

REDACTED

FILED WITH THE
COURT SECURITY OFFICER
DATE: 3/20/2007

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**MOTION TO COMPEL PRODUCTION OF
CLASSIFIED BRADY AND RULE 16 MATERIALS
(FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER)**

Defendant Joseph P. Nacchio, by and through undersigned counsel, respectfully moves for entry of an Order compelling the government to produce classified *Brady* and Rule 16 materials in the possession of four clandestine government agencies.

A. INTRODUCTION

We have now had an opportunity to review the documents produced by the government on February 5, 9, 10 and 12, 2007, and it is apparent that the clandestine government agencies still retain additional *Brady* and Rule 16 materials which have not been produced. These documents largely fit in one of two categories: records of negotiations between Qwest and the agencies during late 2000 and the first half of 2001, and records of visits between Messrs. Nacchio and Payne, on the one hand, and senior agency representatives, on the other hand. We now move for entry of an order compelling that production so that we may have adequate time to prepare for trial.

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In the course of the CIPA proceedings in this matter, the Court has made findings of use, relevance and admissibility of evidence bearing upon the Defense Information Systems Agency ("DISA"), [REDACTED]

[REDACTED] Those findings were largely based on our May 15 and October 31, 2006, § 5 filings. The potential projects in question were:

- DISA -- The expansion of the QVPN II fiber optic intranet from the Continental United States ("CONUS") to Outside the Continental United States ("OCONUS"). Specifically, the negotiations centered around connecting QVPN II to a network in Europe, potentially extending into the Middle East and Africa. Potential expansion into Hawaii and the Pacific may also have been discussed.
- [REDACTED] -- The creation of a [REDACTED] intranet linking CONUS to points in South America and the Pacific Rim, [REDACTED] This network was to be similar to the [REDACTED] European network which had been contracted for with Qwest in September 2000.
- [REDACTED] -- The creation of an overseas fiber optic intranet.
- NSA -- In February 2001, Messrs. Nacchio and Payne visited the NSA at Ft. Meade, to discuss the participation by Qwest in the Groundbreaker project.

The government successfully moved to quash our Rule 17(c) subpoenas for documents regarding these potential projects, but accepted that it had both Rule 16 and *Brady* obligations regarding the subject matter thereof. Beginning on February 5, 2007, the government made a series of classified document productions to Mr. Nacchio. However, the government has yet to produce any documents related to any of the critical areas set forth above.

Specifically, our § 5 filings have put the government on notice of meetings between Mr. Nacchio and Mr. Payne, and representatives of the various clandestine agencies, and suggested that confirmatory documents exist in the form of base admission logs, facility admission logs, SCIF admission logs, and the diaries and calendars of government attendees. Nothing beyond a single calendar entry of [REDACTED] was produced by the government in this regard. Additionally, with respect to DISA, [REDACTED] also missing are any documents related to Mr. Nacchio's assertion that, during late 2000 and the Spring of 2001, Qwest was actively discussing the matters set forth above with those agencies, potentially worth hundreds of millions of dollars, which were specifically documented in our October 31, 2006 § 5 filing. Finally, with respect to NSA, Mr. Nacchio submitted a proffer and Exhibit documenting a February 2001 meeting at Ft. Meade, at which Qwest's possible participation in the Groundbreaker project was discussed.

Given that trial is set to commence on March 19, 2007, the government's failure to have made production is glaring and prejudicial. These records go directly to demonstrating the truth of the facts set forth in our Section 5 submissions, and substantiated in multiple documents produced by the government on February 5 and 10, 2007, as included in our accompanying Fourth Section 5 CIPA Submission.

**B. THE CATEGORIES OF INFORMATION WE SEEK
WILL CORROBORATE THE DEFENSE PRESENTATION**

Our request for documents can be broken down into several general categories:

1. The Facts Of Mr. Nacchio and Payne's Joint Meetings

This category of documents goes to proof that the meetings Mr. Nacchio recalls took place in the company of Mr. Payne, and also that other related meetings took place. The types of documents sought are:

a) Each time Messrs. Nacchio or Payne visited with representatives of DISA, [REDACTED] records of the visit were created. All of these visits took place at secure facilities, and some additionally took place on secure bases. For example, Messrs. Nacchio and Payne would have to be cleared into [REDACTED] then escorted to a specific building and logged into a SCIF. These records will, additionally, show who else was present at these meetings.

b) Presumably, the government representatives with whom Mr. Nacchio met maintained personal appointment records or diaries. These, too, will reflect the fact that the meetings took place.

c) Equally presumably, minutes or notes were taken by agency representatives during these meetings. These, too, will help establish that these meetings occurred, and what happened during such meetings.

2. Meetings With Other Qwest Personnel

The next category of documents goes to the fact that other meetings took place with the agencies, attended not by Messrs. Nacchio and Payne, but by Mr. Payne alone, and/or with members of his staff. As we have already shown, Mr. Nacchio did not meet with the agencies until a prospective classified contract had been identified. The nuts and bolts of each classified contract were first discussed between the respective Qwest and agency staffs. The records of these meetings bear upon both the work previously awarded to Qwest and the prospective work being considered for award during 2001.

¹ Importantly, it must be recalled that [REDACTED] and our proffer suggests that one of Mr. Nacchio's meetings with [REDACTED] might have taken place at [REDACTED]. It is not sufficient, therefore, for the government to merely search the records at [REDACTED] for evidence of visits by Messrs. Nacchio and/or Payne.

3. **Agency Records Going To Their Own Assessment Of The Business They Were Considering Awarding To Qwest During The Time In Question**

As we have shown, the process of awarding government contracts often evolved over the course of months. During that time, the agencies most likely kept records of the discussions with Qwest. These records will demonstrate not just that the possibility of awarding classified contracts to Qwest in 2001 was very real, but will also lend insight into the scope and breadth of that work including the consideration that was given to awarding the work on a "sole source" basis. Even records which only generically discuss an agency's upcoming telecommunications requirements are relevant, in as much as Qwest might have been one of the possible vendors under consideration.

4. **Agency Records Regarding Specific Projects**

In sum, we request all documents including, but not limited to, notes, memoranda, email, calendar entries, journal entries, personal appointment records or diaries, base, SCIF or facility log-in sheets, records of visits, agendas, schedules, drafts of proposals, Requests For Information, Requests For Proposals, and White Papers,² relating to the following topics and agencies:

a. **Defense Information Systems Agency (DISA)**

i. An expansion of the QVPN II network into Europe, the Middle East, the Pacific or Africa, as it relates to Qwest;³

ii. OCONUS telecommunications projects in which Qwest was a potential contractor during the period 1999 to September 10, 2001;

² For example, Qwest submitted "White Papers" to both DISA and [REDACTED] during this time period.

³ We have proffered that these discussions were taking place in late 2000 and the first half of 2001.

iii. All records of contacts between Qwest representatives, including but not limited to Joseph P. Nacchio and/or James F.X. Payne; and DISA personnel, including but not limited to Lt. General Harry Raduege.

b. [REDACTED]

i. Whether [REDACTED] or otherwise, a private [REDACTED] network or networks linking the continental United States to points in South America, the Pacific Rim or elsewhere beyond the continental United States, which was under consideration during the period 1999 to September 10, 2001, as it relates to Qwest;

ii. All records of contacts between Qwest representatives, including but not limited to Joseph P. Nacchio and/or James F.X. Payne, and [REDACTED] personnel.

c. [REDACTED]

i. Telecommunications projects in Europe, Asia and Middle East as to which Qwest was a potential vendor during period 1999 to September 10, 2001; and

ii. All contacts between Qwest representatives, including but not limited to Joseph P. Nacchio and James F.X. Payne, and [REDACTED] personnel, including but not limited to [REDACTED]⁴

iii. Also, with respect to [REDACTED] contract with Qwest known as [REDACTED] on February 5, 2007 the agency produced documents related to "vouchers" 1, 35, 45 and 54. Necessarily missing, therefore, were documents related to "vouchers" 2-34, 36-44, and 46-53. These additional documents would further demonstrate the breadth of the course of dealing over time between [REDACTED] and Qwest.

⁴ This would include any meetings which took place in [REDACTED]

d. [REDACTED] – All contacts between Qwest employees, including but not limited to Joseph P. Nacchio or James F.X. Payne, and [REDACTED] personnel, during the period 1998 to September 10, 2001.

C. CONCLUSION

For the foregoing reasons, Defendant, Joseph P. Nacchio, respectfully asks that the Court enter an order compelling the government to immediately produce additional *Brady* and Rule 16 materials in the possession of the clandestine government agencies.

Respectfully submitted this 20th day of February, 2007.

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CERTIFICATE OF SERVICE

I certify that, on the 20th day of February, 2007, the forgoing **MOTION FOR ORDER COMPELLING PRODUCTION OF CLASSIFIED *BRADY* AND RULE 16 MATERIALS**, was filed by hand delivering same to the Court Security Officer, at Washington, D.C.

Edward S. Nathan