

# Nacchio conviction overturned

By Andy Vuong  
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The 10th Circuit Court of Appeals has overturned the guilty verdict in the criminal insider trading case of former Qwest CEO Joe Nacchio and ordered a new trial before a different judge.



Joe Nacchio, center. (Brian Brainerd, Post file photo)

The 2-1 decision cited U.S. District Judge Edward Nottingham's exclusion of expert testimony by Northwestern University law professor and private consultant Daniel Fischel.

Fischel was allowed to testify on Nacchio's behalf about the facts behind his stock sales, but was excluded from providing economic analysis.

"We conclude that on the record before him the district judge was wrong to prevent Professor Fischel from providing expert analysis, and that this error was not harmless," the majority decision from Judges Paul Kelly and Michael McConnell states.

The judges also ruled that there was sufficient evidence to warrant a new trial without "violating the double jeopardy clause."

After a month-long trial in Denver federal court, Nacchio was convicted in April 2007 on 19 counts of insider trading connected to his sale of \$52 million in Qwest stock. He was acquitted on 23 other charges.

He was sentenced to six years in a prison and ordered to forfeit the \$52 million in ill-gotten gains and pay \$19 million in fines — \$1 million per count.

Nacchio, 58, had remained free on a \$2 million bond during the appeal.

"This is a setback, not a defeat," U.S. Attorney for Colorado Troy Eid said in a statement. "The good news is the circuit court said our trial team presented sufficient evidence to convict Mr. Nacchio of insider-trading."

He added that his office is considering its options "in consultation with the Department of Justice."

The next step for the government — before a new trial or negotiations on a possible plea deal — is to request that the case gets heard by the entire 10th Circuit Court of Appeals, a request that is rarely granted.

"We are of course delighted and look forward to Joe Nacchio's ultimate and total vindication," said Nacchio's trial attorney Herb Stern.

He said Nacchio hasn't asked him to serve as his attorney for the possible new trial.

Asked if he would be willing to take on the job again, Stern responded: "Sure."

Kelly and McConnell stated that they ordered for the new trial to be heard by a different judge because "we have concluded that it would be unreasonably difficult to expect this judge (Nottingham) to retry the case with a fresh mind."

Though appellate Judge Jerome Holmes disagreed with how his colleagues reached their decision, he agreed that the jury's guilty verdict was proper.

"I also believe the evidence was legally sufficient to support the jury's verdict," he wrote. "Therefore, I would affirm the district court and uphold Mr. Nacchio's conviction."

In addition to the wrongful exclusion of Fischel's testimony, Nacchio also argued on appeal that he should be granted a new trial because of flawed jury instructions and rulings related to his classified information defense. He also contended that the case should be thrown out because there was insufficient evidence for conviction.

During oral arguments in the appeal in December, the judges focused on the exclusion of expert testimony and whether the inside information Nacchio sold stock on the basis of was "material," or important enough that he was legally required to disclose it to the public.

Prosecutors showed during trial that Nacchio received repeated warnings from several of his top lieutenants about Qwest's deteriorating financial condition in 2000 and 2001. Many of them, including former president Afshin Mohebbi and former CFO Robin Szeliga, testified that beginning late 2000 they told Nacchio that it would be a huge stretch for Qwest to hit 2001 financial projections.

Nacchio kept their concerns private while accelerating his sale of company stock in early 2001, the government charged. At the same time, Nacchio kept reassuring investors that the company would hit its publicly stated financial targets.

The defense argued the warnings Nacchio received were related to Qwest's internal budgets and thus did not have to be disclosed to the markets. His attorneys also contended that

Nacchio was too consumed with the mental health of his oldest son to plot such a crime. It was revealed during trial that David Nacchio attempted suicide in early 2001, nearly pushing his father to resign from Qwest.

Qwest founder Philip Anschutz, who handpicked Nacchio to lead the fast-growing startup in 1997, testified that he talked Nacchio out of resigning.

The aggressive Nacchio had spearheaded a spectacular takeover of US West in 2000, which transformed Qwest from startup into one of the country's largest telecommunications companies.

Qwest, however, nearly collapsed into bankruptcy in the summer of 2002 amid an accounting scandal and the tech downturn. Nacchio was ousted in June 2002. Qwest later restated more than \$2 billion in revenue booked under his watch.

Nacchio didn't take the stand in his defense. He maintained an upbeat presence publicly throughout much of the trial and sometimes took notes during testimony. He welled with emotion whenever his son's mental illness was discussed.

Nacchio was given the opportunity to address the court before his sentence was handed down in July, but declined. At the end of that hearing, Nacchio made a bizarre attempt to speak, only to be rebuffed by the judge.

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### **Further reading:**

- [Read](#) prosecutors' 98-page petition to the Tenth Circuit Court of Appeals for rehearing, filed April 30, 2008. (PDF)
- [Read](#) the Post's complete coverage of the trial.
- [Discuss](#): Are you surprised by the appeals court ruling? Share your thoughts in West Watch.
- [Read](#) the Nacchio appeal verdict.
- [Read](#) a summary of Professor Daniel Fischel's proposed testimony.
- [Read](#) a brief filed in support of Nacchio's appeal.
- [Read](#) a brief filed by the prosecution arguing Nacchio's appeal.
- [Read](#) the appellant's reply brief.
- [Read](#) the judges' order granting Nacchio freedom during his appeal.
- [Watch](#) video from the Nacchio sentencing, including a statement by U.S. Attorney Troy Eid, and the reactions of former Qwest employees.
- [Read](#) and download the transcript from the Nacchio sentencing. (PDF, 117 pages)
- [Read](#) and download the judge's forfeit order. (PDF, 16 pages)
- [Read](#) the live blog from the courtroom
- [Discuss](#) Judge Nottingham's sentence for Joe Nacchio.
- [Read](#) a timeline of Joe Nacchio's time at Qwest and his criminal insider trading case.