

FILED WITH THE
COURT SECURITY OFFICER
CSO: [Signature]
DATE 10/31/06

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

REDACTED

v.

JOSEPH P. NACCHIO,

Defendant.

APPLICATION FOR LEAVE TO SERVE RULE 17(c)
SUBPOENAS ON GOVERNMENT AGENCIES AND
THE NATIONAL SECURITY COUNCIL
(FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER)

Defendant Joseph P. Nacchio, by and through undersigned counsel, respectfully applies for leave from the Court to serve, pursuant to Fed. R. Crim. P. 17(c), the attached pretrial subpoenas seeking production of documents from four government agencies and the National Security Council.

A. INTRODUCTION

Although Mr. Nacchio was indicted on December 20, 2005, he could not investigate a key element of his defense until October 12, 2006, when the Court ruled that he had the "need to know" which would allow him to interview witnesses about potential classified government contracts which formed the basis of his reasonable, good faith belief as to Qwest Communications International, Inc. ("Qwest") revenue for the year 2001. This potential revenue was not included in Qwest's public guidance for the year ending December 31, 2001, which was issued on September 7, 2000 and remained unchanged until September 10, 2001.

REDACTED

In the brief time we have had to investigate, we have re-interviewed Mr. Nacchio and interviewed six witnesses, in five different SCIF's located in Washington, D.C., Denver and northern Virginia. Arranging these interviews was complex and cumbersome. Beyond the normal difficulties of coordinating availability of counsel and the witnesses, before each interview we were first required to engage in back and forth communications with five government agencies to obtain authorization for the interviews.

Despite these logistical difficulties, we succeeded in obtaining corroboration of many of the facts which have been the subject of our previous two Section 5 CIPA submissions. From these witness interviews we learned of the existence of contemporaneous corroborative documents which were available from Qwest's archives.¹

There is still further corroborating evidence, as well as affirmative evidence, likely to exist in the archives of four government agencies [REDACTED] as well as (with respect to GovNet) the National Security Council. These records relate to the meetings attended by Mr. Nacchio, the agencies' own assessment of the additional classified business they were considering awarding to Qwest during the time in question, and the records relating to the specific classified projects identified in Mr. Nacchio's various Section 5 CIPA submissions. The detailed breadth of our latest Section 5 CIPA submission, replete with corroborating contemporaneous documents, demonstrates clearly that our request to serve Rule 17(c)

¹ These internal documents have been buried among the millions of documents gathered in the Qwest archives. It was not until we interviewed other witnesses -- particularly Mr. Payne -- that the documents were located and their significance revealed. Our investigation has only begun and we will require additional time to complete it. As the Court is well aware, it is not easy to pull together corroborating evidence or get to the truth of events which took place five, six and even seven years ago. In consequence, we expect it will be necessary to make additional Section 5 submissions as our investigation progresses, in accordance with § 5(c) of CIPA.

subpoenas is narrowly drawn and is not a fishing expedition. Nor is it an effort to "discover" facts. Rather, it is aimed at corroborating the facts that we have.

As the Court is well aware, inferential evidence is readily admissible and can be just as useful as direct evidence. Mr. Nacchio is not obligated to take the stand in his own defense. This aspect of his defense may be put in through the testimony of witnesses and use of relevant documents. Thus far, the thrust of the government's response to Mr. Nacchio's Section 5 CIPA submissions has largely been to deny the truth of what Mr. Nacchio recalls. This denial, of course, bears directly on the reasonableness and good faith of Mr. Nacchio's state of mind during the time he was trading.

The records we now seek from the government go directly to demonstrating the truth of facts set forth in our Section 5 submissions. Although we believe that we have the right to make this application *ex parte* in order not to reveal critical defense strategy to the government (as the Court has previously recognized), we now make this application with notice to the government.

B. RULE 17(C) ALLOWS FOR NARROWLY FRAMED SUBPOENAS

Rule 17(c) provides, in pertinent part:

(c) Producing Documents and Objects.

(1) **In General.** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

A subpoena under Rule 17(c), whether seeking pretrial or trial production, must encompass materials which are relevant, admissible, and specifically described. *United States v. Nixon*, 418 U.S. 683, 700 (1974). There are many cases holding that Rule 17(c) subpoenas act as

an aid to obtain relevant evidentiary material for use at trial. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139, 144 (3rd Cir. 1980), cert. denied, 449 U.S. 1126 (1981).

The Rule provides courts with discretionary authority to issue subpoenas returnable prior to trial. *United States v. Beckford*, 964 F. Supp. 1010, 1016 (E.D. Va. 1997). To obtain production of eligible materials prior to trial, the applicant must show that the documents are not otherwise procurable reasonably in advance of trial by the exercise of due diligence and that the party issuing the subpoena cannot properly prepare for trial without advance production. *Cuthbertson*, 630 F.2d at 144 (citing *Nixon*, 418 U.S. at 699). Pretrial subpoenas are particularly appropriate here, where Mr. Nacchio may only obtain the documents from the agencies themselves, he can only prepare for trial with advance production of the documents and there will be a subsequent need for additional proceedings under CIPA.

Generally, the district court must approve in advance the issuance of a Rule 17(c) subpoena returnable on any date earlier than the actual trial date. *United States v. Ferguson*, 37 F.R.D. 6, 7-8 (D.D.C. 1963). Accord, *United States v. Nobles*, 422 U.S. 225, 244 n.1 (1975) (White, J., concurring opinion) ("[U]nder Fed. Rule Crim. Proc. 17(c), evidentiary materials may be obtained pursuant to subpoena in advance of trial in the discretion of the trial judge."); *United States v. Poindexter*, 725 F. Supp. 13, 28-29 (D.D.C. 1989).

C. THE CATEGORIES OF INFORMATION WE SEEK WILL CORROBORATE OR ADD TO THE DEFENSE PRESENTATION

As the schedules on the attached forms of subpoena show, our request for documents can be broken down into several general categories.

1. Time Frame -- With the exception of records reflecting the historical revenue paid to Qwest pursuant to classified government contracts (see ¶ C (5), below), the records we

seek relate to the period August 2000 through September 10, 2001, the "relevant" time set forth in the Court's October 24, 2006 First CIPA Memorandum and Order (the "First CIPA Order").

2. The Facts Of Mr. Nacchio's Meetings

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

a) Each time Mr. Nacchio visited a clandestine government facility, records of his visit were created. Often, Mr. Nacchio would have to be cleared past an entry gate or into a specific building, and then cleared again going into a SCIF. ~~These records will, additionally, show who else was present at these meetings.~~

b) Additionally, we have been advised by at least one witness that 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) Presumably, minutes or notes were taken by agency representatives during these meetings. These, too, will establish that these meetings actually occurred, and what happened during those meetings.

3. Meetings With Other Qwest Personnel

The next category of documents -- identical in substance to category Number 2, above -- goes to the fact that other meetings took place with the agencies, attended not by Mr. Nacchio but by Dean Wandry and James F.X. Payne, the successive heads of Qwest's government services department, and/or members of their staffs. 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 hammered over months between the respective Qwest and agency staffs. ~~The records of and from these meetings will demonstrate~~

not just the breadth of the work previously awarded to Qwest, but also the breadth of the prospective work being considered for award during 2001.

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

As we have shown, the process of awarding classified contracts often evolved over the course of months. During that time, the agencies most likely kept records of the evolution of negotiations and discussions with various telecommunication companies, including 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. Indeed, although we have interviewed witnesses, it is not reasonable to expect them to display a perfect recollection of events going many years. These records might well refresh the recollections of all the defense witnesses.

5. Agency Records Regarding Specific Projects

The projects that representatives of Qwest discussed at meetings with senior agency representatives. These documents will show the historical breadth, scope and terms of the work awarded to Qwest, i.e., the amount of revenue generated and the "sole source" nature of past awards. In its First CIPA Order, the Court ruled that these facts are relevant, in that the past history of Qwest's dealings with the agencies informed Mr. Nacchio's state of mind during the relevant time period. These documents will also show the breadth, scope and terms of prospective work for the year 2001, i.e., plans to use those existing contracts as vehicles to award

additional work during 2001. The following documents are being requested from the following agencies:

All documents, including meeting notes, calendar entries, journal entries, personal appointment records or diaries, SCIF or facility log-in sheets, records of visits, agendas, schedules, drafts of proposals, Requests For Information, Requests For Proposals, and White Papers, relating to the following topics and agencies:

1. [REDACTED]

a. [REDACTED]

b. [REDACTED]

c. CONUS (Continental United States)/OCONUS (Outside Continental

United States), as those concepts relate to Qwest;

d. [REDACTED]

e. [REDACTED]

f. Awards to and rankings of Qwest as a contractor during period 1999 to

September 10, 2001;

g. Telecommunications projects in Europe, Asia and Middle East as to which

Qwest was a potential vendor during period 1999 to September 10, 2001; and

h. All contacts between Qwest representatives, including but not limited to

Joseph P. Nacchio, [REDACTED] including but not limited to [REDACTED]

2. National Security Administration (NSA)

a. The Groundbreaker Project as it relates to Qwest;

b. CONUS (Continental United States)/OCONUS (Outside Continental

United States), as those concepts relate to Qwest;

c. Telecommunications projects in which Qwest was a potential contractor during the period 1999 to September 10, 2001; and

d. All contacts between Qwest employees, including but not limited to Joseph P. Nacchio, and NSA personnel, including but not limited to

3.



4. Defense Information Systems Agency (DISA)

a. 

b. CONUS (Continental United States)/OCONUS (Outside Continental

United States), as it relates to Qwest;

c. Telecommunications projects in which Qwest was a potential contractor during the period 1999 to September 10, 2001;

d. All records of contacts between Qwest representatives, including but not limited to Joseph P. Nacchio, and DISA personnel, including but not limited to General Harry Raduege.

5. National Security Council (NSC)

a. The GovNet project as it relates to Qwest during the period 1999 to September 10, 2001.

CONCLUSION

For the foregoing reasons, Defendant, Joseph P. Nacchio, respectfully asks that the Court grant leave to serve the attached forms of document subpoenas on the clandestine government agencies and the National Security Council, pursuant to Fed. R. Crim. P. 17(c).

Respectfully submitted this 31st day of October, 2006.

s/Herbert J. Stern

Herbert J. Stern

Jeffrey Speiser

Edward S. Nathan

~~Alain Leibman~~

Stern & Kilcullen

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(973) 535-1900

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s/John M. Richilano

John M. Richilano

Marci A. Gilligan

Richilano & Gilligan, P.C.


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Denver, CO 80202

(303) 893-8000

(303) 893-8055 (facsimile)

EXHIBIT 1

Proposed Subpoena To 

AO 89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

DISTRICT OF

COLORADO

UNITED STATES OF AMERICA

SUBPOENA IN A
CRIMINAL CASE

V.

JOSEPH P. NACCHIO

Case Number: 05-cr-00545-EWN

TO:

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE

COURTROOM

DATE AND TIME

☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See Attachment A.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT

DATE

(By) Deputy Clerk

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

John M. Richilano, Richilano & Gilligan, P.C., 633 17th Street, #1700, Denver, CO 80202, Phone 303-893-8000
Herbert J. Stern, Stern & Kilcullen, 75 Livingston Avenue, Roseland, NJ 07068, Phone 973-535-1900

Attachment A

All documents, including meeting notes, calendar entries, journal entries, personal appointment records or diaries, SCIF or facility log-in sheets, records of visits, agendas, schedules, drafts of proposals, Requests For Information, Requests For Proposals, and White Papers, relating to the following topics:

a. [REDACTED]

b. [REDACTED]

c. CONUS (Continental United States)/OCONUS (Outside Continental United States), as those concepts relate to Qwest;

d. [REDACTED]

e. [REDACTED]

f. [REDACTED]

Awards to and rankings of Qwest as a contractor during period 1999 to September 10, 2001;

g. [REDACTED]

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

h. [REDACTED]

All contacts between Qwest representatives, including but not limited to Joseph P. Nacchio, and [REDACTED], including but not limited to [REDACTED]

EXHIBIT 2

Proposed Subpoena To NSA

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

UNITED STATES OF AMERICA

V.

JOSEPH P. NACCHIO

SUBPOENA IN A
CRIMINAL CASE

Case Number: 05-cr-00545-EWN

TO: National Security Administration
(NSA)

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U.S. MAGISTRATE, JUDGE OR CLERK OF COURT

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Attorneys for Defendant Joseph P. Nacchio

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- a. The Groundbreaker Project as it relates to Qwest;
- b. CONUS (Continental United States)/OCONUS (Outside Continental United States), as those concepts relate to Qwest;
- c. Telecommunications projects in which Qwest was a potential contractor during the period 1999 to September 10, 2001; and
- d. All contacts between Qwest employees, including but not limited to Joseph P. Nacchio, and NSA personnel, including but not limited to [REDACTED]

EXHIBIT 3

Proposed Subpoena To 

2-A 089 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

UNITED STATES OF AMERICA

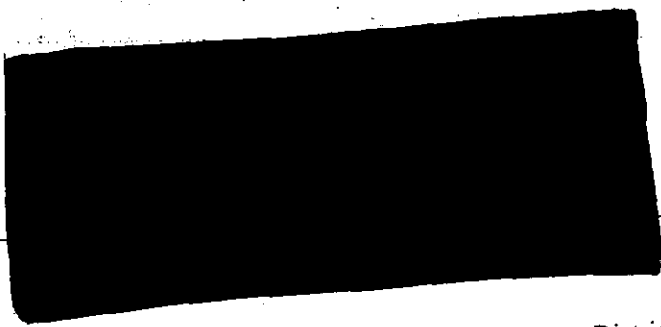
V.

JOSEPH P. NACCHIO

SUBPOENA IN A
CRIMINAL CASE

Case Number: 05-cr-00545-EWN

TO:



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COURTROOM

DATE AND TIME

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U.S. MAGISTRATE JUDGE OR CLERK OF COURT

DATE

(By) Deputy Clerk

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Attorneys for Defendant Joseph P. Nacchio

Attachment A

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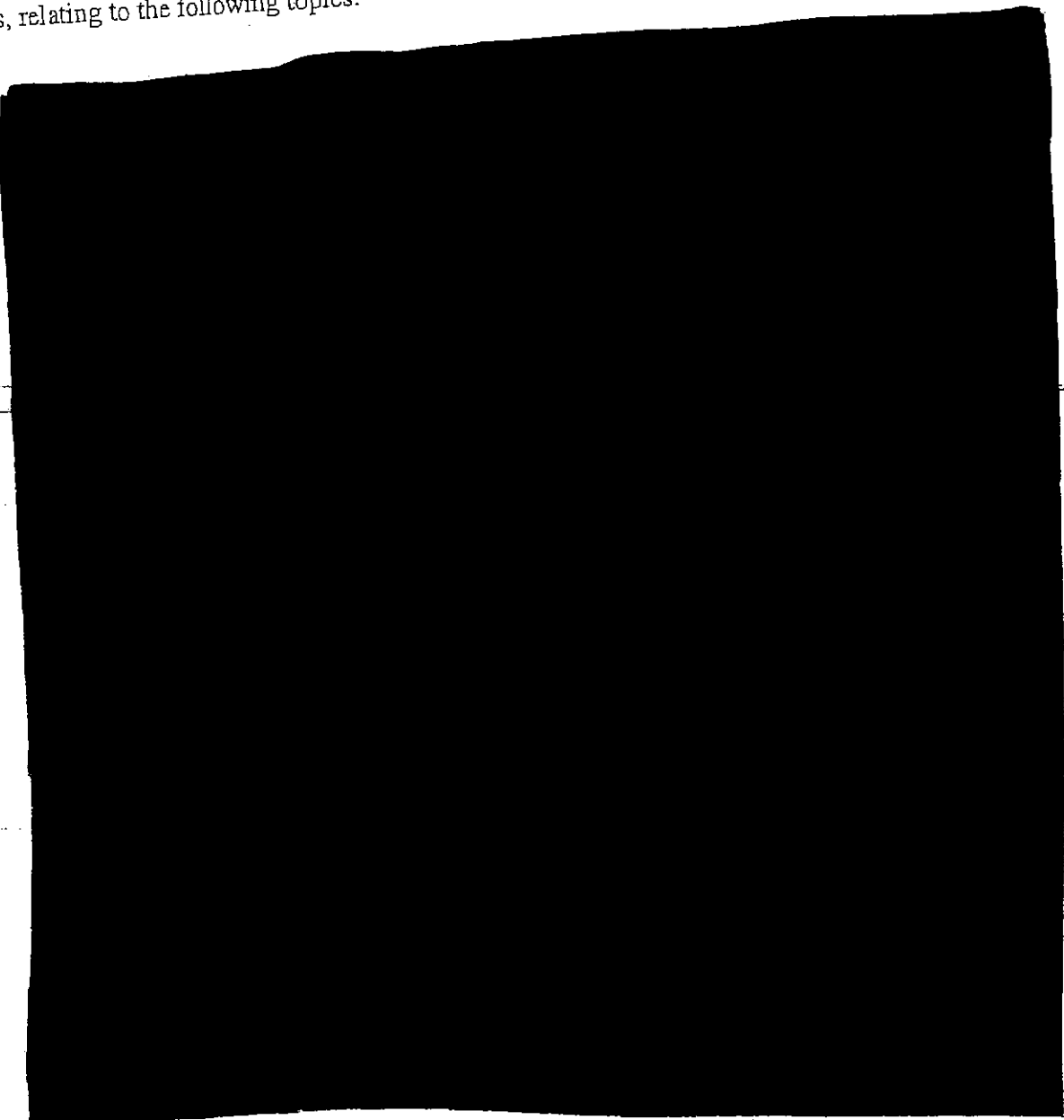


EXHIBIT 4

Proposed Subpoena To DOD/DISA

AO 89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

UNITED STATES OF AMERICA

SUBPOENA IN A
CRIMINAL CASE

v.

JOSEPH P. NACCHIO

Case Number: 05-cr-00545-EWN

TO: Defense Information Systems Agency
(DISA)

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DATE AND TIME

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U.S. MAGISTRATE JUDGE OR CLERK OF COURT

DATE

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ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER

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a. 

b. CONUS (Continental United States)/OCONUS (Outside Continental United

States), as it relates to Qwest;

c. Telecommunications projects in which Qwest was a potential contractor during the period 1999 to September 10, 2001;

d. ~~All records of contacts between Qwest representatives, including but not limited~~
to Joseph P. Nacchio, and DISA personnel, including but not limited to General Harry Raduege.

EXHIBIT 5

Proposed Subpoena To National Security Council

FD-204 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT

DISTRICT OF

COLORADO

UNITED STATES OF AMERICA

SUBPOENA IN A
CRIMINAL CASE

V.

JOSEPH P. NACCHIO

Case Number: 05-cr-00545-EWN

TO: National Security Council
(NSC)

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DATE

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Attachment A

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- a. The GovNet project as it relates to Qwest during the period 1999 to September

10, 2001.