

Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that unless the hearing is scheduled to begin less than 20 days after the person conducting the proceeding issues a notice stating the time of the hearing, each party must exchange, in writing, with all other parties, the direct testimony of each witness that the party will call to provide oral direct testimony at the hearing. (See proposed 7 CFR 1.141(g), 1.168(f), 47.15(f), and 47.58(a) and 9 CFR 202.112(e).) The written direct testimony must be in narrative form and must be verified. The written direct testimony of witnesses shall be exchanged by the parties at least 10 days prior to the hearing. The oral direct testimony provided by a witness at the hearing will be limited to the presentation of the written direct testimony, unless the person conducting the proceeding finds that oral direct testimony which is supplemental to the written direct testimony would expedite the proceeding and would not constitute surprise. These provisions regarding exchange of direct testimony are designed to ensure that all parties have a full opportunity to participate in the hearing, and cross-examine witnesses. As discussed above, we have limited the provisions regarding the exchange of written verified narrative statements of oral direct testimony to hearings to be conducted by telephone and to certain specified witnesses.

These provisions will ensure that parties to adjudicatory proceedings conducted under the rules of practice which we are amending will have ample opportunity to observe documents.

We do not agree with the comment that parties will have any more difficulty calling witnesses in a hearing conducted by telecommunication than parties will have when calling witnesses in a face-to-face hearing. The commenter did not provide any basis for this concern.

(b) One commenter stated that no provision can be made in hearings conducted by telecommunication for—the introduction of real evidence, the examination of a witness regarding documents that the witness has in his or her possession on entering the courtroom, the examination of a witness regarding his or her ability to read at a distance, the request that a witness draw a picture; or any “other unexpected events.”

We have not made any change based on this comment. Very few of the hearings conducted under the rules of practice which this final rule amends necessitate the introduction of real

evidence, the examination of a witness regarding documents that the witness has in his or her possession on entering the courtroom, the examination of a witness regarding his or her ability to read at a distance, or the request that a witness draw a picture.

As discussed previously in this rulemaking document, the final rule provides that the person conducting the proceeding may require hearings conducted by telecommunication to be held at locations at which the parties and the person conducting the proceeding are able to transmit and receive documents during the hearing. This requirement will enable parties to examine witnesses regarding documents that the witness has in his or her possession on entering the courtroom and the ability to read at a distance, and to request witnesses to draw pictures or diagrams in hearings conducted by telecommunication.

If real evidence is to be introduced in a hearing, the hearing or that part of the hearing in which the real evidence is to be introduced can be conducted by the personal attendance of those who are to participate in the hearing. As stated above, the person conducting the proceeding can require the hearing to be conducted by personal attendance of any individual who is expected to participate in the hearing if personal attendance is necessary to prevent prejudice to a party. The inability of a party to introduce admissible evidence because a hearing is conducted by telecommunication may prejudice a party, and, in such circumstances, a face-to-face hearing will be conducted.

(c) Two commenters stated that hearings conducted by telecommunication would reduce the appearance of justice.

We disagree with the comment and have not made any change based on this comment. The quality of justice will not be affected by this final rule. If any party will be prejudiced by a hearing conducted by telecommunication, the person conducting the proceeding will require the hearing to be conducted by personal attendance of any individual who is expected to participate in the hearing. The use of audio-visual technology preserves due process, promotes ease of participation by those for whom travel is difficult, and allows each party and the person conducting the proceeding to participate fully and with the effect of face-to-face confrontation. Therefore, we believe that this final rule will in fact heighten the appearance and fact of justice done.

(d) Two commenters stated that hearings conducted by

telecommunication would make sequestration difficult.

A person conducting a hearing by telecommunication could order sequestration in the same manner in which it is ordered in a face-to-face hearing. We agree that, in most situations, the person conducting a hearing by telecommunication will not be in a position to determine whether a sequestration order has been followed. We expect that all parties in adjudicatory proceedings conducted by the Department and counsel to those parties will make every effort to comply with lawful orders issued by the person conducting the proceeding.

(e) Two commenters stated that hearings conducted by telecommunication would make recesses impractical.

We disagree and have made no change based on these comments. Recesses can be called as easily in a hearing conducted by telecommunication as in a hearing conducted by personal attendance of those involved with the hearing.

(f) Four commenters stated that prompting witnesses at hearings conducted by telecommunication would be difficult to control.

Prompting of witnesses can occur in face-to-face hearings, but we do agree that, in some situations, it may be more difficult for a person conducting a hearing to detect witness prompting at a hearing conducted by telecommunication than to detect witness prompting at a hearing conducted by personal attendance of participants. However, prompting of witnesses in hearings conducted by audio-visual telecommunication will be far more difficult to conceal from other parties and the person conducting a hearing than in hearings conducted by telephone. In fact, current audio-visual technology can provide the person conducting the proceeding and the parties with virtually unlimited vision in the room in which a hearing is being conducted. We believe that the potential prompting problem is minimized by making audio-visual hearings the prevalent method of hearing.

(g) Two commenters stated that hearings conducted by telecommunication could be negated by a signal or power failure or electronic interference.

We disagree. If a signal or power failure were to occur, the hearing would be adjourned until such time as the hearing could be resumed. That portion of the hearing which is completed prior to the signal or power failure would not be negated. A signal or power failure which causes the adjournment of a