

22.1 INTRODUCTION

The Administrative Procedure Act (APA) requires that an agency engaged in rulemaking with a hearing make an “affirmative presentation of facts establishing the need for and reasonableness of the proposed rule” at the public hearing.¹ When the legislature imposed this requirement in 1975, a hearing was required for all permanent rulemaking.² The APA adds the flexibility of rulemaking without a hearing under certain circumstances but imposes this same affirmative-presentation requirement whether the agency is adopting rules with or without a hearing.³

In making its affirmative presentation, the statute specifically permits the agency to rely on facts presented by others during the rulemaking proceeding.⁴ State agencies now make their full affirmative presentation in the *statement of need and reasonableness* (SONAR),⁵ even when a hearing is conducted.⁶ The agency can then forego a lengthy oral presentation by introducing the statement as an exhibit at the hearing.⁷

The legislature’s impetus for the major changes in 1975 was a legislative perception that certain state agencies had not given adequate consideration to public comments in their rulemaking and had not adequately supported the proposed rules in the record. The Office of Administrative Hearings (OAH) first required a detailed written SONAR in OAH’s procedural rules that were adopted in 1976.⁸ The legislature later added the SONAR requirement to the statute for rulemaking, both with and without a hearing.⁹ Exempt and expedited rules, however, can be adopted without a SONAR.¹⁰ The question of whether the agency has established both need and reasonableness during its rulemaking proceeding is determined by OAH’s review.¹¹

In rulemaking with a hearing, the APA directs the administrative law judge (ALJ) to take notice of the degree to which the agency has demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.¹² The

¹ MINN. STAT. § 14.14, subd. 2 (2014); *Boedingheimer v. Lake Country Transp.*, 485 N.W. 2d 917, 922 (Minn. 1992).

² 1975 MINN. LAWS, ch. 380, § 2, at 1287.

³ MINN. STAT. § 14.26, subd. 1 (2014).

⁴ *Id.* § 14.14, subd. 2.

⁵ *Id.* § 14.131. The SONAR must be made available for public review, must be prepared under rules adopted by the chief ALJ, and must describe the classes of persons likely affected, probable costs, alternatives, and an assessment of the rules “cumulative effect” with other federal and state regulations. *Id.* For further discussion of the SONAR, see § 17.2 of this text (drafting the SONAR).

⁶ See MINN. STAT. § 14.14, subd. 2a (2014).

⁷ MINN. R. 1400.2220, subp. 3 (2013); see also *City of Morton v. Minn. Pollution Control Agency*, 437 N.W.2d 741, 748 (Minn. Ct. App. 1989) (citing MINN. R. 1400.0500 (1989) and the predecessor to this treatise at § 23.1) (finding affirmative presentation of facts requirement satisfied where written document was available as a handout at and throughout the hearing).

⁸ Before 1976, agencies were required to provide a less comprehensive post-hearing statement of need.

⁹ See MINN. STAT. §§ 14.131, .23 (2014).

¹⁰ *Id.* §§ 14.386 (procedure for adopting exempt rules), .389 (expedited process) (requiring “an easily readable and understandable summary of the overall nature and effect of the proposed rule”).

¹¹ *Id.* §§ 14.26, subd. 3, .14, subd. 2a.

¹² *Id.* § 14.50(iii).

agency is also required to summarize the facts and argument that it intends to present at the hearing in its SONAR and must state how the evidence rationally relates to the choice of action taken.¹³ If the chief ALJ approves a finding of the ALJ that the agency failed to demonstrate the need for and reasonableness of a proposed rule, the chief ALJ must suggest actions to correct the defect. The agency may correct the defects as suggested or decline to do so. If the agency chooses not to follow the actions suggested by the chief ALJ, then it must submit the proposed rule to the Legislative Coordinating Commission (LCC) and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for advice and comment.¹⁴ The agency must then wait up to sixty days to receive the commission's or committees' advice before adopting the rule. The advice of the commission, however, is not binding on the agency, and the agency may then proceed to adopt the rule as proposed.

The role of the chief ALJ in regard to defects relating to need and reasonableness is quite different in effect from a finding of a defect in regard to legality, substantial difference or procedural violations of the APA. If the chief ALJ approves a finding of a defect regarding legality, substantial difference, or the substantive and procedural requirements of law, including legality and statutory authority, then the agency cannot adopt the rule until the defects found by the chief ALJ have been corrected or the agency has satisfied the rule requirements for the adoption of a substantially different rule.¹⁵ As noted above, the agency may decline to follow a suggested action related to a need or reasonableness defect. This difference in approach is presumably a legislative recognition that determinations of need or reasonableness might verge on policy choices that are more properly within the final authority of the agency itself.

Likewise, in the course of his or her review of permanent rules adopted without a hearing, the ALJ must determine whether “the record demonstrates a rational basis for the need for and reasonableness of the proposed rule.”¹⁶ As with a hearing, if the chief ALJ determines that the need for or reasonableness of the rule has not been established, and if the agency does not elect to follow the suggested actions of the chief ALJ to correct that defect, then the agency must submit the proposed rule to the LCC and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for advice and comment.¹⁷

The agencies are also required to provide a copy of the SONAR to the legislative reference library when mailing the notice of hearing to those who have registered to receive notice of rulemaking proceedings.¹⁸

¹³ MINN. R. 1400.2070, subp. 1 (2013); *see* Minn. League of Credit Unions v. Minn. Dep't of Commerce, 486 N.W. 2d 399, 405-406 (Minn. 1992) (finding Department of Commerce's SONAR failed to summarize the evidence and argument the Department advanced at the hearing, but upholding the rule as properly promulgated “despite the minor defects in rulemaking procedure” since the defects were not prejudicial to the petitioner).

¹⁴ MINN. STAT. § 14.15, subd. 4 (2014). For a discussion of the role of the LCC, see ch. 25 of this text.

¹⁵ MINN. STAT. §§ 14.15, subd. 3, .26, subd. 3(b) (2014).

¹⁶ *Id.* § 14.26, subd. 3. Presently, as directed by MINN. STAT. § 14.26, an administrative law judge is assigned by the chief administrative law judge to review rules in which no hearing is required. Before 1996, such review was conducted by the Office of the Attorney General.

¹⁷ *Id.* § 14.26, subd. 3(c).

¹⁸ *Id.* §§ 14.131, .23, .14, subd. 1a.