

REDACTED

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DATE 2/20/2007

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.

FOURTH SECTION 5 CIPA SUBMISSION ON BEHALF OF DEFENDANT
(FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER)

Defendant Joseph P. Nacchio, by and through undersigned counsel, pursuant to Section 5 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5, respectfully submits this CIPA Memorandum.

A. INTRODUCTION

On February 5, 2007, the government made its first classified document production.¹ On February 9, 2007, the government made its second classified document production,² and on February 10, 2007, the government made a third classified document production.³

¹ This production was identified by the government as Rule 16 materials.

² This production consisted of purported § 6(f) rebuttal materials from [REDACTED]

³ This production consisted of purported § 6(f) rebuttal materials from [REDACTED]

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On February 12, 2007, the government made its first production of purported § 6(f) rebuttal witness interviews. We were quite surprised to see that four of the classified witness interviews took place in *July 2006*, at a time when we were barred from interviewing anyone. Nevertheless, the government showed our initial § 5 CIPA submission to various witnesses and questioned them about its contents. One of those questioned was James F.X. Payne, whom we sought to question as early as April 2006 but were not authorized to question until October 12, 2006. See Exhibit C (government Memorandum of July 18, 2006 interview with Mr. Payne). We then had until October 31, 2006 to interview Mr. Payne and file a new § 5 submission. However, despite the government's obligations under *Brady*, Rule 16 and CIPA § 6(f), we did not see any of these classified interview memoranda until *February 12, 2007*.

At the February 8, 2007 Status Conference, the Court directed Mr. Nacchio to make a § 5 CIPA filing on or before February 20, 2007, providing notice as to any documents produced in any of these productions which he "reasonably expects to disclose or to cause the disclosure of" during the upcoming trial in this matter. CIPA, § 5(a).

The documents recently produced by the government provide substantial corroboration to many aspects of Mr. Nacchio's prior Section 5 proffers. Indeed, many of the purported § 6(f) rebuttal materials actually provide still further substantiation. Yet, the government's document productions still fail to include several critical areas of both *Brady* and Rule 16 materials which are implicated by our previous proffers. These failures are the subject of a companion Motion to Compel the Production of Classified *Brady* and Rule 16 Materials, which is being filed with the Court Security Officer along with this Section 5 submission.

Our § 5 notice will be segregated by agency and then by document, with a brief explanation as to why for each document the Court should make a finding of "use, relevance and admissibility." CIPA, § 6(a).

B. [REDACTED]

The [REDACTED] February 5, 2007 document production provides detailed substantiation of Mr. Nacchio's proffer regarding the history of the agency's relationship with Qwest, including the first, "sole sourced" contract, which came to be known as [REDACTED]. Multiple documents make reference to the inter-agency sharing of Qwest relationships. Also documented are repeated awards over the years of millions of dollars in bonuses for Qwest's outstanding work. These documents will corroborate a past relationship with Qwest that gave Mr. Nacchio good reason to believe that discussions of future projects would result in new work being awarded to Qwest.

The specific [REDACTED] documents Mr. Nacchio reasonably expects to disclose at trial are:

1. OUSAC-CC-57 [REDACTED]⁴ -- This is the September 19, 1997 "Program Plan" that preceded the industry-wide request for information and request for proposal, following which Qwest was awarded its first [REDACTED] classified contract. The section entitled "Sole Source Justification," at 7, recites that: "Preliminary research has identified a single vendor capable of satisfying the requirements of this initiative" -- namely, Qwest. Thus, from the very outset, even though [REDACTED] went through the motions of seeking competitive bids, the agency understood that only Qwest could deliver the network it desired. This scenario is exactly as Mr. Nacchio

⁴ For purposes of effective narration, the documents will be listed chronologically. Because the electronic files are titled by name, for the Court's ease of convenience the document names will be identified parenthetically, following the Bates number.

proffered. Additionally, part of an attached PowerPoint presentation, at 12, shows that it was always [REDACTED] plan to extend the network to [REDACTED]

2. OUSAC-CC-02 [REDACTED] -- This 15 page document is the December 12, 1997 [REDACTED] which set forth [REDACTED] requirements for what came to be known as [REDACTED] Section 1.3 at 5 recites that, "this acquisition will most likely be the pre-cursor to a follow-on sole source acquisition...." The acquisition schedule, at 15, called for a "draft RFP release" on [REDACTED] with an actual contract award on [REDACTED]

3. OUSAC-CC-17 [REDACTED] -- These are 8 pages of handwritten notes which set out the acquisition schedule, apparently written in summary after the fact because it recites the details of what actually transpired. The notes state:

a) [REDACTED] "source selection plan and approval for less than full and open competition due to national security approved." This, too, demonstrates that [REDACTED] fully intended to give Qwest the contract prior to seeking industry involvement.

b) [REDACTED] - Requests for Proposals ("RFP") were issued to nine companies, one of which was Qwest.

c) [REDACTED] - "no bid" letters were received from everyone except Qwest and [REDACTED] each of which submitted a bid that same day.

d) [REDACTED] - *in less than two weeks*, [REDACTED] bid was ruled "not compliant" and the bid was eliminated, leaving Qwest as the sole bidder. This outcome was just as [REDACTED] had anticipated and precisely what was told to Mr. Wandry by [REDACTED]

e) [REDACTED] - the contract was awarded to Qwest.

f) Appendix E, at 5, contemplates "connectivity" to the [REDACTED]

[REDACTED] Thus, from the very inception, [REDACTED]

contemplated the project which came to be known as [REDACTED]

⁵ An

additional destination outside the continental United States ("OCONUS") was [REDACTED]

4. OUSAC-CC-72 [REDACTED]

-- This 11 page PowerPoint

presentation is the February 26, 1998 "pre-award briefing." The slide at 3 notes the desire to "retain Qwest as the only offeror in the competitive range." The evaluation schedule, at 5, shows that the proposals were received on February 2, 1998, and that *within three days* there was a "consensus on Qwest proposal." A modified request was transmitted on February 17, 1998, Qwest responded on February 24, 1998, and the evaluations were completed the very next day.

5. OUSAC-CC-01 [REDACTED]

-- This 139 page document is the actual

award of the first classified contract Qwest received while Mr. Nacchio was CEO, dated April 17, 1998, which came to be known as [REDACTED] The "Statement of Work" begins at page 66, and under "scope," notes that the contract is for a [REDACTED]

[REDACTED] This document therefore marks the beginning of the years of close

interaction between Qwest and [REDACTED] Paragraph 22.02 of the incorporated [REDACTED] at 102, gave [REDACTED] the unilateral right to make whole or partial assignment of its rights to another government agency. Thus, from the very beginning, the clandestine agencies were sharing their relationship with Qwest.

6. OUSAC-CC-51 [REDACTED]

a) [REDACTED]

b) Paragraph 1(c) at 5, titled "Acquisition Situation," states:

Special factors influencing negotiations: This acquisition originally started off as a formal source selection. A formal RFP was issued on [REDACTED]. Proposals were received on [REDACTED] from Qwest and [REDACTED]. The proposals were evaluated by the technical, costs, and security team. Upon review of the [REDACTED] proposal, it was determined that they did not submit a compliant proposal. As such, the Contracting Officer determined that [REDACTED] was not in the competitive range. Upon making this determination, the SSA was briefed on [REDACTED]. The Competitive range briefing to the SSA found that only one offeror was responsive. The SSA accepted the Contracting Officer's request to convert the source selection to a negotiated procurement, allow fact finding to begin, and to enter into negotiations with Qwest.

c) [REDACTED]

7. QUSAC-CC-48 [REDACTED] -- These are handwritten notes of a meeting with [REDACTED] in which it was contemplated having [REDACTED]

Precisely as proffered, this is an early instance of inter-agency sharing of Qwest relationships.

8. QUSAC-CC-06 [REDACTED] -- This undated document, ¶ "a" at 1, recites the "transfer of [REDACTED] The transfer was effective as of May 22, 1999, and carried a total initial price of [REDACTED] Besides documenting Qwest's second classified contract (which came to be known as [REDACTED] this document also substantiates, from very early on, the intertwining of relationships among agencies and Qwest. Indeed, at 3, the document recites that, "this action is the result of a combined agreement between [REDACTED] ... was part of the original competition run in the 1997/1998 timeframe." Again, this demonstrates interagency sharing of Qwest relationships from the very beginning.

9. OUSAC-CC-47 [REDACTED] -- These handwritten notes from
a May 15, 1998 meeting with [REDACTED]

10. QUSAC-CC-10 [REDACTED] - By June 15, 1998, payment Voucher 1 had been executed by [REDACTED] In other words, just as proffered by Mr. Nacchio, [REDACTED] began generating revenue immediately for Qwest through the use of already appropriated funds. This is the start of the course of dealing between Qwest and the various clandestine intelligence agencies that provides the vital context for the

reasonableness of Mr. Nacchio's good faith belief that conversations with senior agency personnel about upcoming work in late 2000 and 2001 would generate revenue in 2001 that was not part of the September 2000 guidance which forms the basis for the indictment.

11. QUSAC-CC-26 [REDACTED] -- This business case dated November 20, 1998, lays out the [REDACTED]
[REDACTED]

a) At 3, the document notes support from [REDACTED] and that [REDACTED] might make use of the connectivity. This is another instance of inter-agency sharing of Qwest relationships. *See also id.* at 36 (PowerPoint slide announcing support for the project from three other intelligence agencies, beyond [REDACTED])

b) At 4-5, the five year cost is estimated at [REDACTED]. Thus, when [REDACTED] told Messrs. Nacchio and Payne in early 2001 that [REDACTED] would want Qwest to do elsewhere something similar to what had been contemplated in [REDACTED] Mr. Nacchio had a good faith basis to think the scope of the new work would be in the hundreds of millions of dollars.

c) At 13, [REDACTED] states, [REDACTED]
[REDACTED]

12. QUSAC-CC-32 [REDACTED] -- This is a March 22, 1999 PowerPoint briefing to Congress on [REDACTED] project. The route map, at 4, states [REDACTED] While it is unclear whether Qwest had already provided [REDACTED] (as contemplated by the original September 19, 1997 "Program Plan") or whether this was part

of the new proposal, it certainly is clear that in 1999 [REDACTED] was still talking to Qwest about going into [REDACTED]

13. QUSAC-CC-40 [REDACTED] ⁶ -- The first of these letters is an April 1, 1999 letter from [REDACTED] to the Chairman of the House Permanent Select Committee on Intelligence, advising of the withdrawal of a funding request for the [REDACTED] project. However, [REDACTED] hopes for the project continued to stay alive and when finally, in 2002, [REDACTED] Qwest received a contract for connecting that link from [REDACTED]

[REDACTED] But, the point is not whether, in fact, [REDACTED] contracted with Qwest in 2001 for a fiber optic connection between [REDACTED] Rather, the point is that Mr. Nacchio had a good faith basis to believe Qwest might receive further work in 2001 because the [REDACTED] project conceptually existed, was engineered and bid, and [REDACTED] was aware of Qwest's capabilities in this regard when [REDACTED] met with Messrs. Nacchio and Payne to discuss doing something similar in a new project elsewhere in the world.

See also QUSAC-CC-09 [REDACTED]

14. QUSAC-CC-36 [REDACTED] -- This is a June 20, 1999 PowerPoint presentation by [REDACTED] for Chairman Lewis, arguing for reconsideration of [REDACTED] program. Thus, even though the funding request had been withdrawn, [REDACTED] did not give up on its efforts to bring the project to fruition.

15. QUSAC-CC-14 (Award Fee Briefings) -- These PowerPoint presentations from October 14, 1999, April 12, 2001 and October 13, 2001 set forth the bonus awards -- over and above contract amounts -- Qwest received from [REDACTED] for its superior work. The listing of awards on the final slide, at 35, dramatically summarizes how successfully [REDACTED] viewed its relationship with Qwest over the years:



This chart substantiates our proffer that Qwest had achieved bonus levels never before achieved in [REDACTED] history, as well as the close relationship which existed over time between [REDACTED] and Qwest.

16. QUSAC-CC-20 [REDACTED] -- This is one week of entries in

[REDACTED] electronic calendar, noting on February 26, 2001: "cc/ w Joe Nacchio."

However, no further calendar entries were produced, nor were any records produced of any facility admission logs, SCIF admission logs, or the diaries and calendars of other government attendees. This, despite that we have proffered the following:

a) There were two face-to-face meetings between Messrs. Nacchio and Payne, and [REDACTED] between September 2000 and February 2001. We noted that one of the meetings might have taken place at [REDACTED]

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[REDACTED] yet it does not appear that any search has ever been made for those records.

b) No record has been produced regarding the presence of [REDACTED] and two members of Mr. Payne's staff and either of these meetings.

17. QUSAC-CC-13 [REDACTED] -- Substantiating Mr. Nacchio's proffer that [REDACTED] continued to add to the work under [REDACTED] as time went on, Voucher 54 was issued on January 25, 2002. Beginning at 3 is a summary of costs, from inception in the Spring of 1998 through December 31, 2001. The five year total, at 11, reflects [REDACTED] in payments to Qwest.

18. [REDACTED] On February 9, 2007, [REDACTED] produced additional documents purported to be § 6(f) rebuttal to Mr. Nacchio's own § 5 proffers. These documents

[REDACTED] contract was awarded following a solicitation to multiple companies for bids, as to which all but Qwest and [REDACTED] submitted "no bid" letters. However, as set forth in ¶ B(1), above, from the very beginning, in the September 19, 1997 "Program Plan" and, thus, well before the requests for bid were issued, [REDACTED] had already concluded that there was "sole source justification" because "Preliminary research has identified a single vendor capable of satisfying the requirements of this initiative." This early realization was borne out when all but one other company "no-bid" the contract and the one other bid that was submitted was discarded as insufficient virtually immediately. *See supra*, ¶ B(3)(d).

19. What Is Missing From [REDACTED] Document Production -- As set forth in the accompanying "Motion to Compel the Production of Classified *Brady* and Rule 16 Materials,"

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missing from [REDACTED] document production are materials relating to discussions in 2000 or 2001 concerning the creation of a fiber optic network elsewhere in the world. Also missing are any additional calendar entries from [REDACTED] regarding meetings with Messrs. Nacchio and/or Payne [REDACTED] as well as admission logs, facility admission logs, and the diaries and calendars of other government attendees.

Finally, [REDACTED] produced just four "voucher" documents (Nos. 1, 35, 45 and 54). This necessarily implies that documents related to 51 other [REDACTED] vouchers were not produced. These additional documents would further demonstrate the breadth of the course of dealing over time between [REDACTED] and Qwest.

C. [REDACTED]

[REDACTED] February 5, 2007 document production provides detailed substantiation of Mr. Nacchio's proffer regarding the history of the agency's relationship with Qwest, including the May 1998 award of Qwest's second, "sole sourced" contract, which came to be known as [REDACTED]

[REDACTED] This contract was modified no fewer than 26 times over the ensuing years, and time after time [REDACTED] noted the need to "sole source" the work to Qwest due to its unique ability to perform the work needed.

These documents also reflect that, in the Spring of 2002, [REDACTED] contracted with Qwest for a \$400 million "enhancement" to [REDACTED] which included a program called [REDACTED] [REDACTED] to extend the network to over 90 locations outside the continental United States, connecting to military facilities, [REDACTED] and other [REDACTED] agencies. This is the multi-hundred million dollar project that was discussed in 2000 and 2001, which Mr. Nacchio believed would be awarded in 2001, and as to which he has proffered extensively and submitted

multiple corroborating exhibits. That the project ultimately was not awarded until 2002 (perhaps as a result of shifting governmental priorities in the aftermath of the events of September 11, 2001), does not detract from the fact that during the period of the indictment Mr. Nacchio had a reasonable, good faith, belief that the project would be awarded and generate significant revenue in 2001.⁷

The specific [REDACTED] documents Mr. Nacchio reasonably expects to disclose or to cause the disclosure of at trial are:

1. QUSAC 2001 (basic) -- This is the 77 page May 22, 1999 contract between [REDACTED] and Qwest for the network that came to be known as [REDACTED]. This is the same network that was envisioned in an "option" incorporated in the [REDACTED].
2. QUSAC 4942 (j&a and acquisition plan file-18) -- Although this is an undated document, ¶ 12 at 4 makes reference to the need to place an order with Qwest by July 15, 2000. The document begins with the recital, at 1, of approval for "other than the use of full and open

⁷ Apart from the issue of Mr. Nacchio's state of mind these documents -- as well as each of our § 5 proffers -- also bear upon the issue of materiality. As explained during the sealed portion of the October 12, 2006 hearing:

MR. STERN: Aside from [Mr. Nacchio's] state of mind, ... there is a question of the materiality of [the "warners"] views. Their views, it is our contention, are not material if they don't have sufficient information to make them material. ... for example, the views of an elevator operator as to how Qwest was doing would not be material under the law, that's a separate point, if your Honor pleases.

THE COURT: All right. I understand what you're saying.

competition" for reasons of national security, thus supporting our contention that contracts were awarded on an expedited basis.⁸

3. QUSAC 4961 (j&a and acquisition plan file-22) -- This is a July 5, 2000 document, with the initial recital, at 1, of approval for "other than the use of full and open competition" for reasons of national security, again supporting the same contention.

4. QUSAC 4883 (j&a and acquisition plan file-14) -- This is the April 2002 "Acquisition Plan" (revision 2). It was this enhancement to [REDACTED] with Qwest that was the subject of an extensive proffer by Mr. Nacchio, demonstrating that the contract was the subject of discussions between DISA and Qwest by late 2000, at which time it was already being described by Mr. Payne as a [REDACTED] and as the discussions moved into the Spring of 2001, not only had the amount of the potential contract ballooned to almost \$250 million (it was only kept that low by excluding [REDACTED] from the expansion), but Mr. Nacchio believed that the contract would come to fruition in 2001. The notable aspects of the Acquisition Plan confirm the nature of the project Mr. Nacchio thought Qwest would receive in 2001:

a) It recites, ¶ A.1(b) at 4, that: the government lacked the resources to perform the work itself, "full and open competition" was not selected for reasons of national security, and that, therefore, Qwest was awarded the contract on a sole source basis. This was, of course, as true in 2000 and 2001 as it was in 2002.

b) ¶ A.3(a) at 7 lays out an eight year cost of [REDACTED]

⁸ "J&A" is an abbreviation for the agency's "justification and approval" process for awarding work. Although we will not go into the details of each of the 25 "j&a and acquisition plan file" documents, we reserve the right to introduce each of them (perhaps as a combined exhibit) to demonstrate the breadth of the course of dealing over time between DISA and Qwest.

c) In the Description, at 2, one of its stated purposes was to "support [REDACTED] requirements." See also *id.*, ¶ A.1(c) at 5 ("Additionally, Qwest will support requirements for providing equipment, installation, engineering, integration and operations maintenance ... for the [REDACTED] [REDACTED]. This aspect of the [REDACTED] expansion, then, appears to be the multi-hundred million dollar project that Mr. Payne was writing about as early as January 2001, which was the subject of an extensive proffer and multiple corroborating Exhibits in our October 31, 2006 § 5 submission.

5. Contract Modification Records -- The February 5, 2007 [REDACTED] document production also includes 131 classified, and 141 unclassified, documents with electronic names running from P00001 to P00026. Each "P" number represents a different amendment or modification to the "base" [REDACTED] contract. Many of these 26 amendments or modifications include multiple documents, e.g., "P0001-03." We reserve the right to introduce each of them (perhaps as one or more combined exhibits) to demonstrate the breadth of the course of dealing over time between [REDACTED] and Qwest.

6. What Is Missing From [REDACTED] Document Production -- As set forth in the accompanying "Motion to Compel the Production of Classified *Brady* and Rule 16 Materials," missing from [REDACTED] document production are materials relating to discussions in 2000 or 2001 for the expansion of the [REDACTED] fiber optic intranet from the Continental United States ("CONUS") to Outside the Continental United States ("OCONUS"). Specifically, the discussions centered around connecting [REDACTED] to a network in Europe, potentially into the Middle East and Africa. Potential expansion into [REDACTED] and the Pacific may also have been

discussed. Also missing are any calendar entries from [REDACTED] regarding meetings with Messrs. Nacchio and/or Payne, as well as base admission logs, facility admission logs, SCIF admission logs, and the diaries and calendars of other government attendees.

D. [REDACTED]

The [REDACTED] February 5 and 10, 2007 document productions are problematic, due to the intensity of redactions. However, despite this difficulty, it is clear that these documents substantiate our proffer that Qwest was awarded a \$25 million sole source contract in September 2000 for the creation of a [REDACTED] intranet connecting the United States with [REDACTED] Europe. It is also clear that this was a five year global telecommunications project, for which [REDACTED] Europe was just the beginning, with an expectation from the very start that the South American and Pacific Rim portions of the project would come next, to "be ready" within the next year.

Because Qwest, alone, was chosen to receive the entire base contract for the initial network in [REDACTED] Europe, because it was a built-in option of this contract to go forward with the South American and Pacific Rim portions, and because [REDACTED] itself projected having the South American and Pacific Rim portions "ready" in a year, these [REDACTED] documents substantiate Mr. Nacchio's reasonable, good faith belief that the company would receive revenue in 2001 from the South American and Pacific Rim portions of the project.

The purported § 6(f) materials provided [REDACTED] consisting as they do entirely of documentation from [REDACTED] project under which [REDACTED] ultimately went forward with the second phase of its global network, do not alter these realities. That [REDACTED] project was not put out for bid until the Spring of 2002 and the contract was not awarded until the Fall of

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2002 -- particularly given the intervening events of September 11, 2001 -- has no relevance whatsoever to the reasonableness of Mr. Nacchio's beliefs during the period January 2 - May 29, 2001. Indeed, the fact that the South American portion of [REDACTED] contract was awarded to Qwest as a sole source contract corroborates our proffer, since when the work was awarded it was done in the precise manner Mr. Nacchio expected during the time period of the indictment.

The specific [REDACTED] documents Mr. Nacchio reasonably expects to disclose or to cause the disclosure of at trial are:

1. QUSAC 21006 (67) -- This 24 page document begins with the July 14, 2000 Request for Procurement Review for a "firm fixed price" type of contract with an estimated total value of "\$25M, including four options." The "Acquisition Plan" begins on the fourth page of the document. This document corroborates Mr. Nacchio's proffer about expanding [REDACTED] network from [REDACTED] Europe into South America and the Pacific Rim in 2001. The Acquisition Plan begins with a "Statement of Need" which recites (emphasis added), in relevant part, that:

[REDACTED]

* * *

The ... contract will be for one year with four option years. The entire value of the contract is unknown at this time. Funding and coordination issues [REDACTED] will determine the overall contract value. ...

A phased implementation approach will be used. The first task order addresses the transatlantic and [REDACTED] European regions. Future task orders will address both individual circuits and other regions of the world as the telecommunications infrastructure becomes available. *The Central and South America and Pacific*

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Rim regions are anticipated to be ready within the next year. This project will be in existence indefinitely due to the need for high speed communications

[REDACTED]

* * *

It is anticipated that the four options of the ... contract will be exercised. A new competitive action will be initiated prior to the end of the fourth option.

The Acquisition Plan Statement of Need, attached to the *July 14, 2000* Request for Procurement, demonstrates that it was [REDACTED] stated intention from the very inception to expand into South America and the Pacific Rim as the second phase of its global project, with the expansion to "be ready" within a year.⁹ And because, as the government's documents show, Qwest received the entirety of the September 2000 contract, the plan to have the South American and Pacific Rim networks ready within a year necessarily meant that Qwest would receive that work.

2. QUSAC 20733 (55) -- This is the July 21, 2000 Request for Proposal for [REDACTED]

[REDACTED] European network.

3. QUSAC 20177 (16) -- This is an August 21, 2000 letter from Mr. Nacchio to [REDACTED]

[REDACTED] providing personal assurance of the importance with which Qwest viewed the work contemplated and the need to interface smoothly and successfully with [REDACTED]

As we proffered, Mr. Nacchio would be brought in near the end of contract negotiations to help "close" the deal and give exactly these types of assurances from the highest level of the

⁹ The Court may recall that, at one of the § 6 hearings, the government criticized our some our Exhibits for failing to provide a sufficient nexus between [REDACTED] project and Qwest's efforts to expand its network into the Pacific Rim. The Acquisition Plan provides that nexus.

company. See also QUSAC 20180 (18) (another copy of this letter, attached to which is Volume I of Qwest's August 21, 2000 [REDACTED])

4. QUSAC 20144 (09) -- This single page document is dated September 29, 2000, and apparently is the "Request For Procurement Services" connected with the award to Qwest of the [REDACTED] European contract.

5. QUSAC 20146 (11) -- This document, which followed the award of the contract to Qwest, is entitled [REDACTED] Europe - Debriefing to Qwest 10 October 2000."

a) The first listed "purpose of debrief" was to "explain how proposal was evaluated."

b) The "Management and Technical, Price Rankings," at 12, show that Qwest was ranked first among the eight offerors across the board, and also ranked first on price. The "Evaluation Summary" rated Qwest as "very good" in all but one area.

c) The "Summary of Award Rationale" cited two factors: "Qwest's proposal surpassed all other Offeror's proposals in both Management and Technical approaches;" and it represented the "best overall value to the Government."

d) The fact that the network is described as "global" from its very inception further confirms our proffer that [REDACTED] Europe network was just the first segment of a much larger project, and that [REDACTED] soon thereafter began discussing the second segment with Qwest, which was a further expansion into South America and the Pacific Rim. Our proffer included multiple exhibits showing that Qwest was acquiring [REDACTED] links throughout both regions.

6. OUSAC 20636 (49) -- This is the September 7, 2000 source selection summary.

a) It notes, ¶ 4 at 1, that "the technical and management evaluation panel recommends that each CLIN be awarded to Qwest."¹⁰ The four CLIN's covered by the contract were: (1) the trans-Atlantic loop from the United States to Europe; (2) a "northern" loop; (3) a "central" loop; and (4) a "southern" loop." *See id.* at 3.

b) Although literally page after page of Doc. No. 49 is blanked out in its entirety,¹¹ it is clear that Qwest was chosen as the superior candidate to perform the work.

7. § 6(f) Rebuttal Materials

On February 10, 2007 [REDACTED] made a second document production -- some 1,200 pages of paper with a promise of an electronic version -- purported to be § 6(f) rebuttal materials, consisting of documentation from [REDACTED] project under which [REDACTED] ultimately went forward with the second phase of its global network in South America, the Pacific Rim and elsewhere. That [REDACTED] project was not put out for bid until the Spring of 2002 and the contract was not awarded until the Fall of 2002 -- particularly given the intervening events of September 11, 2001 -- has no relevance to the reasonableness of Mr. Nacchio's beliefs during the period January 2 - May 29, 2001. Indeed, the fact that the South American portion of [REDACTED] contract was awarded to Qwest as a sole source contract actually corroborates our proffer, since when the work was awarded it was done in the precise manner Mr. Nacchio expected during the time he was trading.

¹⁰ "CLIN" stands for "contract line item number." In layman's terms, each CLIN appears to represent one [REDACTED] link.

¹¹ In this 61 page document, but a single page had no redactions of any kind. Twenty-three pages had partial redactions (often, everything on a page but a section heading was redacted), and fully 37 pages were redacted in their entirety.

Relevant documents are:

a) OUSAC 21252 (see Exhibit A) -- This document, titled "Source Selection Plan," is dated December 5, 2001 and lays out the evaluation factors to be considered for award of the contract. Notable is the "Source Selection Schedule" at Appendix I (QUSAG 21273), which lists a timetable beginning on [REDACTED] and ending with a post-award debriefing of the winning bidder on [REDACTED]. The use of a timetable from the first half of 2000 suggests that this December 2001 document is a modification of an earlier document. And if earlier documents exist, they would substantiate our objection that many missing *Brady* and Rule 16 documents remain unproduced.

b) OUSAC 21097 (see Exhibit B) -- This is the [REDACTED] "final" RFP for project [REDACTED]. The document includes a description of the work orders to be issued under the contract (QUSAC 21139), which included the areas under discussion in 2001 which Mr. Nacchio believed were to be awarded to Qwest then.

8. What Is Missing From [REDACTED] Document Production -- As set forth in the accompanying "Motion to Compel the Production of Classified *Brady* and Rule 16 Materials," missing from [REDACTED] document production are materials, [REDACTED] [REDACTED] or otherwise, concerning the creation of a private [REDACTED] network or networks linking the continental United States to points in South America and the Pacific Rim, or elsewhere beyond the continental United States, which was under consideration during the period 1999 to September 10, 2001, all as it relates to Qwest.

E. [REDACTED]

On February 12, 2007, the government produced for the first time a classified memorandum of its July 18, 2006 interview with James F.X. Payne. *See Exhibit C.* In his interview, Mr. Payne confirmed to the government what we have previously proffered: [REDACTED]

This information was known to the government -- but unknown to us or the Court -- when, in August and December 2006, the Court heard argument on our initial Section 5 proffers [REDACTED]

What is also new since the Court's ruling on this issue is that in the government's recent classified production it has taken the position that if contracts did not come to fruition until 2002 or -- in the case of [REDACTED] -- not at all, this allows for an inference that Mr. Nacchio never had a reasonable basis to expect revenue in 2001. The new evidence -- [REDACTED]

¹² This proffer was first made in our "Section 5 CIPA Submission On Behalf Of Defendant" at 9 n.5 (May 15, 2006).

[REDACTED]

If we are not allowed to present this evidence, the government's assertion that, because Qwest never got the contract, it never had a reasonable basis to expect the contract, will go unrefuted. Accordingly, it now becomes critical that we be allowed to present evidence from which the jury can reasonably infer why Qwest did not receive this contract.

The government failed to share Mr. Payne's statements with us or with the Court. Instead, not even one month after interviewing Mr. Payne, the government characterized footnote 5 of our May 15, 2006 submission as "untrue." "Government's 2nd Response To Defendant's Section 5 CIPA Submission And Motion Pursuant To §6(A) and (C)(1) For Substitution Of Facts" at 18 (August 16, 2006). Similarly, during the August 25, 2006 *ex parte* hearing during which the government sought leave to modify or withdraw the *ex parte* Declaration filed [REDACTED] counsel for the government stated, "The agency, [REDACTED] has reviewed that Section 5 filing and that footnote in particular to make a classification decision. And one of the challenges in making the classification review is if information is inaccurate, false, it's difficult to classify." Transcript of Sealed Proceedings, 17:14-16 (August 25, 2006). The [REDACTED] Declaration itself averred that "the footnote contains factual inaccuracies." See Declaration of [REDACTED], ¶ 4 (August 16, 2006). Yet, the government did not disclose that

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one month earlier Mr. Payne had told the government, not only that the meeting took place and

[REDACTED]

Unaware, as were we, of Mr. Payne's statements to the government on July 17, 2006, the

Court ruled that [REDACTED]

[REDACTED] and that any relevance was outweighed by the likelihood of creating confusion. *See* Transcript of Sealed Proceedings, 48:14 - 51:21 (December 8, 2006). That ruling should, respectfully, now be reconsidered in light of this withheld information. *See* CIPA, § 5.

And, as to the risk of confusion the Court was concerned about, if this were now ruled relevant and admissible, we would simply ask the jury to infer [REDACTED]

[REDACTED] Furthermore,

should the government call any [REDACTED] personnel as witnesses at trial to testify that Qwest never received [REDACTED] opportunity -- and that therefore Mr. Nacchio had no good faith basis to believe that Qwest would -- not allowing us to use these facts to cross-examine the witnesses would deny us the ability to challenge the credibility of these witnesses.

Consequently, this new revelation -- which was withheld from us and the Court when the matter was initially heard -- warrants a re-examination.

F. CONCLUSION

For the foregoing reasons, Mr. Nacchio respectfully requests that the Court find that the documents and information identified herein are relevant, admissible and may be used at trial in this matter.

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Respectfully submitted this 20th day of February, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2007, a true and correct copy of the foregoing **FOURTH SECTION 5 CIPA SUBMISSION ON BEHALF OF DEFENDANT** was filed and served by hand delivering same, in Washington, D.C., to the Court Security Officer appointed by the Court in this within matter.

s/Edward S. Nathan
Edward S. Nathan