1.8 THE 1995 AMENDMENTS

The legislative response to the reports by CORE and the Legislative Auditor came during the 1995 session. Two competing bills were introduced. In the House of Representatives, Representative Mindy Greiling introduced a bill that was initially modeled after the rulemaking provisions of the model State Administrative Procedure Act. The legislation would have produced a simpler process more akin to notice and comment rulemaking. In the Senate, Senator John Hottinger introduced a bill that substantially adopted the recommendations of the Legislative Auditor. After extensive testimony in both bodies, the Senate bill prevailed and was enacted into law.

The 1995 legislation enacted the most extensive changes to the APA since 1975. The legislative review authority was strengthened by specifying the reasons for rule suspension,[1] and by giving the LCRAR the power to object to a rule, which then shifts the burden to the agency to defend the rule upon judicial review.[2] The LCRAR itself was authorized to challenge a rule in court after its objection to the rule.[3] Additionally, the LCRAR was authorized to allow agencies to omit publication of rules in the *State Register* if the agency could establish that publication would be unduly expensive given the number of people interested in the proposed rule.[4]

For a number of years, the attorney general and OAH had differing definitions of "substantial change" in their rules to determine when an agency had changed a rule so much that it had to start the rulemaking process over again. The 1995 legislature addressed the issue of "substantial change" by defining what makes a rule "substantially different" in statute.[5] The definition employs the "logical outgrowth" test developed in federal case law, but also requires, in accordance with the OAH rule, consideration of the extent to which the "effects" of the rule differs.[6] The legislation also required the chief administrative law judge to adopt a rule that creates an expedited procedure for adoption of a rule found to be substantially different.[7]

Notice of the rulemaking process was strengthened by mandating that agencies publish requests for comments for <u>every</u> rule prior to initiating the rule proceeding.[8] The agencies are also explicitly authorized to establish advisory committees to comment on a rule.[9] The agencies are directed to "make reasonable efforts" to give notice to people affected by the rule who are not on the agency's rulemaking list.[10] The chief administrative law judge was further directed to adopt rules that allow agencies to receive prior binding approval of its plan for additional notice of proposed rules.[11] Each agency is

1 1995 Minn. Laws ch. 233, art. 2, §2, at 2085.
2 1995 Minn. Laws ch. 233, art. 2, §3, at 2086.
3 *Id*.
4 1995 Minn. Laws ch. 233, art. 2, §§14-20, at 2091-95.
5 1995 Minn. Laws ch. 233, art. 2, §6, at 2087.
6 *Id*.
7 1995 Minn. Laws ch. 233, art. 2, §31, at 2104.
8 1995 Minn. Laws ch. 233, art. 2, §11, at 2089. This requirement replaced the optional notice of solicitation of outside opinion.
9 *Id*.
10 1995 Minn. Laws ch. 233, art. 2, §§14-20, at 2091-95.
11 1995 Minn. Laws ch. 233, art. 2, §31, at 2104.

required to maintain a public rulemaking docket to advise interested persons of pending proceedings.[12] Although the new rule repealed the small business considerations in rulemaking act, it then proceeded to add several requirements to the SONARs.[13] The new requirements mandate agency consideration of who will bear the costs of the new rule and who will benefit. The agency is also required to describe its efforts to provide additional notice of the rulemaking.[14]

Under prior law, 25 or more requests for review would require an agency to conduct a rule hearing.[15] As a result, agencies negotiated with requesters to withdraw their requests in exchange for changes in the rule. Because of complaints that not all requesters were involved in such negotiations, the 1995 legislation set out specific requirements for the agency to meet when requests were withdrawn, including notice to all persons who requested a hearing.[16] An administrative law judge was then authorized to review the withdrawal process upon legal review of the rule.[17]

The legislation also established, for the first time, an abbreviated procedure for the review of rules exempted from the APA by the legislature.[18] The procedure required approval by the revisor of statutes, approval by OAH, and publication in the *State Register*.[19] Agencies were also authorized to use
this procedure for a limited number of rules where the full procedure is unnecessary and the change is either minimal or required by federal law or court order.[20] OAH must approve this "good cause" exemption.[21] The legal review of non-hearing rules was transferred from the attorney general to OAH.[22]

Traditionally agencies have made policy not only in rulemaking, but also to some extent in contested cases by following the precedent of prior decisions. In an apparent attempt to affect the balance of this type of policymaking, the legislature added a provision encouraging agencies to codify precedent when asked to do so.[23] The new requirement provides that:

> Upon the request of any person, and as soon as feasible and to the extent practicable, each agency shall adopt rules to supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedent in future cases. This paragraph does not apply to the public utilities commission.[24]

12 1995 Minn. Laws ch. 233, art. 2, §26, at 2099.
13 1995 Minn. Laws ch. 233, art. 2, §13, at 2090.
14 *Id*.
15 1992 Minn. Laws ch. 494, §5, at 400.
16 1995 Minn. Laws ch. 233, art. 2, §23, at 2096.
17 *Id*.
18 1995 Minn. Laws ch. 233, art. 2, §27, at 2100.
19 *Id*.
20 1995 Minn. Laws ch. 233, art. 2, §29, at 2103.
21 *Id*.
22 1995 Minn. Laws ch. 233, art. 2, §24, at 2097.
23 1995 Minn. Laws ch. 233, art. 2, §8, at 2088..
24 1995 Minn. Laws ch. 233, art. 2, §8, at 2088.

The Public Utilities Commission successfully sought an exemption because it traditionally set most of its policy through contested case proceedings.

An unexpected detour on the road to greater legislative review also occurred in the 1995 session. In a cost-cutting measure, the LCRAR, along with a number of other legislative commissions, were abolished.[25] The measure provided that the statutory duties of an abolished commission "shall be performed as determined necessary by the legislative coordinating commission."[26] Therefore, the legislature would have to resolve the question of defining legislative review in order for it to survive in a future session.

25 1995 Minn. Laws ch. 248, art. 2, §6, at 2422.

26 *Id*. at 2423.