EXHIBIT 1

DECLARATION AND FORMAL **CLAIM OF STATE SECRETS** AND STATUTORY PRIVILEGES BY J. MICHAEL MCCONNELL

United States' Statement of Interest and Motion for Entry of Protective Order, SEC v. Nacchio 05-CV-48-MSK-CBS

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

| SECURITIES AND EXCHANGE COMMISSION, |) |
|-------------------------------------|-----------------------|
| Plaintiff, |)) |
| ٧, |) 05-CV000480-MSK-CBS |
| JOSEPH P. NACCHIO, et al, |) |
| Defendants. |) |

DECLARATION AND FORMAL CLAIM OF STATE SECRETS AND STATUTORY PRIVILEGES BY J. MICHAEL McCONNELL, DIRECTOR OF NATIONAL INTELLIGENCE

- I, J. MICHAEL McCONNELL, hereby declare and state:
- 1. I am the Director of National Intelligence (DNI). I have held this position since February 2007. Previously, I served as Executive Assistant to the Director of Naval Intelligence, as Chief of Naval Forces Division at the National Security Agency, as Director of Intelligence for the Joint Chiefs of Staff during Operation Desert Storm, and as Director of the National Security Agency.

I. Purpose of This Declaration

2. The purpose of this declaration is to assert formally, in my capacity as DNI and head of the Intelligence Community, the military and state secrets privilege to protect national security information (state secrets privilege), as well as statutory privileges under the National Security Act of 1947, 50 U.S.C. § 403-1(i)(1), to protect intelligence sources and methods from unauthorized

disclosure in connection with this case, and Executive Order 12958, as amended, to protect classified information from unauthorized disclosure. Disclosure of information covered by these statutory and state secrets privileges would cause damage to the national security of the United States and such information should therefore be excluded from any use in this litigation.

3. I make this claim of state secrets and statutory privileges in my capacity as DNI and after personal consideration of the matter.

II. Statutory and Executive Order Authorities

4. Congress created the position of the Director of National Intelligence (DNI) in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI serves as the head of the United States Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council for

Executive Order 12958 was amended by Executive Order 13292. See Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Exec. Order No. 12958 are to the Order as amended by Exec. Order No. 13292. See Exec. Order No. 12958, 3 C.F.R. 333 (1995), reprinted as amended in 50 U.S.C.A. § 435 note at 187 (West Supp. 2007).

intelligence matters related to the national security. 50 U.S.C. § 403(b)(1), (2).

- 5. The United States Intelligence Community includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, the Drug Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with the analysis of intelligence information; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the DNI and the head of the department or agency concerned, as an element of the Intelligence Community. 50 U.S.C. § 401(a)(4).
- 6. The responsibilities and authorities of the DNI are set forth in the National Security Act of 1947, as amended. These responsibilities include ensuring that national intelligence is provided to the President, heads of the

departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is charged with establishing the objectives of; determining the requirements and priorities for; and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the Intelligence Community. 50 U.S.C. § 403-1(f)(1)(A)(i) and (ii).

- 7. In addition, the National Security Act of 1947, as amended, states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the Intelligence Community for the classification of information under applicable law, Executive Orders, or other Presidential directives and for access to and dissemination of intelligence. 50 U.S.C. § 403-1(i)(2)(A), (B).
- 8. By virtue of my position as DNI, and unless otherwise directed by the President, I have access to all intelligence related to the national security that is collected by any department, agency, or other entity of the United States. Pursuant to Executive Order No. 12958, as

amended, the President has authorized me to exercise original TOP SECRET classification authority.

9. In the course of my official duties, I have been advised of this litigation. The statements made herein are based on my personal knowledge, as well as on information provided to me in my official capacity as the DNI. I have also read the information contained in the separate classified declarations filed in camera and exparte in support of this declaration.

III. Assertion of the State Secrets and Statutory Privileges

been advised of the litigation between the Securities

Exchange Commission (SEC) and defendants Joseph P. Nacchio,

Robert S. Woodruff, Robin R. Szeliga, Afshin Mohebbi,

Gregory M. Casey, James J. Kozlowski, and Frank T. Noyes. I

have been informed that these individuals are former

executives of Qwest Communications, Inc. (Qwest) and that

the company has classified contracts with U.S. intelligence

agencies. I also have been informed that several of the

company's officials, including, but not limited to,

defendant Nacchio, had classified discussions with officials

of several U.S. intelligence agencies at various times. I

am also aware that four of the defendants have requested

discovery of classified information related to U.S.

intelligence agencies, and that one of those four

defendants, Mr. Nacchio, already has possession of some of the classified information at issue as a result of the criminal proceeding, <u>United States v. Nacchio</u>, 05-cr-005450EWN (D. Colo.). Disclosure of classified information through discovery in this case reasonably would cause damage to the national security. Therefore, upon personal consideration, I formally invoke and assert the state secrets privilege to prevent the disclosure of that information described in paragraph thirteen of this declaration, which is described more specifically for the Court in the three <u>in camera</u>, <u>ex parte</u> declarations submitted by the United States for the Court's review.

privilege held by the DNI under the National Security Act to protect certain intelligence sources and methods implicated by this case. Any public disclosure of the information described in, but not limited to, paragraph thirteen of this declaration, which is more specifically described in the three in camera, ex parte declarations filed with this declaration, in connection with this case is unauthorized, and would disclose intelligence sources and methods that I am required by statute to protect. Therefore, and coextensively with my assertion of the state secrets privilege, I formally assert and invoke the statutory

privilege to protect intelligence sources and methods from unauthorized disclosure.

12. Finally, I assert my original TOP SECRET classification authority under Executive Order 12958, as amended, to protect classified information from unauthorized disclosure. After actual and personal consideration of the matter, I have determined that the classified declarations which accompany this assertion of state secrets and statutory privileges, filed in camera and ex parte, are properly classified under § 1.2 of Executive Order 12958, as amended, because public disclosure of information contained in these declarations could reasonably be expected to cause damage to the foreign policy and the national security of the United States.2

Information Subject To State Secrets and Statutory Privileges

- I hereby formally assert the state secrets and statutory privileges, and respectfully ask the Court to prevent any party from testifying, eliciting testimony, producing, disclosing, entering into evidence, or making any other use in discovery, at trial, or in any other way in connection with this litigation, any information concerning:
 - (a) any classified contracts or potential contracts involving any U.S. intelligence agency and Qwest,

The classified declarations submitted ex parte, in camera for the Court's review contain classified information to which the involved agencies have not authorized access to defendant Nacchio and his

including, but not limited to, any negotiations, proposals, documents related to the contracts or potential contracts, or any classified communications by or between any U.S. intelligence agency and Qwest relating to actual and potential classified contracts; (b) any contact (including, but not limited to, any actual or proposed relationship, meeting, agreement, connection, task, transaction or communication of any kind)

- (i) by or between any U.S. intelligence agency, or any current or former official, employee, or representative thereof, and Qwest or its current or former executives or employees;
- (ii) that concerned any discussion of classified information including, but not limited to, any U.S. intelligence agency's sources, methods or activities, whether or not the discussions related to contracts or potential contracts;
- Any and all information relating to unclassified contracts involving the National Security Agency (NSA) with which Qwest or its current or former executives or employees, including defendant Nacchio, had involvement or potential involvement, but only to the extent that such information would reveal details regarding NSA's

attorneys and that was not provided to defendant Nacchio or his attorneys during the criminal case.

information technology infrastructure (i.e., I intend to protect details of NSA's mission, activities, or technology); and

(d) any other information that has properly been determined to be classified by any U.S. intelligence agency that may have a connection with this litigation or the criminal proceedings in <u>United States v.</u>
Nacchio.

This claim of state secrets and statutory privileges is intended to preclude the disclosure of such information during any and all further proceedings in this matter.

V. Damage to the National Security

- have determined that disclosure of the above-referenced information reasonably could be expected to cause damage to the foreign relations and the national defense of the United States. Thus, as to the information described in paragraph thirteen, as more fully detailed in the accompanying classified declarations filed in camera and ex parte, I formally invoke and assert the state secrets privilege.
- 15. I have also personally determined that any inquiry into the information described in paragraph thirteen, as further described in the classified declarations filed herewith, would risk unauthorized disclosure of intelligence

sources and methods. Public disclosure of information that confirms the use of particular intelligence methods compromises the effectiveness of those methods by alerting likely targets to their use, while public denial of the use of particular intelligence methods reveals to adversaries that some of their activities are secure. Disclosure of classified information related to intelligence sources or methods informs hostile foreign intelligence agencies about specific ways that the United States collects intelligence, and results in a loss of valuable intelligence when our adversaries are able to take countermeasures. Disclosure of such information would be likely to cause damage to the national security. Therefore, to prevent such damage to our nation's security, I invoke both the state secrets privilege and my statutory privilege under the National Security Act to prevent any use of information relating to intelligence sources, methods and activities in this case.

VI. Conclusion

16. As DNI, I assert the state secrets and statutory privileges to protect our nation's security from the damage that would result from disclosure of the information described in paragraph thirteen of this declaration, as more fully described in the classified declarations filed herewith.

- 17. In connection with my assertion of these privileges, I have considered the extent to which the bases for my assertion could be filed on the public record. After careful consideration, I have determined that no further information about the bases for my assertion beyond what is in this unclassified declaration can be disclosed on the public record without revealing the very information I seek to protect. The full scope of the information protected by the claim of privilege is itself privileged from disclosure. as are the identities of the specific intelligence agencies who own that information. Accordingly, the description of the scope of information protected by the privilege and the bases for my determination are contained in the classified declarations submitted with this declaration.
- 18. Finally, I understand that certain defense counsel for defendant Nacchio have been granted limited security approvals and access to certain classified information in connection with the criminal case brought against Nacchio. After careful consideration, I have determined that disclosure of the classified information at issue, and as described in the classified declarations submitted ex parte, in camera, to those counsel or the counsel of any other defendant would not be consistent with the national security interests of the United States. Accordingly, my claim of the state secrets privilege and related privileges is

asserted to protect such information from disclosure, including disclosure to counsel who may have been cleared in other circumstances. In making this determination, I wish to make clear that my determination should not be read to reflect in any way upon the integrity of that counsel.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of November, 2007.

J. Michael McConnell

Director of National Intelligence