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STATEMENT OF THE ISSUE

Whether the Minnesota Radioactive Waste Management Act, Minn. Stat. Sec. 116C.72, prohibits the construction or operation of a nuclear waste storage facility in Minnesota unless the Minnesota legislature expressly authorizes the construction or operation of such a facility.

The Minnesota Public Utilities Commission found that the language of the Minnesota Radioactive Waste Management Act and its legislative history did not require a utility to obtain approval from the Minnesota legislature to construct or operate a radioactive waste management facility.

STATEMENT OF THE CASE

The Prairie Island Mdewakanton Dakota Community, the Prairie Island Coalition Against Nuclear Storage, and the Minnesota Public Interest Research Group, have appealed the determination of the Minnesota Public Utilities Commission (the "Commission") which granted Northern States Power Company ("NSP") a certificate of need to construct and operate a high level radioactive waste storage facility in Minnesota. The Commission's decision rejected an Administrative Law Judge's Findings and Conclusions that no certificate of need be granted. The Administrative Law Judge also found that a certificate of need could not be granted without the express authorization of the Minnesota legislature.

Many individual members of the Minnesota Legislature disagree with the Commission's determination. They believe legislative authorization is required before the construction of a radioactive waste facility and accordingly, file this amicus curiae brief on this issue.

STATEMENT OF FACTS

Over 37 individual members of the Minnesota House of Representatives and the Minnesota Senate, have requested this court leave to file an amicus curiae brief (hereinafter "amici"). The issue for amici is the enforcement of the underlying public policy embodied within the Radioactive Waste Management Act.

The facts of this case are fully stated in the briefs of the Relators. In the interest of brevity and to minimize duplication of facts and procedures already delineated, amici respectfully

adopts such facts as if fully incorporated herein.

ARGUMENT

THE RADIOACTIVE WASTE MANAGEMENT ACT PROVIDES THE MINNESOTA LEGISLATURE WITH EXCLUSIVE AUTHORITY TO PERMIT OR DENY ANY PERSON LEAVE TO CONSTRUCT OR OPERATE A HIGH LEVEL RADIOACTIVE WASTE MANAGEMENT FACILITY IN MINNESOTA

The Legislature has expressly reserved for itself a specific role in high level radioactive waste management as it relates to the health and welfare of the people and the protection of the economic and environmental resources of Minnesota. The Radioactive Waste Management Act, Minn. Stat. Secs. 116C.71 - 116C.843, provides the Minnesota Legislature with the ultimate responsibility for determining whether a person may construct or operate a radioactive waste management facility in Minnesota. The Commission's decision to grant NSP a certificate of need to construct and operate a radioactive waste storage facility is contrary to the language and purpose of the Act. To allow the Commission's conclusion to stand would render the Legislature impotent to make specific decisions, as envisioned in the Act, to control the proliferation of high level radioactive waste in Minnesota.

1. The Unambiguous Purpose is to Reserve to the Legislature the Authority to Allow the Construction or Operation of a Radioactive Waste Management Facility in Minnesota

In 1977, the Minnesota Legislature passed the Radioactive Waste Management Act. The Act provided for a specific role for the Legislature in determinations concerning the construction or

operation of radioactive waste management facilities. Minn. Stat. Sec. 116C.72 provides that:

"Notwithstanding any provision of chapter 116H, to the contrary, no person shall construct or operate a radioactive waste management facility within Minnesota unless expressly authorized by the Minnesota legislature."

(emphasis added). A "radioactive waste management facility" is defined as "a geographic site, including buildings, structures, and equipment in or upon which radioactive waste is retrievably or irretrievably disposed by burial in soil or permanently stored." Minn. Stat. Sec. 116C.71, Subd. 7. "Person" is defined as "any individual, corporation, partnership or other unincorporated association or governmental agency." Minn. Stat. Sec. 116C.71, Subd. 3.

The language of Minn. Stat. Sec. 116C.72, is unambiguous. Minn. Stat. Sec. 645.16. The provisions are couched in plain and simple language; nothing can be read into it. State v. Theo. Hamm Brewing Co., 247 Minn. 486, 78 N.W.2d 664 (1956). The words of Minn. Stat. Sec. 116C.72 clearly defines the intent of the Legislature as the sole authorizing governmental body for the construction or operation of a radioactive waste management facility. The Act seeks to control a particular danger, high level radioactive waste, and avoid the mischief of the proliferation of such waste in Minnesota where it would put the people and their environment at risk. The explicit language embodied in the word "shall" and in the phrase "unless expressly authorized by the Minnesota Legislature" precludes any

administrative body of the executive branch of government, here the Commission, from directly approving such a facility. The magnitude of the implications of having temporary or permanent nuclear waste storage facilities within the State cries out for public debate, discussion, and vote in the forum of Minnesota's elected body.

Likewise, the language defining the radioactive waste management facility governing both temporary and permanent disposal sites (buried under ground) and permanent storage sites is unambiguous. Minn. Stat. Sec. 116C.71, Subd. 7. The provision embodies the underlying intent of the Legislature to reserve to itself the exclusive authority to approve or reject the disposal and permanent storage of high level radioactive waste management facilities.

On the other hand, when spent fuel rods (high level radioactive waste) of a nuclear power plant are temporarily stored in already existing pools of a nuclear plant complex, legislative approval is not required. For instance, NSP currently uses its nuclear plant facilities for short-term storage. Because the spent fuel rods are stored in already existing pools of reactor facilities, and not underground, nor permanently, it falls outside the definition of a waste management facility and thus, outside the requirement for legislative approval. Furthermore, the 1977 bill, as drafted, was found to adequately address the concerns about storage at the then existing nuclear power plant facilities. (Note of Minnesota

Pollution Control Commissioner Sandra Garderbring, and testimony of Joe Foran, Commission Decision at p. 13, Joint App. at p. 57). In short, the Act did not affect the temporary storage of spent fuel rods within NSP's existing nuclear complexes and thus, did not affect the operation of the nuclear plants.¹

However, NSP now wishes to construct a new waste management facility to store high level radioactive waste. The structures are referred to as dry-casks or Independent Spent Fuel Storage Installations ("ISFSI"). The structures are not part of the reactor facility, but independent from the existing reactor complex.² The dry-cask structures fall within the definition of a radioactive waste management facility.

The Act does not preclude NSP from constructing or operating

¹The original version of the 1977 bill prohibited the storage of radioactive waste in Minnesota for any period greater than twelve months. H.F. No. 1215, Sec. 2 (May 4, 1977), S.F. No. 133, Sec. 2 (May 3, 1977). Committee hearings dealt with the issue of the retention of spent fuel rods at nuclear plants before shipping them out of state. NSP representatives indicated that such shipments could not occur for a period of between two and three years and as much as eight years in order to adequately protect the public from exposure during shipment. Senate Committee on Agriculture and Natural Resources, 70th Sess., hearing on S.F. 1133. (Minnesota Senate Tape, April 22, 1977). References regarding time periods were omitted before the enactment of the Act.

²Even a newly constructed addition attached to the current reactor facility for the purpose of disposal or storage of high level radioactive waste would require legislative approval. The nuclear plants of NSP at Prairie Island and Monticello were in existence in 1977, including the pools which now hold spent fuel rods. The pools within the reactor complex were remodeled in 1977 and 1981 which further increased their holding capacity. Regardless, to allow any new addition without the express approval of the legislature, would clearly circumvent the intent of the Radioactive Waste Management Act.

the dry-cask structures, however, it cannot do so without prior legislative approval. If NSP is not required to seek such approval, the Radioactive Waste Management Act's purpose is undermined and the powers reserved to the legislature essentially non-existent. The Legislature was simply stating as a matter of public policy that it was to play a decisive role in radioactive waste management in the first instance.

2. The 1984 Amendments to the Radioactive Waste Management Act did not Change the Intent of the Original Act, Rather, it Expanded Legislative Protection Over Matters Relating to Radioactive Waste Management

Unless there is a clearly expressed intention to the contrary, a presumption exists that the legislature did not intend to change existing law. The statute should be construed to harmonize the amendments with existing law unless it is obvious the intent was to change the law. See Washburn v. Van Steenwyk, 32 Minn. 336, 20 N.W. 324 (1884). At the same time, the adoption of an amendment raises a presumption that some change in existing law was intended. Honeymead Prods. Co. v. Aetna Cas. & Sur. Co., 270 Minn. 147, 132 N.W.2d 741 (1965). There exists no legislative history to suggest a legislative intent to change the purpose of the 1977 law. The 1984 amendments to the original 1977 Radioactive Waste Management Act did not abrogate or substitute other decision-making bodies for the express authority of the Legislature.

The Radioactive Waste Management Act was amended in 1984, to address legislative concerns regarding the United States interest in constructing a nuclear waste repository site in northern

Minnesota. (Jd. Klein's Findings and Conclusions at p.20, Joint App. at p. 20; Commission's Decision at p. 57, Joint App. at p. 57). The focus of the amendments was to ensure that Minnesota's interests were adequately protected in the federal government's nuclear waste repository siting process. As the Senate author explained to the Senate Subcommittee on Environmental Protection^a:

In Section 2, we get into the definitions. I might add that we are proposing that this new law be integrated with existing law having to do with high-level radioactive waste and the current law, codified in 116C.71 to .74, essentially says two things. Number one, you can't construct a radioactive waste management facility within the state without express authorization by the legislature, and number two, you can't transport high-level radioactive waste into the state for the purposes of disposal or temporary storage in excess of 12 months. We don't propose to change those provisions in any meaningful way, but to allow the flexibility that will enable us to participate more fully in this Department of Energy process.

Hearing on S.F. No. 1258 before the Senate Subcommittee on Environmental Protection, 73rd Sess. (Minn. Senate tape for January 24, 1984) (statement of Senator Merriam).

The Minnesota Legislature also made specific findings regarding the Act. The Legislature found that:

[T]he disposal and transportation of high level radioactive waste is of vital concern to the health, safety, and welfare of the people of Minnesota, and to the economic and

^aThe Senate Subcommittee on Environmental Protection was a subcommittee of the Senate Agriculture and Natural Resources Committee.

environmental resources of Minnesota. To ensure the health, safety, and welfare of the people, and to protect the air, land, water, and other natural resources in the state from pollution, impairment, or destruction, it is necessary for the state to regulate and control, under the laws of the United States, the exploration for high level radioactive waste disposal within the state of Minnesota. It is the intent of the legislature to exercise all legal authority for the purpose of regulating the disposal and transportation of high level radioactive waste.

Minn. Stat. Sec. 116C.705 (1984).

The legislative findings of Section 116C.705, read in conjunction with the express and existing legislative authority of 1977, provided in Section 116C.72, demonstrates a legislative intent to expand the scope of the Act to further regulate the disposal, storage, and transportation of high level radioactive waste to protect human, economic, and natural resources from the unfettered accumulation of such waste from within and outside the state. The existing law, read in conjunction with the 1984, amendments indicates a necessary liberal interpretation of public policy to issues regarding the regulation of high level radioactive waste facilities. The Legislature did not intend to diminish its authority to approve or reject proposals to construct or operate radioactive waste management facilities within Minnesota.

The addition of certain definitional terms to the Act did not lessen the scope of existing law. Of particular interest and central to the instant action is the 1984 amendment governing the definition of "dispose" and "disposal." The terms were not

defined in the 1977 Act. Minn. Stat. Sec. 116C.71, Subd. 16, defined the terms "dispose" and "disposal" as:

"The permanent or temporary placement of high level radioactive waste at a site within the state other than a point of generation."

It is the definitional phrase "point of generation" that has been identified as the source of ambiguity. See Judge Klein's Findings and Conclusions at pp. 21-22, Joint App. at pp. 21-22; The Commission's Decision at pp. 11-12, Joint App. at pp. 55-54.

The Commission ruled that the above language changed pre-existing law so that no legislative approval is required for permanent disposal of high level radioactive waste so long as the disposal site is the point of generation, here, Prairie Island.⁴ This reading would defeat the entire purpose of the Radioactive Waste Management Act. Under the Commission's interpretation of the definition of "dispose" or "disposal," NSP could accept high level radioactive waste from out of state for permanent disposal at Prairie Island without legislative approval. The Legislature did not intend this absurd result.

Examining the phrase "point of generation" in its ordinary meaning, the "point" refers to the source, here the nuclear reactor complex, wherein high level radioactive waste is created

⁴As State Senate author Gene Merriam stated in subcommittee hearings, the 1984 amendments to the Act were not to change in any meaningful way the provisions of the Act, but to create flexibility for the State to participate in a federal nuclear repository siting process. Hearing on S.F. No. 1258 before the Senate Subcommittee on Environmental Protection, 73rd Sess. (Minn. Senate tape for January 24, 1984) (statement of Senator Merriam).

(generated) in the process of producing electricity. The Commission's expansion of the phrase to encompass areas outside the immediate reactor complex results in a construction that is inconsistent with existing law and short-circuits the role of the Legislature as the creator of public policy. State v. End, 232 Minn. 266, 45 N.W. 2d 378 (1950).

The Radioactive Waste Management Act was enacted in 1977, long before the United States' 1984 interest in Minnesota as a nuclear waste repository. The Act sought to reserve for the Legislature control over radioactive waste management facilities within the state's borders, while accepting the temporary storage (two to eight years)⁵ of spent fuel rods within the existing reactor complex of NSP nuclear facilities. To accept the Commission's construction would allow the continued accumulation of high level radioactive waste outside the present nuclear plant complex over an extended period of time, a position repugnant to the public policy of the Act. Any new facility creating the likelihood of temporary or permanent disposal or storage, presents a risk to the health and welfare of the people and the environment which the Act seeks to protect. The Act establishes a public policy whereby the risk of such radioactive waste facilities will not be imposed upon the people, without debate, review, or vote of the Legislature.

⁵See Hearing on S.F. No. 1133 Before the Senate Committee on Agriculture and Natural Resources, 70th Sess. (Minnesota Senate Tape, April 22, 1977).

3. As Recently as 1992, the Legislature has Made Efforts to Assert its Role in the Decision-Making Process as Defined Within the Radioactive Waste Management Act

On February 27, 1992, the Minnesota House of Representatives Environment and Natural Resources Committee passed a resolution which expressed its concerns about NSP's failure to seek approval of the Legislature to store high level radioactive waste in dry-cask structures at its Prairie Island facility. The resolution stated in relevant part, that:

WHEREAS, Northern States Power Company proposes to store high level radioactive waste from its Prairie Island nuclear plant outdoors on Prairie Island for an indefinite number of years, and

WHEREAS, Northern States Power Company gives no date where radioactive waste placed outdoors at Prairie Island will be removed from the island; and

WHEREAS, the intent of the Radioactive Waste Management Act is to ensure that the legislature vote on the establishment of any facility for long term storage of high level radioactive waste in the state; NOW, THEREFORE,

BE IT RESOLVED that it is the position of the House Committee on Environment and Natural Resources that Northern States Power Company must seek approval of its proposal to store high level radioactive waste outdoors at Prairie Island from the Minnesota legislature pursuant to Minnesota Statutes, section 116C.72.

House Committee Resolution, Joint App. at p. 104.

On March 5, 1992, the Chairman of the Committee, Willard

Munger⁶, wrote to the Honorable Judge Klein expressing the concerns of the Committee and forwarding the Committee's resolution. Munger wrote:

The Radioactive Waste Management Act was intended by the Legislature to give it a role in waste storage decisions that could affect the State for many years into the future. It is the Committee's understanding NSP has identified to the Commission no date by which the outdoor storage will end and the waste be removed to another location. It is further the Committee's understanding that experts from the Department of Public Service and other intervenors testified that the waste would remain outdoors at Prairie Island for a minimum of twenty-five years, and with the potential to stay there indefinitely or permanently....In light of this testimony, it is clear that the concerns embodied in the Radioactive Waste Management Act have come to pass. NSP's waste storage program is not temporary; it will affect the State and its residents for an indefinite period of time into the future.

The intent in the Radioactive Waste Management Act was to ensure that a democratically elected body vote on the establishment of a high-level radioactive waste storage facility in Minnesota. The Committee does not doubt the fairness or commitment of the Court or the Commission in evaluating this matter. When a utility proposal can result in burdening the State with an essentially permanent outdoor radioactive waste storage facility, it is certainly appropriate for legislative approval to be required.

Letter of Representative Willard Munger, dated March 5, 1992, Joint App. at p. 107.

The Committee's Resolution and Representative Munger's

⁶Representative Munger was a co-author and also Chair of the Environment and Natural Resources Committee in 1977, when the Act was first introduced.

letter concisely states the arguments for legislative approval for a radioactive waste management facility. The significant public implications of the long-term disposal, or storage, of high level radioactive waste in the State, requires public debate in Minnesota's duly elected lawmaking body.

The Legislature did not relinquish its responsibility to authorize the construction or operation of a radioactive waste facility to the executive branch of government through the Commission. When appropriate, the Legislature has delegated appropriate authority to agencies to enforce stated policies of enacted law. See e.g., Minn. Stat. Sec. 216B.01 (governing purpose and responsibility of Public Utilities Commission); Minn. Stat. Sec. 116C.01 (governing purpose and responsibility of Minnesota Environmental Quality Board). However, due to the magnitude of the issues surrounding high level radioactive waste, the Legislature's wisdom was to deal with disposal and storage management facility issues itself. The House Committee's adopted resolution reiterates the clear intent of the Legislature.

CONCLUSION

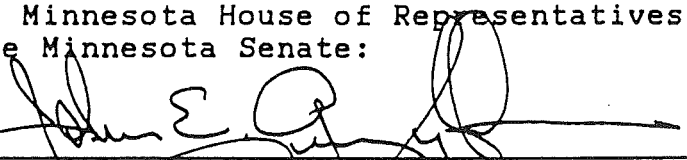
The Legislature recognized high level radioactive waste as a threat to the health and welfare of the people and the economic and environmental resources of Minnesota. The language and intent of the Radioactive Waste Management Act is clear. It provides a process wherein the Legislature reserved for itself, as Minnesota's deliberative body, the power to authorize the approval of the construction or operation of radioactive waste

management facilities in Minnesota. Later amendments did not change the underlying policy and intent of the Act. In short, the Act provides for a mechanism to check the proliferation of high level radioactive waste in Minnesota.

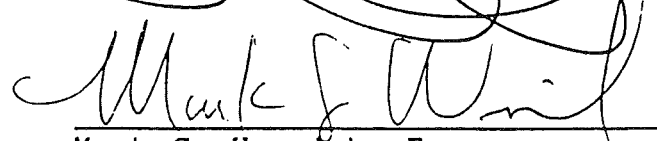
The decision to approve an independent, waste management facility is not the Public Utilities Commission's, but that of the Legislature. The Commission's decision clearly undermines public policy. Therefore, the individual members of the Minnesota House of Representatives and the Senate respectfully demand that this court reverse the order of the Commission granting the certificate of need for the construction of Independent Spent Fuel Storage Installation, and direct NSP to seek legislative approval for its radioactive waste management facility.

Dated: December 23, 1992.

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STATE OF MINNESOTA
IN THE COURT OF APPEALS

In the Matter of an Application for
a Certificate of Need for Construction
of an Independent Spent Fuel Storage
Installation.

Court of Appeals
Nos. C1-92-2314,
C3-92-2315, and
C9-92-2321

Minnesota Public Utilities Commission
Docket No. E-002/CN-91-19

Appeal from Order issued October 28, 1992 after
Reconsideration of Order of August 10, 1992

SUPPLEMENTAL PETITION

CERTAIN INDIVIDUAL MINNESOTA HOUSE OF REPRESENTATIVES
AND MINNESOTA SENATE MOTION FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF

TO: The Minnesota Court of Appeals:

The members of the Minnesota House of Representatives and the Minnesota Senate, as identified below, hereby move the Minnesota Court of Appeals pursuant to Rule 129 of the Minnesota Rules of Appellant Procedure for leave to file a brief as amicus curiae in the above-entitled matter. The Prairie Island Mdewakanton Sioux Indian Community and the Prairie Island Coalition Against Nuclear Storage have sought judicial review of the Minnesota Public Utilities Commission's decision to grant a certificate of need to Northern States Power Company for the construction of a facility to store high level radioactive waste in Minnesota. This motion is made on behalf of Minnesota

legislators who are concerned with the circumvention of the legislative process as it relates to the management of high level radioactive waste in the state of Minnesota.

The interest of Minnesota legislators in this litigation reflects the common interests and concerns of a governing body representing the people of Minnesota. As an elective body, the Minnesota State Legislature is responsible for the passage of laws which protect the life, liberty, and property of citizens consistent with the purposes and interpretations of the Minnesota and United States Constitutions. In this respect, the Legislature passed the Minnesota Radioactive Waste Management Act, Minn. Stat. Secs. 116C.71-.843 in 1977, governing the practices of disposal and transportation of high level radioactive waste. Findings of the Legislature made at the time of certain amendments to the Act in 1984, stated in relevant part that:

[T]he disposal and transportation of high level radioactive waste is of vital concern to the health, safety, and welfare of the people of Minnesota. To ensure the health, safety, and welfare of the people, and to protect the air, land, water, and other natural resources in the state from pollution, impairment, or destruction, it is necessary for the state to regulate and control, under the laws of the United States, the exploration for high level radioactive waste disposal within the state of Minnesota.

Minn. Stat. Sec. 116C.705 (1984). These findings are indicative of the grave concern of the legislature as it relates to the disposal or transportation of high level radioactive waste in Minnesota.

Granting Minnesota legislators leave to file an amicus curiae brief is desirable to this court for several reasons. First, Minnesota legislators can provide the experienced and practical perspective of the one governmental body directly responsible for establishing laws protecting the health and welfare of Minnesota citizens and their environment. Second, Minnesota legislators are especially interested in the outcome of this litigation because the authority of the legislative branch is being challenged on issues relating to the disposal of high level radioactive waste. The significant public implications of the disposal of high level radioactive waste in the State, requires public discussion in a lawmaking body. An amicus curiae brief can assist this court with the definition of the relative spheres of authority of the various governmental agencies, boards, commissions, and the legislature as it relates to high level radioactive waste. In short, Minnesota legislators are particularly interested in preserving a consistent legislative, administrative, and judicial approach to Minnesota's Radioactive Waste Management Act.

Finally, Minnesota legislators should be granted leave to file an amicus curiae brief because they can best articulate the public policy reasons for ensuring that the ultimate decision of the disposal of high level radioactive waste rests with the legislature. The Minnesota Radioactive Waste Management Act provides that:

"Notwithstanding any provision of chapter 116H, to the contrary, no person shall

construct or operate a radioactive waste management facility within Minnesota unless expressly authorized by the Minnesota legislature."

Minn. Stat. Sec. 116C.72 (1977). The Act reflects the legislature's desire to keep issues of radioactive waste management facilities in the public domain vis-a-vis public discussion in Minnesota's lawmaking body. The disposal of high level radioactive waste will have an impact on not just the next generation of Minnesotans, but generations upon generations of Minnesotans yet to come. The participation of Minnesota legislators in the court's review of Minnesota's Public Utilities Commission's decision will illuminate the proper legislative function, public policy concerns, and purposes of the Act.

The members representing the Minnesota House of Representatives and the Minnesota Senate listed

below, respectfully pray leave of this court to file an amicus curiae brief in this matter.

Dated: _____, 199 .

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MEMBERS OF THE MINNESOTA HOUSE OF REPRESENTATIVES
AND SENATE ASKING FOR LEAVE OF COURT TO FILE
AN AMICUS CURIAE BRIEF

MEMBERS OF THE MINNESOTA HOUSE OF REPRESENTATIVES

SIGNATURES ON AMICUS CURIAE BRIEF

Senate:

- Sen. Finn
- Sen. Flynn
- Sen. Krentz
- Sen. Piper
- Sen. Spear
- Sen. Hottinger
- Sen. Bertram, Sr.
- Sen. Pogemiller
- Sen. Berglin
- Sen. Chandler

- Sen. Pappas
- Sen. Anderson
- Sen. Janet Johnson
- Sen. Price
- Sen. Morse
- Sen. Marty
- Sen. Mondale
- Sen. Riveness
- Sen. Wiener

House:

- Rep. K. Brown
- Rep. McCollum
- Rep. Pauly
- Rep. Cooper
- Rep. Pugh
- Rep. Pelowski
- Rep. Kelso
- Rep. Carlson
- Rep. Dorn
- Rep. Mariani
- Rep. A. Johnson
- Rep. Sekhon
- Rep. Simoneau
- Rep. Delmont
- Rep. Wejcman
- Rep. Dawkins
- Rep. Asch
- Rep. Ozment
- Rep. Clark
- Rep. Ostrom
- Rep. Farrell
- Rep. Garcia
- Rep. Kelly
- Rep. Anderson
- Rep. Hasskamp

- Rep. Orenstein
- Rep. Jefferson
- Rep. Peterson
- Rep. Vellenga
- Rep. Orfield
- Rep. Trimble
- Rep. Rodosovich
- Rep. Kahn
- Rep. Hausman
- Rep. Lourey
- Rep. Neary
- Rep. Greiling
- Rep. Luther
- Rep. Munger
- Rep. Greenfield
- Rep. Evans
- Rep. McGuire
- Rep. Skoglund
- Rep. Steensma
- Rep. Carruthers
- Rep. Jaros
- Rep. Milbert
- Rep. Reding
- Rep. Bergson
- Rep. Knickerbocker