



Office of the
Inspector General
Commonwealth of Massachusetts

Gregory W. Sullivan
Inspector General

An Investigation of the Use
of Certain Bond Funds by
the North Attleborough
Electric Department

December 2005



The Commonwealth of Massachusetts
Office of the Inspector General

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December, 2005

Dear North Attleborough Board of Electric Commissioners and Selectmen:

The Office of the Inspector General is issuing this report regarding the misuse of bond funds by the management of the North Attleborough Electric Department (NAED). Our investigation revealed that the bond funds were improperly used by NAED management to start up an internet service provider business. This Office estimates that this misapplication of funds will cost the electric ratepayers of the Town of North Attleborough (Town) more than \$8 million. These costs include the repayment of bond principal, interest on the bonds, capital write-offs and cumulative business losses.

The most troubling aspect of the investigation was that NAED management knowingly misled Town officials in requesting issuance of these funds. NAED management also vigorously fostered an environment which sheltered the electric department from Town oversight. Without adequate oversight and control, the illegal use of bond funds went undetected for over three years. This course of action encouraged a culture of arrogance that contributed to NAED'S risky management decision-making and ultimately cost the electric ratepayers in their pocketbooks.

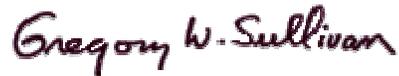
While NAED management spent bond proceeds without adequate oversight and control, its auditor, Grant Thornton LLP, enabled these inappropriate expenditures to remain undetected by Town officials. The lack of reasonable care exercised by Grant Thornton is both surprising and unacceptable. Grant Thornton's actions were negligent because they failed to follow generally accepted auditing standards. For example, they failed to validate NAED expenditures against Town approved bond fund authorizations. Moreover, they consistently allowed NAED to charge operating fund expenses to a capital bond fund account. Finally, these identified deficiencies occurred despite several red flags present in the audited records, which should have alerted accounting professionals to serious underlying problems.

The Inspector General's office strongly recommends that an effective system of independent oversight and control be implemented for NAED expenditures, that NAED

management and Town management put in place a management structure and focus to create a cooperative and mutually beneficial work environment which will provide increased value to the ratepayers and the taxpayers of the Town, that consideration be given to contracting for common professional services for both the electric department and other Town operations (i.e. a single audit firm and a common lead law firm), that the 2003 and 2004 audits are brought to an expeditious completion, and that appropriate recourse be considered against Grant Thornton for negligence in the conduct of their audits of NAED's financial statements during the period when the bond funds were expended. More detailed recommendations are reflected in the body of the report.

I hope that this report assists you in preventing possible fraud, waste, and abuse in the future. Please do not hesitate to contact my staff with any questions you may have or if you require additional assistance.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan
Inspector General

cc: Mr. James C. Moynihan, NAED General Manager
Mr. Mark Fischer, North Attleborough Town Manager
The Honorable Thomas F. Reilly, Attorney General
The Honorable Paul F. Walsh, Jr., Bristol County District Attorney
Chairman Paul G. Afonso, Department of Telecommunication & Energy

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Introduction

In September 2004, at the request of North Attleborough (Town) officials and electric department commissioners, the Inspector General's Office initiated an investigation into the use of \$4.0 million of bond funds by the management of the North Attleborough Electric Department (NAED). The bond funds in question were issued in March 1999 by the Town and were authorized for specific improvements to the electric light department plant (see Appendix A for a list of projects and detail work supporting the estimated costs for the original bond authorization). The original bond authorization occurred through passage of Article 19 at the Town's 1988 Semi Annual Town Meeting. The primary focus of this investigation was to determine whether the \$4.0 million of bond funds were spent on purposes for which they were originally authorized.

In order to determine whether the bond funds were spent appropriately, the Inspector General's Office reviewed thousands of pages of pertinent documents. The documents included original bond authorization and bond indenture agreements along with numerous financial reports and statements. Supporting financial documentation (including invoices) for charges made against the \$4.0 million bond fund was reviewed and analyzed. Audit reports and applicable audit work-papers were scrutinized. Business plans, legal opinions/memorandums, and board minutes were examined. In concert with the review of documents, the Inspector General conducted related interviews in order to clarify issues and arrive at an understanding of the facts.

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Findings

Finding 1: NAED's management misled the Town of North Attleborough with respect to their request for the issuance of \$4.0 million of bond funds.

Pursuant to M.G.L. c. 164, §14 bond funds can only be expended for the purposes for which such bonds have been authorized. On July 6, 1998, the General Manager of NAED sent a letter to the Town Treasurer requesting the issuance of \$4.0 million of bonds with the stated purpose of completing the projects authorized under Article 19 of the 1988 Town Meeting. Excerpts from this letter are reflected below:

"At the 1988 Annual Town Meeting, Article 19, 'Electric Department Distribution Improvements' was approved. This Article provided \$12 million for funding several projects for the electric department. Projects which have been completed are: (1) the rebuilding of Sherman Substation and, (2) the construction of the Operations Center. To accomplish this, we have used \$4 million of the \$12 million that was authorized.

We are now ready to undertake the final phase of the Article 19 projects and to do that, we will need to borrow another \$4 million. We understand that you do all permanent financing during the first half of the year and since our project is now underway, there will be a need for interim financing. . .

The specifics of the final phase of our Distribution System Improvement are to build an 18-mile fiber optic SONET ring consisting of 144 fibers that will provide North Attleborough Electric with the ability to (1) read customers' electric meters remotely, (2) control customers' electrical equipment and appliances, (3) develop demand side management strategies that will control electrical loads, (4) provide a Wide Area Network (WAN) for the Town's municipal facilities and, (5) provide a communications link that will allow North Attleborough Electric to monitor and control its 15kV and 4kV distribution equipment located throughout North Attleborough.

I have stated earlier in this letter we will need to borrow construction funds soon, as our scheduled completion is late December 1998. If you need additional information about our final distribution project, please call at your convenience."

Any reasonable reader of this letter would conclude that the final phase of NAED's Distribution System Improvements as listed in items 1 through 5 of the General

Manager's letter were authorized and in accordance with Article 19. This was not the case. The letter is misleading because it understated and failed to disclose the true intention of the General Manger. Our investigation found that NAED management intended to use the bond funds to start-up a new telecommunications business venture. Numerous communications from the General Manager to NAED's Board of Commissioners implied that the final capital improvements contemplated pursuant to Article 19 of NAED's Distribution System were never intended to be implemented using these bond funds. Using bond funds for purposes other than the capital improvements as specified in Article 19 would not be authorized. While the General Manager never implemented the telecommunication business in its entirety, the internet service provider (ISP) portion of the business was initiated. In fact, the General Manager used the entire \$4.0 million of the bond proceeds to fund the ISP portion of the telecommunication business venture. Such use of the bond money was not authorized as expenditures under Article 19. In effect, the General Manager spent the \$4.0 million in bond funds in violation of the law.

On April 16, 1998 (approximately three months before the General Manager submitted the \$4.0 million request to the Town Treasurer), the General Manager submitted a memo to NAED's Board of Commissioners titled "Fiber Telecommunications Project." The memo summarized the activities undertaken by NAED over the previous two years to become a telecommunications utility. After discussions with consultants, NAED settled on a proposal developed with help from R.W. Beck, Inc. The result was a plan called "North Attleborough Electric's Telecommunications Business Plan" (Business Plan). Key elements of the business plan included the following:

- Install the 17-plus mile all fiber SONET network;
- Become an Internet Services Provider;
- Install a PBX (private branch exchange);
- Become a Telecom Services Provider for all customers who are connected to the fiber network; and,
- Use the fiber network for North Attleborough Electric purposes such as automatic meter reading and control of customer's electric equipment.

In the memo, financing for this telecommunications business plan was proposed as follows:

“Convert the \$4 million authorized but unissued Bond issue into cash. This cash will then be used to:

- *Conduct the make-ready work study and report*
- *Complete the make-ready work*
- *Purchase and install the fiber optic network and related equipment*
- *Purchase capital equipment to operate and maintain the fiber network*
- *Provide startup capital for new business opportunities*
- *Provide operating cash for new business ventures and fiber network service until service revenues are sufficient to pay all expenses.”*

On May 18, 1998 (approximately two months before he submitted the \$4.0 million request to the Town Treasurer), the General Manager sent another memorandum to NAED’s Board of Commissioners titled, “New North Attleborough Electric Business Opportunities.” The memorandum provided an overview of the following three business opportunities:

- Build and operate a high-speed fiber telecommunications network;
- Provide telephone services for the Town’s municipal facilities; and
- Become an Internet Services Provider (ISP).

Included with the business plan was a report from R.W. Beck, Inc. along with revenue projections, capital budget, operating budget and an implementation schedule.

The following funding proposal was included in the capital requirements section of the Business Plan:

“We propose to obtain these funds by issuing the \$4.0 million of debt that is authorized but unissued. The final \$4.0 million from the 1988 Town Meeting authorization vote has been earmarked to repay North Attleborough Electric’s working capital which has been the source of funds for the Sherman Substation rebuilding project. Now that the project is nearing completion, the issuance of the \$4.0 million will replenish the working capital fund and provide the startup capital for the Business Plan.”

In line with this Business Plan, R.W. Beck, Inc. prepared a presentation (dated July 16, 1998) titled, “North Attleborough Internet Service Provider (NAISP) Presentation.” The presentation addressed the startup of an ISP operation for NAED. Funding for the

startup was identified as \$4.0 million from bond proceeds. The cash flow schedules included in the presentation reflect a starting balance of \$4.0 million and include debt service payments, which are equal to the debt service payments required by the March, 1999 bond issue.

Subsequently, on March 15, 1999 the Town issued general obligation bonds totaling \$10,209,000. Of this issue, \$4.0 million was for NAED and is described in the bond agreement as follows:

“\$4,000,000 Electric Bonds were authorized pursuant to the Chapter 44 Section 8 (8) of the Massachusetts General Laws, as amended, and a vote of the Town passed under Article 19, at the October 17, 1988 Special Town Meeting for improvements to the electric light department plant. A total of \$12,000,000 was authorized by said vote and represents Phase III of the Master Plan for the department of which \$4,000,000 has been previously issued and \$4,000,000 was rescinded at the April 27, 1998 Annual Town Meeting. These Bonds will be used to retire a like amount of bond anticipation notes currently outstanding.”

There are obvious inconsistencies in what the General Manager communicated to the Town Treasurer in order to secure the additional bond funds and what he communicated to NAED's Board of Commissioners in terms of funding new business opportunities. The General Manager misrepresented to and concealed from the Town material facts related to the true usage of the \$4.0 million bond fund issuance.

Finding 2: Prior to requesting the issuance of \$4.0 million in bond funds, NAED management was informed several times that bond funds could only be used for the purposes for which they had been authorized.

In September, 1996, the General Manager obtained from NAED's legal counsel, Rubin and Rudman LLP, an opinion delineating the legal use of unissued bond funds. This opinion, although relating to the proposed use of bond funds for a different purpose, clearly stated that bond funds could not be used for purposes other than those authorized through Town Meeting Vote. The opinion reads in part as follows:

"We have also researched whether authorized but unissued debt (\$8 million) from the 1988 Town Meeting Vote taken for the purpose of bonding certain electric system improvements could be used to fund construction of a cable television system to supply residents of North Attleborough. . . .

Article 19 defines the exact use for the authorized funds. Neither the Capital Improvements Plan nor the descriptions of the items under Article 19 mention anything that could be construed to incorporate the purchase of fiber optic cable for municipal light plant and municipal communications systems or a cable television system . . .

If a bond has not been issued, then it does not apply. In fact, if the bonds have not been issued for the purposes for which they were voted, then they cannot be issued at all. The Town is only allowed to incur debt in accordance with G.L. c. 44 8(8), and the Town Meeting votes taken that authorized the debt in the first place"

A review of the meeting minutes of NAED Board of Commissioners indicates that in March of 1997, while NAED management was contemplating the startup of a new telecommunications project, it was aware that this new venture would require Town Meeting action. Following are excerpts of the March 20, 1997, NAED Board of Commissioners meeting minutes:

"Telecom Project: The Manager reviewed a memo that he had previously written about the project. He stated that he was to attend a meeting at Lucent Technologies to discuss the building of the Hybrid Fiber Coax system and Lucent's assistance in designing a system for North Attleborough. The Commissioners also requested a project schedule to determine where the critical points are especially since it appears that Town Meeting action will be needed."

In July, 2004, the public accounting firm of Powers and Sullivan, Certified Public Accountants published a report summarizing the findings from its forensic investigation conducted on the startup operations of NAED's internet service provider business called North Attleborough Internet Service Provider (NAISP). This forensic audit was commissioned by the Town in order to respond to a number of questions regarding NAED's use of the proceeds of the \$4.0 million bond issued in March 1999. In conducting its forensic audit of NAISP, Powers and Sullivan met with the NAED Business Unit Division Manager. The auditors asked him about the bond funds being used to fund the Internet start up. On page 5 of the Powers and Sullivan forensic audit report, his response is documented as follows:

"[T]hey knew this was inappropriate but they thought (1) that they would have other on-going costs if they needed to back into what the \$4.0 million was used for, and (2) they expected the Internet business would be profitable and would support the repayment of the bonds."

Well before the request to issue the additional \$4.0 million of bond funds, NAED management knew that Article 19 bond funds could not be used for purposes other than those for which they had been originally approved at the 1988 Town Meeting. It was clear that these funds could not be used for a fiber optic telecommunications system or for the startup of an ISP business. Although NAED management knew that it was inappropriate to use these bond funds to startup an ISP business without Town meeting approval, they nonetheless (as reflected in the previous finding) proceeded to request the funds and failed to disclose to the Town the full and complete intended use.

Finding 3: NAED's auditor, Grant Thornton LLP failed to exercise reasonable care in conducting NAED audits from 1999 through 2002.

Our investigation has revealed that NAED's auditor, Grant Thornton failed to exercise reasonable care in the performance of NAED audits for fiscal years 1999 through 2002. As an integral part of our investigation, this Office reviewed (through summons to Grant Thornton) NAED's annual financial audit reports, audit management letters and all audit documentation relative to Grant Thornton's planning, conducting, and reporting on the NAED audits for fiscal years 1999 through 2002.

Grant Thornton indicated in their NAED audit reports for fiscal years 1999 - 2002 that they were conducted in accordance with auditing standards generally accepted in the United States of America. Each report contained the following:

"Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe our audits provide a reasonable basis for our opinion."

The above statement notwithstanding, this Office believes that Grant Thornton failed to conduct its NAED audits according to generally accepted auditing standards. These standards require auditors to determine whether expenditures charged against bond proceeds are consistent with the authorization to borrow and that all provisions of applicable indenture agreements have been met. Our opinion in this regard is based upon our review of the Grant Thornton audit work-papers from fiscal year 1999 through fiscal year 2002. This review found no evidence that the auditors performed adequate detailed testing to enable them to properly determine whether the costs charged against the bond proceeds were consistent with the authorization to borrow these funds. In fact, this Office found no documentation, in any of the fiscal year work-paper binders or in the permanent files, related to the Town meeting's Article 19 authorized expenditures. An understanding by the auditor of the Article 19 authorization would be essential in

determining the appropriateness of expenditures made against the bond funds. Grant Thornton's apparent failure to consider the actual spending authorizations of Article 19 in conducting its NAED audits signals a lack of reasonable care.

Contained in the fiscal year 2000 Notes to the Financial Statements, Grant Thornton commented as follows:

"The Bond Fund is deposited with the Treasurer of the Town of North Attleborough who commingles it with other Town Funds. The Bond Fund proceeds will be used to fund NAE projects as defined in the Bond Indenture 'Use of Proceeds'."

Once again in the fiscal year 2001 Notes to the Financial Statements, Grant Thornton stated that,

"The Bond Fund proceeds were used to fund NAE projects as defined in the Bond Indenture 'Use of Proceeds'. During 2001, NAE expended the remaining bond proceeds."

This Office believes that when Grant Thornton made these statements, they intended to convey that NAED spent the bond funds within the authorized parameters of Article 19. These statements are incorrect and misleading. Actually, the work-paper documentation reflects a very different use for these bond funds than what was authorized through Town Meeting vote. The Grant Thornton work-papers clearly document that these bond funds were used for the start-up and ongoing operation of the North Attleborough Internet Service Provider (NAISP) business, which was not authorized by Article 19.

In addition to the above, our review of the work-papers disclosed several "red flags" that should have alerted the auditors to the realization that the bond fund expenditures were inappropriate. For example, the \$4.0 million in bond funds were authorized by Article 19 and issued for specific capital improvements to NAED's electric distribution system. Capital improvements should appear as additions in the appropriate fixed asset accounts. Highlighted below are some of these "red flag" warnings that should have alerted the auditors to problems with the bond fund expenditures.

Grant Thornton's work-papers reflected that some limited fixed asset addition testing had been performed. The auditors verified selected fixed asset additions against the relevant vendor invoices. Included in the samples of fixed asset additions tested by the auditors were some additions associated with the NAISP business. These ISP related invoices clearly indicated through a bond fund ink stamp mark that these purchases were funded through the bond fund. NAED management implemented this bond fund stamp as a control mechanism in order to identify what NAED spent the bond funds on. Although, the startup of the NAISP business was not an Article 19 authorized bond fund expenditure, the auditors failed to make this connection even though these NAISP fixed asset invoices were conspicuously marked as bond fund related.

Some of the associated expense invoices reviewed by Grant Thornton were related to NAISP operations. Similar to the fixed asset invoices mentioned above, these NAISP expense invoices were stamped as being financed through the bond fund. Not only did the auditors again fail to make the connection that these were not Article 19 approved expenditures, but they also failed to make the connection that as operating expenses, these costs should not have been funded through the bond fund. The bond funds were authorized for specific capital improvements not operating expenses. From 1999 through 2001 approximately \$3.6 million of NAISP operating expenses and \$400,000 of NAISP capital expenditures were charged to the bond fund. Included in the NAISP operating expenses charged to the bond fund were legal opinions, orders of take-out food, deli lunches, restaurant meals charged on NAED issued credit cards, and chocolates.

Another prime example of a missed red flag warning is reflected in the FY2000 audit work-papers. During FY2000, NAED purchased and capitalized some dial-up internet third party accounts. These accounts were purchased from Lightband Communications and Andonet for a total of \$205,159. During the FY2000 annual audit, Grant Thornton reviewed these capital additions as part of its fixed asset testing. The voucher packages (including invoices, checks and contract memorandums) reviewed by the auditors clearly indicate that payment was made from the bond fund. The auditors did not take

exception that the payments were made from the bond fund, but did question the appropriateness of these costs being capitalized. This was because all the customer accounts purchased were under month-to-month terms and therefore, future economic benefit could not be determined. Grant Thornton proposed amortizing the cost over twelve (12) months. Since they could not amortize the costs over five (5) years, NAED elected to expense the entire amount in FY2000. Not only did Grant Thornton fail to grasp the fact that these bond fund expenditures were not for the authorized Article 19 capital projects, but then they improperly permitted these expenditures to be expensed against the bond fund which was authorized for specific capital improvements and not for expense items.

Other examples demonstrating Grant Thornton's lack of reasonable care are highlighted below. In each of the audit reports reviewed from 1999 through 2002, Grant Thornton disclosed through a comment under the Utility Plant Note that, "*Construction work in progress expenditures have been substantially funded from operating cash.*" No mention of capital expenditures against the bond fund is reflected in any of the years. These bond funds were authorized for capital improvements and as such, expenditures against these funds should have been reflected against a fixed asset or construction in progress account. During fiscal years 1999, 2000 and 2001 (the years when the bond funds were being expended) an accounting/auditing professional should have expected that at a minimum, \$4.0 million worth of fixed asset additions would be accounted for through additions to the distribution plant account. However, as documented in the Grant Thornton work-papers, the distribution plant fixed asset additions for these three years totaled only \$3,126,634. The total fixed asset additions for the utility plant (which in addition to distribution plant would include additions to production, transmission, and general plant) only totaled \$3,569,582.

More troubling is the fact that based on the documentation in the work-papers, Grant Thornton was fully aware that the bond funds were being used for operating expenses related to the new ISP business and also to a lesser extent for internet business capital needs and not for the Article 19 authorized electric distribution improvements.

Highlighted below are some excerpts from the work-papers which support this conclusion:

1998: *“CLIENT RESPONSES TO FLUXUATIONS: The Cash Operating Fund is down drastically due to the Internet Business, which was funded with internal cash by NAED. The Town reimbursed NAED with 4 million dollars to cover the costs of the Internet business and for the addition of Fiber Optic Lines.”*

It should be noted that the last sentence above was crossed out by a Grant Thornton auditor. There was no indication in the work papers that Grant Thornton auditors probed why the \$4.0 million in bond funds were spent on an internet business. Instead, Grant Thornton ignored this “red flag” and failed to pursue a matter that cried out for further inquiry.

1999: *“**Cash** - Increased approximately \$4 million due to the issuance of new bonds in March 1999 for \$4 million. Increase appears reasonable.”*

2000: Flux in Operating Fund was explained as follows: *“Per [NAED accountant], this decrease is due to expenses (especially power expenses) increasing during FY2000. **Also bond monies were being spent on advertising, supplies, computers, payroll for the Internet sector, and any purchases the Internet sector makes.**”* [Emphasis added].

These work-paper excerpts clearly show that Grant Thornton auditors were aware that bond funds were being expended on unauthorized matters.

An adjustment between the bond fund and the operating fund was made during fiscal year 2000. Included in the work-papers was a hand-written note from the NAED Controller/Business Manager to the Grant Thornton auditors which explained the adjustment as follows:

“Quick explanation of the \$512,754. In 1998, from the bond fund, NAISP capitalized \$228,841 and expensed \$139,600. This is in agreement with your financials as well. As of 12/98, \$881,195 had been disbursed from the bond fund.

*The \$512K difference was what was expended as **feasibility studies** and other **expenses pertaining to Fiber** for the most part. The electric took the hit but was paid out of the bond. As per our meeting, we agreed to reclass the \$512 to the Op Fund in order to increase the Bond Balance.” [Emphasis added].*

As part of the original summons to Grant Thornton, this Office requested the 2003 audit work-papers. Grant Thornton has not provided these documents nor have they released the 2003 annual audit report, despite accepting more than \$40,000 from NAED to conduct this audit. Grant Thornton has not provided to this Office a reason for their failure to provide these documents or for not releasing the 2003 audit report. The lack of this 2003 audit report has impacted the town budget. The Department of Revenue has refused to certify the town’s free cash figure without this report. In October 2005, NAED hired a new accounting firm to conduct its 2003 audit. This Office finds it peculiar and disconcerting that over a year and a half after the audit was due, this audit has not been completed and issued by Grant Thornton.

It appears that NAED management violated various provisions of M.G.L. c.164. Pursuant to M.G.L. c. 164, § 14 bond funds can only be issued for the purposes for which such bonds have been authorized. M.G.L. c.164, § 57, provides that no bonds, notes or certificates of indebtedness can be issued by a Town for annual expenses of a municipal lighting plant. In order to enter the ISP business, NAED was required under M.G.L. c.164, § 41 to obtain a Town vote in a manner prescribed in M.G.L. c. 44, § 8 (8) for establishing a telecommunications system. No Town vote was pursued or obtained by NAED.

The effective regulation of municipal light departments depends upon the performance by independent auditors of their professional responsibilities in the audits they conduct. Absent Grant Thornton’s lack of reasonable care, the North Attleborough Board of Selectmen would have been able to act sooner to prevent NAED management from continuing to misappropriate and mispend the bond funds. Due in part to Grant Thornton’s professional shortcomings, NAED’s ratepayers have been substantially damaged by approximately \$8.1 million as detailed in Finding 5.

Finding 4: NAED management sheltered the electric department from Town oversight.

Our investigation revealed a corporate culture fostered by NAED management that resisted appropriate oversight by other Town bodies. Through our review, we noted numerous instances (dating back to 1994) where NAED management asked its counsel for a legal opinion when the propriety of NAED expenditures was questioned by the Town Accountant. The basic message to the Town through these opinions was to back off. These opinions reinforced NAED's adopted position that the Town possessed little, if any, authority to review or disapprove NAED expenditures. These opinions also stressed that NAED had independent control over its business which was not subject to change by the Town.

In fact, Rubin and Rudman issued a 1997 legal opinion to NAED's General Manager that stated NAED need not follow any accounting procedures requested by the Town that were inconsistent with those of the Department of Public Utilities (now the Department of Telecommunications and Energy (DTE)). This opinion referred to the Massachusetts Superior Court opinion, Town of West Boylston v. Scirpoli, in which the Court stated, "that the management board [of the West Boylston Municipal Light Plant] is only required to conform with accounting procedures used by the DPU and not any others requested by the town." The Court concluded by stating, "thus, if the DPU does not require supplemental documentation to accompany invoices in their accounting for light plant bills, then the Town may not do so either." Therefore, Rubin and Rudman concluded that Towns can not require municipal light departments to provide back-up documentation for their expenditures since it is not required by the DTE.

Through the years, the theme of the legal opinions regarding Town oversight has been consistent and predictable. Highlighted below, as an example, are excerpts from an October 22, 1999 opinion from Rubin and Rudman regarding the authority of the Town Accountant to refuse payment of consultant bills.

“In summary, Town by-laws or policies regarding allowable expenses of Town Departments and their employees or agents are not applicable to NAE. No other Town Officer, including the Accountant, Auditor or Selectmen, has the authority to second-guess the expenditures of NAE. . . . Finally, NAE’s Manager has the exclusive authority to hire consultants and lawyers and the Town has no authority to challenge their bills. . . . The Town Accountant has no authority to either (1) request back up for NAE’s bills or (2) refuse payment of NAE’s bills unless they are ‘fraudulent, unlawful or excessive.’ . . . Further, the Town cannot question the wisdom of an expenditure or refuse to pay a bill unless it is ‘fraudulent, unlawful or excessive’ . . . (the light plants ‘determination as to what should be expended for the efficient operation of the business is not subject to change by other public Officers or the legislative department’).”

The opinions of legal counsel consistently took the position that the Town could not refuse payment of NAED bills unless these bills were found to be fraudulent, unlawful or excessive. The opinions also stated that Town officials could not review details supporting NAED’s expenditures. In the opinion of this Office, the position articulated by Rubin and Rudman defies logic and common sense and helps to promote an environment for fraud, waste and abuse to exist. No reasonable person can expect an accountant, auditor or other responsible official to make an important determination regarding the possibility of fraud and unlawful or excessive spending without reviewing and examining underlying documents. This position requires a Town Accountant to operate with blinders.

As highlighted above, NAED has a long and active history with respect to asserting its autonomy from external oversight. Attempts by the Town at expense oversight have been consistently challenged and rejected by NAED management. This conduct stands in stark contrast to actions taken by NAED management when responding to the forensic investigation report published in July, 2004 by the certified public accounting firm of Powers and Sullivan.

The Board of Selectmen, commissioned Powers and Sullivan to perform a forensic investigation on the use of the \$4.0 million in bond proceeds received by NAED in March, 1999. This investigation was predicated on inconsistencies discovered by Town

officials when they investigated the underlying causes for rising electric rates. Key findings of the Powers and Sullivan investigation included the following:

1. Use of the bond proceeds were inconsistent with the purposes of the original authorization to borrow; inappropriate in terms of the expenditures charged to the bond fund; and, may have violated some of the timing rules for expenditure required by state and/or federal statutes.
2. The Electric Department appears to have used bond proceeds to fund the start-up of the internet business.
3. The internet business has accumulated losses in excess of (\$2.2 million) through the end of December 31, 2002; a total of \$4.0 million of principal and approximately \$1.8 million of interest need to be paid on the debt service over the 20 year life of the bonds; and the internet business does not appear to have a future as a “going concern”.

NAED management commissioned Rubin and Rudman to review and comment on the forensic audit prepared by Powers and Sullivan. On October 15, 2004 Rubin and Rudman responded to NAED management by letter as follows:

“[T]he Forensic Audit demonstrates how the Town Officers failed to fulfill their statutory duties with regard to the processing of NAE’s bills . . . These Town Officers have a statutory obligation to review expenditure to determine whether they are unlawful, fraudulent or excessive”

This opinion by Rubin and Rudman appears to conflict with the prior opinions issued by them, excerpts of which are set forth above. In prior opinions, Rubin and Rudman concluded as follows:

“[T]he Town has no authority to challenge their [NAED’s] bills. . . .” and *“The Town Accountant has no authority to either (1) request back up for NAE’s bills or (2) refuse payment of NAE’s bills unless they are ‘fraudulent, unlawful or excessive’ . . . Further, the Town cannot question the wisdom of an expenditure or refuse to pay a bill unless it is ‘fraudulent, unlawful or excessive’”*

As previously noted, it is a difficult task at best to detect fraud or other unlawful activities. This task becomes virtually impossible if the oversight agent is not allowed to

review expenditures in detail. These contradictory legal opinions serve to foster conflict between the Town and NAED. At the end of the day, this environment unduly and substantially cost both the Town's taxpayers as well as NAED's ratepayers.

Finding 5: NAED management inappropriately used the \$4.0 million in bond proceeds from the March 15, 1999 bond issue to fund the start-up of the North Attleborough Internet Service Provider business. This use was inconsistent with the approval originally provided through Town meeting. This resulted in more than \$8 million in losses to the North Attleborough ratepayers.

During 1999 through 2001, expenditures (both operating expenses and to a lesser extent capital) related to the Internet Service Provider (ISP) business were routinely charged against the bond fund. These ISP related expenses were submitted by NAED to the Town for payment from bond proceeds. NAED identified the payments which it determined should be made from the bond fund by stamping the related invoices with a special "Bond Fund" stamp. The expenditures charged to the bond fund were clearly related to the ISP business and not to Article 19 capital improvements. Approximately \$350K of the expenditures were for ISP capital equipment and the remaining expenditures appeared to be for normal annual operating expenses. In the annual financial statements, the bond fund cash balance was reported separately from other cash accounts. The end of year bond fund balance for fiscal 1999, 2000 and 2001 was \$2,791,178, \$1,371,867, and \$0, respectively.

In order to help provide accounting control over the expenditures made against the bond fund, NAED implemented a procedure of stamping on each bond-related invoice a "Bond Fund" notation. As part of the forensic investigation, auditors from Powers and Sullivan interviewed NAED's Business Unit Division Manager regarding the use of the "Bond Fund" stamp on invoices. He explained that the accounts payable clerk was instructed to use the "Bond Fund" stamp on all invoices and expenditures relating to the ISP project. These invoices were then posted to various expense accounts in NAED's general ledger.

Through the end of 2002, NAED's internet business had sustained cumulative losses of approximately \$2,204,000 as reflected in the published financial statements. Total interest payable on the \$4.0 million bond debt is approximately \$1.7 million. Also, as of December 31, 2002, the remaining book value (net of accumulated depreciation) of the

NAISP capital assets was approximately \$200,000. Given this financial snapshot and assuming an immediate exit from the ISP business by NAED, the North Attleborough electric ratepayers are adversely impacted by approximately \$8.1 million. Records disclose that as of January 1, 2003, the majority of the costs associated with the bond issuance still remained to be paid. NAED is obligated to continue payments through the year 2018 of approximately \$4.6 million in bond debt principal and associated interest.

Recommendations

An internal control system is an essential and fundamental management responsibility. Internal controls enable reliable financial reporting and help to ensure compliance with applicable laws and regulations. The system of controls provides the framework for efficient and effective operations. An organization's control environment provides the foundation for all other aspects of internal control. A critical element of an effective control environment is the existence of a well functioning system of oversight. Management is responsible for setting the tone for integrity within the organization and for leading by example by establishing sound policies and procedures and by abiding by them.

In order to improve the electric department's controls and operations, the Inspector General's Office recommends immediate implementation of the following corrective actions.

- NAED management should work in concert with Town management to establish an effective system of oversight for the operation of the electric department including the provision of documentation to support expenditures. The new requirement should be implemented as soon as possible.
- NAED management in cooperation with Town management should review potential opportunities for improving efficiencies and reducing costs. Consideration should be given to consolidating professional services through the use of common consulting firms. A single independent auditing firm as well as a common lead law firm should be considered.
- NAED management in concert with Town management should review options available in order to effect the expeditious completion of the 2003 and 2004 audits. As part of this review, serious consideration should be given to available legal recourse against the auditing firm of Grant Thornton LLP for its negligence in the performance of prior NAED audits.
- NAED management should establish clearly written administrative expense policies and procedures that conform to Town guidelines and bylaws which should include, but not be limited to the following:

- a.) Expenditure Review and approval processes;
 - b.) Guidelines to determine the reasonableness of an expense;
 - c.) Required documentation for reimbursement; and
 - d.) Timeframe for submission of expense reimbursements.
- NAED management should continue to invest in procurement training for employees who perform public contracting in order to familiarize themselves with fair and equitable competitive bidding practices and procedures.
 - NAED should work with the Board of Selectmen to adopt uniform policies pertaining to the use of credit card, per diem, travel, lodging, vehicle, and personal reimbursement expenses.
 - Future requests for bonding by NEAD should be made in writing. The written request should be submitted to the Town under the pains and penalties of perjury. The intended use of the funds must be very detailed and specific.

Furthermore, this Office will request that the Department of Telecommunications and Energy (DTE) revise State regulations pertaining to the manner in which municipal light plants report their expenditures to Town and/or City officials. Specifically, the DTE will be asked to supplement its current regulations by making clear that City/Town officials have access to municipal light plants' back-up documents for expenditures. Moreover, this Office will request that the regulations be changed to permit Town/City officials to receive an explanation from municipal light plants regarding questionable expenditures.

Appendix A: Article 19 – Detail Support

In 1988 at the Semi Annual Town Meeting, the Town of North Attleborough approved Article 19 that authorized borrowing of \$12M for electric department distribution improvements. The cost estimates provided by NAED in support of the Article 19 Capital Improvements are highlighted below:

Item #1	Sherman Substation Improvements	\$ 860,000.00
Item #2	Emerald Square Mall/Rte 1 Improvements	\$ 500,000.00
Item #3	New Substation & Transmission Line	\$7,390,000.00
Item #4	Operations Center	\$3,000,000.00
Item #5	Distribution System Improvements	<u>\$ 250,000.00</u>
TOTAL ESTIMATED PROJECT COSTS		\$12,000,000.00

Detail work supporting the estimated costs for each of the five items is reflected below: These details were included in North Attleborough Electric Department's Capital Improvement Plan presented to Town Meeting in 1998 as part of the Article 19 bond request.

Item #1: Sherman Substation Improvements

A. 115KV System Improvements

1. We intend to purchase the 115KV (115,000 volt) equipment from the New England Power Company and redesign the 115KV primary system. We will also be adding new equipment which will improve the reliability of the high voltage section of the substation.

B. 15KV System Improvements

1. We will install four (4) additional 15KV (15,000 volt) switches for the outdoor switch gear which will allow us to use the full rated capacity of the Sherman Substation.

2. One of the new switches will be for a circuit that will be constructed on the right-of-way parallel to John Dietsch Boulevard and will supply electricity to the south section of the Industrial Park and the Triboro Plaza.

3. Another switch will be for a second circuit that will supply the east side of Town and will allow us to reduce the number of customers who are affected when a power failure occurs in the area.

4. The two remaining switches will be for circuits that will initially supply the new mall and when the new substation is built these circuits will allow us to continue expanding the 15KV distribution system and to retire the 4KV system.

Item #2 Construct Electric Facilities to Serve the Emerald Mall and Route #1

A. These projects consists of purchasing and installing electrical equipment to provide primary service to Emerald Mall and to remove the electrical facilities on Route #1 from Route 295 to the new Allen Avenue and place new equipment underground.

The equipment consists of:

1. Underground cable
2. Pad mounted transformers
3. Meters
4. Conduits and manholes

We are also installing more electric equipment than is initially necessary because we anticipate additional load growth on Route #1 after the mall is built.

Item #3: Increase Distribution Capacity by Construction of a Substation and Related Transmission Lines.

The Department needs to build a 115KV Substation in the southwestern section of Town because of the present load growth and estimated future growth in the area surrounding the mall.

Sherman Substation is too far away to be an effective and economic site to serve this growth. Also the addition of the four switches proposed in Item #1 will bring Sherman Substation to its rated capacity.

Any future electrical loads on Route 1 will require more circuits which will have to come from the new substation.

By building this substation we will be able to transfer some of the present electrical load from Sherman Substation allowing us to serve new loads which will develop in the northern section of Town. We also want to transfer some of the electrical load off the Whiting Street Substation to the Sherman Substation and the new substation so that we can convert the old 4KV distribution system to a modern 15KV system.

Item #4: Construct an Operations Center at Landry Avenue

The Department wants to consolidate all functions into one building by moving the distribution group from Whiting Street and the administration and customer service group from the Town Hall. This will help to improve our efficiency by more direct communications between groups and shorten the response time between work orders issued and completed.

The Public Works Department and Massachusetts DEQE have requested that we find an alternative site for the garaging of our vehicles because each vehicle has fuel on board and the present garage is located in close proximity to one of the Town's major sources of water.

Item #5: 15KV Distribution System Improvements

This item consists of the following projects.

A. Circuit E-2

1. Replace all poles and primary wire on Reservoir Street
2. Replace primary wire on Old Post Road from Route #1 to Allen Avenue
3. Rebuild pole line on Mount Hope Street from Towne Street to Commonwealth Avenue.

B. Circuit E-3

1. Install poles and primary wire on John Rezza Drive and connect Mount Hope Street from Reservoir Street to Old Post Road to circuit E-3.
2. Transfer the load on this circuit in the Triboro Plaza to new circuit E-7

C. Circuit E-4

1. Transfer to load on this feeder from Towne Street to Triboro Plaza to a new circuit E-7

D. Circuit E-5

1. Build a new circuit on the north side of Landry Avenue from Sherman Station to Mount Hope Street. Connect the existing E-5 circuit on Mount Hope Street to the new circuit.

E. Circuit E-6

1. Rebuild circuit E-6 on Route #1 from Landry Avenue to Route #120 and make provisions for a second circuit on this pole line.

F. Circuit E-7

1. Install a new circuit from Sherman Station to Triboro Plaza via the 69KV pole line on the right-of-way west of the Industrial Park.
2. This new circuit will serve the Triboro Plaza and the Industrial Park south of Towne Street.

G. Circuit E-8

1. Extend the present E-5 circuit on Landry Avenue to Route #1 and on Route #1 to Route #120.
2. Connect this new circuit to the present circuit E-6.

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***Appendix B:* Letter from the District Attorney of Bristol County**



The Commonwealth of Massachusetts

OFFICE OF THE
DISTRICT ATTORNEY

BRISTOL DISTRICT

PAUL F. WALSH, JR.
DISTRICT ATTORNEY



September 23rd

886 PURCHASE STREET
P.O. Box 973
NEW BEDFORD, MASS. 02741
(508) 997-0711

John W. Giorgio
Kopelman and Paige, P.C.
31 St. James Avenue
Boston, MA. 02116-4102

Re: Town of North Attleborough-North Attleborough
Electric Department-Forensic Audit

Dear Mr. Giorgio:

On August 4, 2004, in your capacity as Special Counsel for the Town of North Attleborough, you forwarded to District Attorney Paul F. Walsh, Jr., a request from the Board of Selectmen asking the District Attorney, Pursuant to G.L. c. 44, §62, to investigate whether officers of the North Attleborough Electric Department should be subject to criminal prosecution for misuse of certain bond proceeds. In response to that request, the District Attorney has directed me to forward to you the memorandum I prepared for him on this matter.

Assuming the accuracy of the Powers & Sullivan investigation, there was a violation of G.L. c.44, §20, and thus there may indeed be a basis for a misdemeanor criminal prosecution under §62. However, I have recommended that our office not prosecute, on the grounds that the available criminal penalties are modest, while the case would consume a disproportionate share of scarce prosecutorial resources better devoted to the prosecution of violent crime. The District Attorney has adopted my recommendation.

We will refer this to the Attorney General for possible action on his part. The Attorney General has both the resources and expertise to undertake this

We will refer this to the Attorney General for possible action on his part. The Attorney General has both the resources and expertise to undertake this prosecution, if he chooses; and he may well conclude that it would be in the public interest to proceed with this case, notwithstanding the limited criminal penalties available.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kevin Connelly".

Kevin Connelly
Assistant District Attorney

KFC/jl

Enc.

Cc: Massachusetts Inspector General

Date: September 20, 2004

From: Kevin Connelly, Appeals Unit Director

To: District Attorney Paul Walsh

Re: North Attleborough Electric Department;
possible criminal liability of certain town or
district officers under G.L. c.44, §62

I. Introduction.

The Board of Selectmen of the town of North Attleborough have made a formal request to us, pursuant to G.L. c.44, §62, to investigate whether the possible misuse of certain bond proceeds by the General Manager and Board of Electric Commissioners of the North Attleborough Electric Department should subject those officers to criminal prosecution under G.L. c.44, §62.¹

II. Background.

The North Attleborough Electric Department (NAED) is a non-profit, publicly owned utility established pursuant to G.L. c.164. Although a department of the town of North Attleborough, it operates as an independent agency and is governed by a three member Board of Electric Commissioners who are separately elected by the citizens of North Attleborough. Although NAED generates revenue from its sale of electricity to the residents of North Attleborough, it funds its major capital improvements from municipal bond proceeds.

At a 1988 town meeting, the town voted to authorize the Board of Electric Commissioners to undertake five specific projects to improve the distribution of electric power.² To fund these

¹ "Any city, town or district officer who knowingly violates, or authorizes or directs any official or employee to violate, any provision of this chapter . . . shall . . . be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both . . ." G.L. c.44, §62.

² The five projects, and their estimated costs were: (1) Sherman substation improvements, \$860,000; (2) Emerald Square Mall/Route 1 improvements, \$500,000; New substation and transmission line,

projects, the town authorized the treasurer to borrow \$12,000,000 "at one time or from time to time" by issuing municipal bonds.

It appears that sometime between 1988 and 1996 a first \$4,000,000 was borrowed and used to fund two of the authorized projects.

In a July 12, 1996 memorandum from the NAED manager to the Board of Electric Commissioners, the manager recommended that \$4,000,000 of the remaining bond authorization should be retained for completing the first authorized project (the Sherman substation improvements) at a now estimated cost of \$2,500,000, and that the remaining \$1,500,000 should be held in reserve for, if necessary, the fifth authorized project (distribution system improvements).

On May 21, 1998, at a board meeting between NAEM management and the Commissioners it was officially voted that NAED would become an internet service provider.

On July 27, 1998, the General Manager and Commissioners were presented with a business plan to fund the internet service startup. According to the report prepared for the town by the accounting firm of Powers and Sullivan, it is plain from the business plan that NAED intended to fund the internet startup from \$4,000,000 in bond proceeds. Evidently this money would be the second \$4,000,000 installment of the borrowing authorized for the capital projects specifically designated at the 1988 town meeting.

In August 1998, the NAED manager informed the town treasurer by letter that NAED would need an additional \$4,000,000 for designated projects numbers 1 and 5. The manager also informed the town treasurer that NAED would not be needing the final \$4,000,000 authorized at the 1988 town meeting, as NAED had no plans to complete project number 3, the new substation and transmission line. This letter made no mention of internet business. (Apparently the letter from manager to treasurer was dated July 6, 1998 and delivered August 27, 1998).

\$7,390,000; operations center, \$3,000,000; Distribution system improvements, \$250,000.

On December 22 of 1998, the controller of NAED requested reimbursement of approximately \$608,000 in expenditures for "feasibility studies, engineering and cost studies, legal opinions, and marketing plans and campaigns, all relating to research into a telecommunications system."

On March 15 of 1999, the town issued a bond for \$4,000,000. "After obtaining the \$4.0 million in bond proceeds, the Electric Department consciously and routinely charged operating expenditures and to a lesser extent capital expenditures of the internet business to the bond fund in accordance with the original internet business plan." Powers & Sullivan report at p.3.

III. Discussion.

The scope of the District Attorney's inquiry into this matter is narrowly limited by the statutory authority pursuant to which the District Attorney has been requested to intervene. Under G.L.c. 44, §62, the selectmen of a town may report alleged violations of any of the provisions of Chapter 44 (or any provisions of similar laws of the Commonwealth) to the District Attorney, "who shall investigate and prosecute the same." Section 62 makes it a misdemeanor criminal offense for a "city, town or district officer" knowingly to violate, or knowingly to authorize or direct any official or employee to violate, any provision of Chapter 44 of the general laws, or like provisions. The letter from the town's special counsel directs our attention to two sections of chapter 44: sections 20 and 31.

General Laws c.44, §20 provides, in relevant part: "The proceeds of any sale of bonds or notes . . . shall be used only for the purposes specified in the authorization of the loan" The report prepared by Powers & Sullivan appears to establish that the NAED board and its general manager agreed to use and subsequently did use bond proceeds for the NAED's internet startup, plainly an unauthorized purpose. Further, the Powers & Sullivan report permits the inference that the Board and the general manager were aware at the time that use of the bond proceeds for the internet startup was a violation of §20. Three lines of

evidence from the Powers & Sullivan report combine to support this inference:

1. The August 1998 letter from the NAED Manager to the town treasurer requesting an additional \$4,000,000 in bond proceeds specifically mentions as justification for the request only projects one and five of the five capital improvement projects authorized at the 1988 town meeting. This letter mentions nothing about the internet startup project, even though the business plan presented at the July 27 meeting of the Board and management (and other documents) clearly anticipated using the \$4,000,000 bond proceeds to fund the startup. See Powers & Sullivan at p.7.
2. According to the Powers & Sullivan report, the NAED Business Division Manager, when asked about the use of bond proceeds to fund the internet startup, candidly responded, "that they knew this was inappropriate but they thought (1) that they would have other on-going costs if they needed to back into what the \$4.0 million was used for, and (2) they expected the internet business would be profitable and would support repayment of the bonds." Powers & Sullivan at p.5.
3. The NAED claims that they did not use the bond proceeds to fund the internet startup, and "NAED has been in the process, only since [the Powers and Sullivan] investigation began, of attempting to back into recurring capital expenditures . . . that would make up the \$4.0 million bond proceeds." Powers & Sullivan at p.6. In other words, NAED now denies any improper use of bond proceeds in the face of considerable evidence that the bond proceeds were improperly used. It is significant, on the question of inferring a knowing violation of §20, that NAED has not admitted the improper use but claimed that they were unaware that they could not use the bond funds for the internet startup.

Section 20 identifies two circumstances in which the proceeds of a sale of bonds may be redirected. First, if a balance remains after completion of the project for which the loan was authorized, "such balance may at any time be appropriated by a city, town or district for any purposes for which a loan may be incurred for an equal or longer period of time than that for which the original loan . . . was issued." Assuming that NAED qualifies as a "district" under the statutory scheme (see G.L. c. 44, §1), and assuming that the internet startup would have been a "purpose[]" for which a loan may be incurred," NAED might claim that it had completed the projects for which the second

\$4,000,000 round of bond funding had been secured. However, NAED has as yet made no such claim, and, in any event, such a claim would be hard to reconcile with the chronology of funding request and internet startup.

The second circumstance in which bond funds may be redirected is where a project has been abandoned uncompleted; however, this option would have required a vote at a town meeting to "abandon or discontinue the project." G.L. c.44, §20.

In short, accepting as accurate the representations in the Powers & Sullivan report, it appears that at least the three members of the Board and the General Manager of NAED knowingly violated G.L. c.44, §20, and are thus criminally liable under §62.

As to the possible violation of G.L. c.44, §31 ("[n]o department . . . shall incur a liability in excess of the appropriation made for the use of such department"): the gravamen of the allegations against NAED is that its directors and officers knowingly misused the \$4,000,000 in bond proceeds, and any prosecution would focus on that claim. The addition of a count for violation of §31 would be getting at a secondary consequence of the principal wrongdoing; and proof of a violation would likely entail asking the fact-finder to resolve a second factually complex accounting question. While it is probable that this section, too, was violated, from a practical standpoint little is to be gained by charging a violation of §31 as well as a violation of §20. If we could not secure a conviction on a complaint charging a violation of §20 we are most unlikely to be able to convict on a complaint charging a violation of §31; if we did secure a misdemeanor conviction under §20, conviction on a second count charging a violation of §31 would add little to the sentencing options.

General Laws c.44, §62 directs that "the district attorney . . . shall investigate and prosecute" violations of Chapter 44. Despite the mandatory language of the statute ("shall prosecute"), the District Attorney always has discretion whether to undertake a particular prosecution. Commonwealth v. Garrity, 43 Mass. App. Ct. 349, 359 (1997). The legislature cannot compel the District Attorney to act, as this would constitute a violation of art. 30 of the Massachusetts Declaration of rights, which establishes the separation of powers of the several branches of government. Commonwealth v. Gordon, 410 Mass. 498, 498 & n.1 (1991).

The question, then, is whether the District Attorney ought to pursue this case. This is clearly a matter of some importance to the community of North Attleborough. It appears that the Electric Board and the NAED management flouted restrictions on the use of bond proceeds in order to pursue a business venture that has become a costly failure. Further, we have learned that there may be a systemic problem with the accountability of these municipal utilities to the communities they nominally serve. It could be argued that criminal prosecution here, even in light of the very modest penalties available upon conviction of this misdemeanor offense, would send a message to other municipal utilities to clean up their acts.

On the other hand, a misdemeanor criminal prosecution is a tool poorly adapted to get at the core problem here: mismanagement at, and poor oversight of, the NAED. The town and its voters have other, better remedies. The three members of the board are elected to staggered three year terms, so that one member of the board comes up for election each year.³ Whether because of voter dissatisfaction or some other reason, only one of the three board members who approved the internet startup in 1998 remains on the board. While the general manager of the NAED is not elected, he acts under the "direction and control" of the Board, G.L. c.164, §56, and thus would be subject to a range of disciplinary action by the Board.⁴

Without minimizing the seriousness of what appears to have happened here, the penalty the legislature has provided for prosecution under §62--a fine of \$1,000, imprisonment for not more than one year, or both--strongly suggests that the legislature does not view violations of the provisions of Chapter 44 as on a par with, for example, the theft of public money.⁵

While the potential penalty for conviction under §62 is small, the allocation of resources that this office would need to make in order to prosecute this case would be prohibitively large. The case would

³ A provision of the General laws that authorizes removal of a member of a municipal light board for "misfeasance or malfeasance in office or willful neglect of duty," G.L. c.164, §56E, appears to apply only to those boards that are appointed, not those that are elected, as is North Attleborough's Board of electric Commissioners.

⁴ It is our understanding that, at present, the general manager of the NAED has been suspended with pay.

⁵ Noteworthy, too, is the paucity of references to G.L. c.44, §62 in the case law, which suggests that prosecutions under this section are rare.

involve multiple defendants; it would be hard fought; the accounting issues presented are factually complex; and no assistant in this office appears to have any substantial background in accounting. The resources and manpower needed to prosecute this case would be at least on par with what is required in a first degree murder prosecution. "The district attorney is the people's elected advocate for a broad spectrum of societal interests -- from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection." Commonwealth v. Gordon, 410 Mass. at 500. It is doubtful that the people of Bristol County would benefit if we devoted thousands of man hours to the prosecution of this case at the expense of prosecutions of more serious, and, in particular, violent, crimes.

As to the concern that the wrongdoing uncovered here is part of a systemic problem in the municipal utilities of Massachusetts: if an exemplary prosecution under §62 would help to address a statewide problem, that prosecution should be undertaken by the Massachusetts Attorney General. The Office of the Attorney General, moreover, has the necessary expertise in accounting in its Criminal Bureau. "The Criminal Bureau's staff of experienced State Police detectives, investigators, and assistant attorneys general focus on investigating and prosecuting crimes that are not usually handled by the state's district attorneys. These crimes include political corruption and . . . economic crime. The cases investigated and prosecuted by the Criminal Bureau are referred to it by crime victims and other citizens, police departments, government agencies and district attorneys offices." Office of the Massachusetts Attorney General, The Attorney General's Commitment to Law Enforcement and Criminal Justice, <http://www.ago.state.ma.us/sp.cfm?pageid=970> (last updated Sept. 2, 2004)

IV. Conclusion.

I recommend that this office not undertake this prosecution, but instead refer it to the Office of the Attorney General for possible action on their part.