of all witnesses the party intends to call to provide oral direct testimony. Under the proposal, testimony would be limited to the written direct testimony. Occasionally parties call hostile witnesses or witnesses over whom they have no control to provide oral direct testimony at hearings in proceedings conducted under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules. Requiring a party to obtain and exchange written verified narrative statements from hostile witnesses and witnesses over whom a party has no control could result in a party's inability to introduce relevant and material evidence at a hearing. Therefore, this final rule provides that each party need only obtain and exchange written verified narrative statements of the oral direct testimony of the following witnesses that the party intends to call at hearings to be conducted by telephone: (1) The party; (2) the employees and agents of the party; and (3) the party's expert witnesses. The oral direct testimony provided by a witness at a hearing conducted by telephone will be limited to the presentation of the written direct testimony, unless the person conducting the hearing finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

6. *Verbatim Recordings in Lieu of Transcripts*

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 provide for the use of recordings of hearings, and, where applicable, depositions. Four commenters opposed the use of recordings. One commenter objected to the use of recordings of hearings and depositions rather than transcripts, but did not state the basis for the objection. Three commenters stated that the review of a recording is more time-consuming than the review of a transcript of the same proceeding and the citation of relevant portions of a recording more difficult than the citation of relevant portions of a transcript. Two commenters stated that transcripts of prehearing conferences are

necessary at a hearing in order to refer to evidentiary rulings made in prehearing conferences and transcripts of depositions are necessary for the proper cross-examination of witnesses. One commenter noted that the Department would have to purchase equipment to enable its counsel to review recordings.

We made changes based on these comments. The final rule requires that hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual who is expected to participate in the hearing shall be transcribed, unless the person conducting the hearing finds that recording the hearing verbatim would expedite the proceeding and the person conducting the hearing orders the hearing to be recorded verbatim. The person conducting the hearing shall certify that to the best of his or her knowledge and belief the recording with exhibits that were accepted into evidence is the record of the hearing. The final rule provides that if a party requests the transcript of a hearing or part of a hearing and the person conducting the hearing determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the person conducting the hearing shall order the verbatim transcription of the recording as requested by the party. (See 7 CFR 1.141(i), 1.168(h), 47.15(i), and 47.60 and 9 CFR 202.112(i) in this final rule.) The final rule provides that transcripts and recordings of hearings conducted under the Uniform Rules and the Capper-Volstead Rules shall be made available to any person at actual cost of duplication. (See 7 CFR 1.141(i) and 1.168(h) in this final rule.) We have retained the provisions regarding the cost and availability of transcripts that are currently in the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules (see current 7 CFR 47.15(g) and 47.60 and 9 CFR 202.112(h)) and have applied these cost and availability provisions to recordings. (See 7 CFR 47.15(i) and 47.60 and 9 CFR 202.112(i) in this final rule.)

The discretion provided to the person conducting the hearing to order that a transcript be provided to a party rather than a recording will ensure that transcripts are available when a party does not have access to equipment that enables that party to use recordings. Further, we believe that parties will be able to review recordings as quickly as

they review transcripts by using the fast forward and reverse modes that are available on most recording devices. In addition, relevant portions of recordings can be referenced by time, revolution, or some other method, as determined by the person conducting the proceeding.

Prior to this rulemaking proceeding, none of the rules of practice which are the subject of this rulemaking proceeding required that prehearing conferences be recorded and we did not propose to require the transcription of prehearing conferences. Therefore, the comment regarding the transcription of prehearing conferences in order to refer to evidentiary rulings made in prehearing conferences is beyond the scope of this rulemaking proceeding.

7. *"Practical" Problems*

Four commenters stated that hearings conducted by telecommunication would result in what the commenters characterized as "practical problems."

(a) One commenter stated that hearings conducted by telecommunication would impair the ability of the parties to observe documents and call witnesses.

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.

As we stated above, we have retained these provisions in the final rule with one minor modification to correct an oversight in the proposed rule.

Further, we proposed to amend the Uniform Rules, the Capper-Volstead