

OWN THE PIPE AND MAKE THEM BID TO USE IT: A FABLE

Truth of the Matter is, cable companies don't really "own" the inside wiring

By W. James Mac Naughton ■ *Attorney*

Once upon a time, when the written word was created with the quill pen and wooden printing press, there was an honorable tradition of writing fables – “true” stories about mythical people doing mythical things. The fables were, in fact, about real people doing real – and mostly despicable – things. However, the names were changed because the real people doing the despicable things controlled the quill and printing press through the laws of libel and sedition. Anyone nifty enough to tell the truth about despicable acts using real names ran the risk of jail – or worse.

lemma. Anyone aggrieved by the fable would have to stand up in court and claim he or she was a Lilliputian in *Gulliver's Travels* or the Mad Hatter in *Alice in Wonderland*. This rarely happened because most people's lust for revenge is quickly tempered by the prospect of public ridicule.

The laws of libel and sedition have, for the most part, gone the way of the quill pen in this country and we, as Americans, are accustomed to speaking our minds freely. However, there is a piece of flotsam that routinely floats on the High Seas of Commerce known as the Confidentiality Clause. Many a

Bulk Service Agreement with the Turning Worm Cable Company. The So-So Bulk Service Agreement was coming to an end and the good people of Cheshire Estates sallied forth onto the High Seas of Commerce to find a Better Deal.

Not wanting to lose a succulent tethered goat such as Cheshire Estates, the Turning Worm Cable Company responded with blandishments and threats (also known as The Carrot and The Stick). They offered a New and Improved Bulk Service consisting of the Basic Plus Tier for \$32 per month, a whopping \$16 savings over the \$45.95 charged for the “retail” service. They offered to waive the \$59.95 installation fee for high-speed Internet access, which sold for \$45.95 per month. The good people of Cheshire Estates did not find The Carrot very enticing.

So the Turning Worm Cable Company's salespeople flourished The Stick. They pointed out that the State of Mandatoria had a mandatory cable access law. This law made Mandatoria a wasteland when it came to finding video competition because all of the competitors had fled south where there were no mandatory cable access laws and the weather was warmer. The Turning Worm Cable Company told the good people of Cheshire Estates, with a large element of truth, they had little chance of finding anyone else to sell them video service.

“And even if you do,” they sneered, “the newcomer will have to spend mil-

There is a piece of flotsam that routinely floats on the High Seas of Commerce known as the Confidentiality Clause. Many a truth lies hidden deep beneath the waves locked in her cold embrace. With that said, and purely for your entertainment, I would like to tell you a story.

But anyone clever enough to fictionalize the names and events and keep true to the story could slide past the laws of libel and sedition and find an audience. A good fable would tell the truth so clearly that the identity of the real people was either irrelevant or a foregone conclusion.

A good fable put the real people being depicted onto the horns of a di-

truth lies hidden deep beneath the waves locked in her cold embrace. With that said, and purely for your entertainment, I would like to tell you a story.

Once upon a time, not so very long ago, there was a good sized condominium complex known as Cheshire Estates located in the State of Mandatoria. The good people of Cheshire Estates had inherited from their developer the So-So



sanitary. But they liked the Old Salt's style so they gave him Letters of Marquee and a hefty retainer to go plunder on their behalf.

His first piece of business was to use legal jiu-jitsu and get ownership of the drop cables at Cheshire Estates out of the hands of the Turning Worm Cable Company and into the hands of the good people of Cheshire Estates. (Editor's Note: The FCC's Cable Home Wiring rules allow competitors to use existing cable plant in multi-family properties. The rules are, for the most part, based on the assumption that only one cable company will be serving a multifamily property. But they also work quite well at forcing an incumbent to share its wires with an overbuilder who competes head to head. See *How to Make an Incumbent Cable Operator Share All its Wire with*



lions to build a new system." The So-So Bulk Service Agreement provided that the Turning Worm Cable Company owned all of the wires at Cheshire Estates and had 90 days after the contract ended to make up its mind about whether to remove them.

"Good luck finding anyone to rewire all of Cheshire Estates while we make up our minds," they said.

And so, the good people of Cheshire Estates drifted on the High Seas of Commerce slowly surrendering to despair. They learned that there were several private cable operators in their area whose names were various iterations of "Starry Eyed Satellite Services." But none of them had the appetite to rewire all of Cheshire Estates and most of them preferred the warm weather of the south.

They learned that the New Horizon Phone Company had fabulous plans to build a brand new fiber to the home network and took hope. But those hopes were dashed when they learned it would be many years before New Horizon was ready to build in Mandatoria. So they continued to drift.

Then, one day, a fair wind blew the

good people of Cheshire Estates into the port of Common Sense where they took sustenance at The Serendipity Saloon and Salad Bar. There they found a cheerful privateer named the Old Salt who favored single malt Scotch and a Meerschaum pipe (thus making him age before his time) while munching on anchovies and cocktail peanuts (thus rendering him salty).

The Turning Worm Cable Company told the good people of Cheshire Estates, with a large element of truth, they had little chance of finding anyone else to sell them video service.

The Old Salt regaled them with tales of the many times he had plundered the Turning Worm Cable Company and its ilk. Pulling a long draw on his Meerschaum, he lowered his voice, leaned forward and drew them closer. "Let me tell you the Truth of the Matter, laddies. Own the pipe and make the scurvy dogs bid to use it."

This sounded like a bunch of Zen nonsense to the good people of Cheshire Estates, not to mention somewhat un-

an Overbuilder in the January 2001 edition of Broadband Properties Magazine, www.bbbpmag.com.)

Then he seduced the Starry Eyed Satellite Services with an irresistible promise – Cheshire Estates would grant them the long term exclusive use of the drops at no charge in exchange for providing bulk video and HSIA services and building the fiber facilities necessary to deliver those services to the drops. No one would have to pay any door fees.

THE LAW

Given the size of Cheshire Estates, the Starry Eyed Satellite Services responded to this invitation with several different proposals, all of which were better than anything the Turning Worm Cable Company had put on the table.

The Old Salt then made the same offer to the Turning Worm Cable Company. They were enraged by his temerity and immediately dispatched Captain Bligh of the Wall Street Fleet to blast him into oblivion.

Captain Bligh put a shot across the bow of the Old Salt with

the Traditional Nasty Solicitor's Letter. "Please be advised that the Turning Worm Cable Company will exercise all of its rights under the laws of Mandatoria, tie Cheshire Estates up in litigation well into the next millennia and thereby discourage anyone from even thinking about serving Cheshire Estates." Feigning surprise, the Old Salt ran up the white flag. He invited Captain Bligh to parlay where he explained the Truth of the Matter to the Captain.

"Cheshire Estates indisputably owns the drops up to the Demarcation Point."

Captain Bligh had to agree because that is part of the Truth of the Matter.

"Cheshire Estates has every right to control that piece of the telecommunications pipe however it sees fit, including letting someone other than the Turning Worm Cable Company use it on an exclusive basis." Captain Bligh had to agree because that is also part of the Truth of the Matter.

"Cheshire Estates has every right to let any vendor it wants build any fiber backbone it wants at Cheshire Estates and connect to the drop owned by Cheshire Estates to provide bulk services." Captain Bligh again had to agree because that too is part of the Truth of the Matter.

"Cheshire Estates has proposals from the Starry Eyed Satellite Services to build a fiber backbone, connect to the drops and provide bulk services." This took Captain Bligh by surprise and he frowned.

"Cheshire Estates will let the Turn-

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ing Worm Cable Company build any facilities it wants anywhere at Cheshire Estates and provide any services it wants on a per subscriber basis." This caused Captain Bligh to grin because this is precisely what the Mandatoria cable access statute provides and the Old Salt had given it up without a fight.

"Cheshire Estates will let the Turning Worm Cable Company use the drops owned by Cheshire Estates and provide bulk services." Captain Bligh began to giggle, giddy at the thought he was having his cake and eating it too. Then the Old Salt dropped the hammer.

"But the Turning Worm Cable Company must make a *better* offer than the Starry Eyed Satellite Services. If it doesn't, then it loses the bulk business at Cheshire Estates and any opportunity

to use the drops." Captain Bligh blinked because this was new territory for the Turning Worm Cable Company in the State of Mandatoria. Captain Bligh began to splutter about subpoenas and depositions, the Warning Flags of the Wall Street Fleet.

"And if the Turning Worm Cable Company makes any trouble or starts any lawsuits, then it can forget about bidding for any bulk services at Cheshire Estates or using the drops – ever. It can build new drops if it wants but none of the good people of Cheshire Estates will use them – they will be getting bulk services from Starry Eyed Satellite Services on the existing drops." The full scope of the Truth of the Matter began to sink in with Captain Bligh and he asked for twenty-four hours to consult

with his client.

Twenty-three hours and fifty-nine minutes later, the Turning Worm Cable Company submitted its bid to use the drops owned by Cheshire Estates to provide bulk services and promised not to make any trouble. Thus the Turning Worm Cable Company came to understand the Truth of the Matter – if you own the pipe, you can make vendors bid to use it. If done right, you get the best deal the marketplace has to offer regardless of whether you live in Mandatoria or parts south.

In the end, the good people of Cheshire Estates got 70+ channels of video and 3 Mbs of high speed Internet access for about \$30 a month and a fiber backbone they will own at the end of the new bulk contract. And they saved a pirate's ransom over the first offer of the Turning Worm Cable Company.

The Starry Eyed Satellite Services, the Turning Worm Cable Company and Captain Bligh were all last seen on the High Seas of Commerce bumping up against the Confidentiality Clause and other flotsam. And the Old Salt returned to the Serendipity Saloon and Salad Bar having collected enough doubloons to keep him in whiskey and anchovies until the next time. **BBP**

THE END

About the Author

The author, W. James Mac Naughton, Esq. is an attorney and businessman with thirty years of experience in the telecommunications industry. He can be reached at w.j.mac.naughton@att.net. Mr. Mac Naughton cautions that any similarities between the fictional characters or events in this fable and real people and their acts (despicable or otherwise) are purely coincidental. However, the Truth of the Matter is quite valid and the numbers are accurate.

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