



Fair trial at issue in Nacchio appeal

9-judge panel to hear arguments over key witness

By Jeff Smith

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Did former Qwest CEO Joe Nacchio get a fair trial?

That may be the critical underlying question as the full 10th Circuit Court of Appeals takes up the case, hearing oral arguments on Thursday.

A three-judge appellate panel earlier this year decided by 2-1 that a defense witness was improperly excluded at Nacchio's trial and ordered a new trial. Nacchio had been convicted on 19 counts of insider trading.

The full appellate court has agreed to take a second look at the panel's decision and consider whether Nacchio's conviction should stand, whether a new trial is in order or whether the issue of the expert witness' exclusion should be sent back to U.S. District Court. The last scenario is considered the least likely.

"This is all about fairness," Denver criminal defense attorney Jeralyn Merritt said Friday. "One of the fundamental basics of any trial is that a defense has the right to present witnesses."

Rick Kornfeld, a Denver attorney and former federal prosecutor, also said the case is about fairness.

"Did the District Court cut the defense off at the knees?"

But Kornfeld said the fact the full court has decided to review the panel's decision suggests there are judges on the circuit court who may believe Nacchio did get a fair trial despite the fact that witness Daniel Fischel wasn't allowed to offer expert testimony. Fischel did testify for nearly three hours about the pace of Nacchio's stock sales.

Nine judges, including the three from the panel, will hear the arguments. The court standard is for the defense and prosecution to get 15 minutes each, but the hearing is expected to take longer because of questions. The judges can issue their ruling whenever they want.

Nacchio was sentenced to six years of prison, fined \$19 million and ordered to forfeit \$52 million of stock proceeds. But he has been free on \$2 million bail pending the appeal.

Nacchio's defense team says Fischel would have testified that the information prosecutors say Nacchio should have disclosed before selling his stock in the spring of 2001 wasn't "material."

Fischel was expected to say that once the information was disclosed months later, Qwest's stock price wasn't significantly affected.

An analyst who testified for the prosecution at trial said he would have considered the information about the magnitude of Qwest's sales and swaps of communications capacity to be material.

Analysts began to question Qwest's financial condition around June 2001 and the company's stock price had already started dropping significantly by the time Nacchio finally disclosed the information later that summer.

Nacchio's attorneys have maintained that Fischel's testimony would have gone to the "heart" of the defense and that U.S. District Judge Edward Nottingham didn't notify them they had to prove Fischel's reliability through additional written testimony or by requesting a hearing.

Prosecutors have dismissed the argument, saying Nacchio's attorneys had "ample opportunity" to establish Fischel's reliability by describing his methodology but failed to do so. They say Fischel's testimony only became the heart of the defense "on appeal and hindsight."

Among those watching closely will be employees, retirees and investors who lost large amounts of money when Qwest's stock price plummeted.

There is a change of players from the hearing before the three-judge panel, when a relatively inexperienced 32-year-old government attorney was pitted against Nacchio's appellate attorney, Maureen Mahoney, who has a long and stellar record arguing cases in front of the U.S. Supreme Court.

This time, veteran appellate attorney Edwin Kneedler, principal deputy solicitor general for the Justice Department, will be arguing for the government against Mahoney. Earlier this year, Kneedler, 62, argued his 100th case in front of the U.S. Supreme Court.

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What's next

* **Oral arguments in the Joe Nacchio case** will be heard 1 p.m. Thursday in front of the full 10th Circuit Court of Appeals at the Byron White U.S. Courthouse at 1823 Stout St. (The public can attend but the seating, which includes an overflow room, is on a first-come, first-served basis).

The four questions the circuit judges will consider:

* Did Nacchio's defense team have sufficient notice that it was required to present witness Daniel Fischel's methodology or request a hearing?

* Did Nacchio have adequate opportunity to present the methodology or request a hearing?

* Did the defense have a burden to request a hearing?

* Did U.S. District Judge Edward Nottingham abuse his discretion in excluding Fischel from offering testimony? If so, would a new trial be an appropriate remedy or could a new evidentiary hearing be held?

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