

hearing conducted by telecommunication is not different than an event, such as a power failure or fire in the building in which a hearing is being conducted, that may cause the person conducting a face-to-face hearing to temporarily adjourn a hearing.

(h) One commenter stated that the rules of practice would be subject to challenge which would add to uncertainty and cost money to defend.

While proceedings conducted by telecommunication could be challenged, we believe that these challenges can be easily defended. Above, we cited a number of cases in which adjudicatory proceedings conducted by telecommunication have been challenged, and the state and federal agencies conducting proceedings by telecommunication have prevailed.

(i) Two commenters stated that hearings conducted by telecommunication would often necessitate the employment of multiple counsel by each party to observe witness demeanor at each location at which a hearing is being held.

The final rule does not require counsel to be present at the location at which a witness is testifying in a proceeding conducted by telecommunication. While we do not believe that the presence of counsel at each location at which witnesses testify is necessary, a party may choose to have counsel present at some or all of the locations at which witnesses testify in hearings conducted by telecommunication. Such an expenditure would be at the option of each party to the proceeding.

#### 8. The Rulemaking Record

Six commenters stated that the rulemaking record is deficient.

(a) Four commenters stated that the cost-benefit analysis is inadequate or nonexistent.

We have not made any change based upon these comments. In accordance with Executive Order 12866, we prepared an assessment in connection with the preparation of the notice of proposed rulemaking which preceded this final rule. The assessment, which was included in the rulemaking record, contains a discussion of the costs and benefits associated with the proposed rule. Again, in accordance with Executive Order 12866, we prepared an assessment in connection with the preparation of this final rule. The assessment, which was included in the rulemaking record, contains a discussion of the costs and benefits associated with the final rule.

(b) Two commenters stated that there was no "justification of the technical

feasibility of conducting cross-examination *via* audio-visual devices."

We have not made any change based upon these comments. Prior to preparing the proposed rule, we thoroughly examined the range of equipment available to conduct adjudicatory proceedings by telecommunication. We found that both the telephone and audio-visual telecommunication equipment are generally adequate to conduct cross-examinations. Again, the final rule amends the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules, to provide that hearings will be conducted by the personal attendance of any individual who is expected to participate in the hearing if the person conducting the proceeding finds that personal attendance: (1) is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication. The person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) would 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.

(c) One commenter stated that it did not have adequate notice of the proposed rule, and, therefore, the comment period should be extended.

On June 22, 1994, in response to this comment, we published a document in the **Federal Register** (59 FR 32138) reopening and extending the comment period until July 22, 1994.

#### 9. Suggestions

(a) Five commenters stated that the Department should experiment with proceedings conducted by telecommunication on a limited basis.

We have not made any change based upon these comments. The use of telecommunication in adjudicatory proceedings is not new. Numerous state and federal agencies have conducted adjudicatory proceedings by telecommunication in the past. We believe that experience of other state and federal agencies is sufficient to enable the Department to forego the

implementation of telecommunication on an experimental basis.

(b) Five commenters stated that hearings should only be conducted by telecommunication when the parties agree.

We have not made any change based on this comment. The final rule provides the parties with ample opportunity to make the person conducting the proceeding aware of the parties' preferences regarding the manner in which the hearing should be conducted and to persuade the person conducting the proceeding to conduct the hearing in a manner other than that ordered by the person conducting the proceeding. Specifically, the final rule amends the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that any party may move that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing rather than by audio-visual telecommunication. Further, within 10 days after the person conducting the proceeding issues a notice stating the manner in which the hearing is to be conducted, any party may move that the person conducting the proceeding reconsider the manner in which the hearing is to be conducted. (See 7 CFR 1.141(b)(2), 1.168(b)(2), 47.15(c)(2), and 47.53 (b) and (c) and 9 CFR 202.112(b) (2) and (3) in this final rule.)

(c) Two commenters stated that the parties should elect the manner in which depositions are to be held and judges should only be involved if the parties cannot agree.

We agree with the commenters with respect to the PACA Reparation Rules and the P&S Reparation Rules. We proposed to amend the Uniform Rules, the PACA Reparation Rules, and the P&S Reparation Rules to provide that a deposition shall be conducted by telephone unless the person conducting the proceeding determines that conducting the deposition by audio-visual telecommunication: (1) Would cost less than conducting the deposition by telephone; (2) is necessary to prevent prejudice to a party; or (3) is necessary because of a disability of any individual expected to participate in the deposition. If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition: (1) Would cost less than