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March 29, 2007

VIA EMAIL AND HAND DELIVERY

Cliff Stricklin
First Assistant U.S. Attorney
1225 17th Street, Suite 700
Denver, CO 80202

Re: United States v. Joseph P. Nacchio
Criminal Case No. 05-cr-00545-EWN

Dear Cliff:

Pursuant to the Court's order last week and in accordance with Fed. R. Crim. P. 16(b)(91)(C), the following is the summary of Professor Fischel's proposed expert testimony.

I. Qualifications

1. Daniel R. Fischel is President of Lexecon, a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues. He is also Professor of Law and Business at Northwestern University School of Law and Kellogg School of Management and the Lee and Brena Freeman Professor of Law and Business Emeritus at The University of Chicago Law School. He has served previously as Dean of The University of Chicago Law School, as Director of the Law and Economics Program at The

University of Chicago Law School, and as Professor of Law and Business at The University of Chicago Graduate School of Business.

2. Professor Fischel's research and teaching have concerned the economics of corporate law and financial markets. He has published approximately fifty articles in leading legal and economics journals on various issues relating primarily to the economics and regulation of financial markets. He is coauthor, with Judge Frank Easterbrook of the Seventh Circuit Court of Appeals, of the book *The Economic Structure of Corporate Law* (Harvard University Press). Courts of all levels, including the Supreme Court of the United States, have cited his articles as authoritative. *See, e.g., Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994); *Basic Inc. v. Levinson*, 485 U.S. 224, 246 n. 24 (1988); and *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). His curriculum vitae, which contains a list of his publications, is attached hereto as Exhibit A.

3. Professor Fischel has served as a consultant or adviser on economic issues to, among others, the United States Department of Justice, the United States Securities and Exchange Commission, The National Association of Securities Dealers, the New York Stock Exchange, the Chicago Board of Trade, the United States Department of Labor, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, and the Federal Trade Commission.

4. Professor Fischel is a member of the American Economics Association and the American Finance Association. He is also a former member of the Board of Directors of the Center for the Study of the Economy and the State at The University of Chicago, and former Chairman of the American Association of Law Schools' Section on Law and Economics. He has testified as an expert witness in multiple proceedings in federal and state courts across the country, as detailed on his curriculum vitae. His testimony has concerned a wide variety of financial issues including patterns of trading by insiders, the economics of diversification, the relationship between company disclosures and the total mix of information available to investors, materiality, and the determinants of stock prices. He has also testified as an expert on multiple occasions on behalf of the U.S. Department of Justice regarding various financial issues.

II. Summary of Opinions and Bases for Opinions

5. Professor Fischel is expected to testify about Mr. Nacchio's holdings of and transactions in Growth Shares, Qwest options, and Qwest stock. In particular, Professor Fischel is expected to testify that the economic evidence is not consistent with the Government's allegation that Mr. Nacchio's stock sales during the first two quarters of 2001 ("the Questioned Sales") were made on the basis of material nonpublic information. Professor Fischel's conclusion is based on the results of his study of the Questioned Sales in relation to various benchmarks and other relevant criteria including: (i) a comparison of the magnitude and timing of the Questioned Sales with the magnitude and timing of

Mr. Nacchio's sales in prior periods; (ii) a comparison of the magnitude and timing of the Questioned Sales with public statements by Mr. Nacchio and requests made by the Qwest Board as to how and when sales should occur; (iii) the relationship between the magnitude of the Questioned Sales and Mr. Nacchio's saleable holdings; (iv) a comparison of the Questioned Sales with other contemporaneous stock transactions by Qwest; (v) an analysis of whether the Growth Share Payment created any incentive to trade on the basis of inside information; (vi) stock sales by other Qwest insiders in the period in which the Questioned Sales occurred; and (vii) stock sales by senior executives of other companies in the period which Mr. Nacchio's sales occurred. Professor Fischel is expected to testify that:

A. Mr. Nacchio's option exercises/stock sales during the first two quarters of 2001 are consistent with his pattern of option exercises/stock sales during 1998, 1999 and 2000. These data show that in each quarter from the third quarter of 1998 through the second quarter of 2001, Mr. Nacchio exercised options that had been granted to him in June 1997 and sold the shares he obtained from exercise. Moreover, in certain quarters prior to 2001, Mr. Nacchio exercised and sold a larger percentage of his exercisable holdings than he sold during the first two quarters of 2001. These data contradict the Government's claim that Mr. Nacchio's "stock sales accelerated in January 2001...."

B. The Questioned Sales are consistent with Mr. Nacchio's stated preference for receiving the January 2, 2001 Growth Share Payment in cash, because by selling the shares he received in settlement of the Growth Share Payment, Mr. Nacchio converted those shares into cash. Moreover, because the dollar value of the shares that Mr. Nacchio would receive in settlement of the Growth Share Payment did not depend on Qwest's stock price, the Growth Share Payment did not provide Mr. Nacchio with any incentive to not disclose material inside information or sell the shares he received in settlement of the Growth Share Payment on the basis of material inside information.

C. The Questioned Sales are consistent with Mr. Nacchio's public statement at an investment community conference call on October 31, 2000 that he would be selling "about a million" shares per quarter obtained from the exercise of options granted to him in 1997 and Qwest Board's request that Mr. Nacchio avoid bunching sales during and at the end of the exercise period of the 1997 options.

D. Mr. Nacchio retained substantial saleable holdings that he would have had an incentive to sell if he were trading on the basis of material adverse inside information. In particular, at the beginning of 2001, Mr. Nacchio held Qwest stock directly and indirectly which he had obtained by exercising options and converting growth shares in prior years, but did not sell any of these shares during the first two quarters of 2001. In addition, Mr. Nacchio did not exercise any of the options he was granted in 1999, and Mr. Nacchio retained most of his vested options he held as a result of the 1997 grant.

E. Qwest's Board approved the repurchase of approximately 22.22 million shares of Qwest stock from BellSouth for $45 per share on January 15, 2001 following a discussion "led" by Mr. Nacchio, and concluded that the "repurchase would be in the Corporation's best interest, and in the best interests of its stockholders." The repurchase is inconsistent with the claim that Mr. Nacchio (and other members of the Board) possessed material adverse inside information at this time. Mr. Nacchio and other members of Qwest's board had no incentive for Qwest to repurchase its own shares at inflated prices because they would be inflicting losses on themselves and all other Qwest shareholders by doing so.

F. The 10b5-1 sales program Mr. Nacchio entered into on February 16, 2001 (the "First 10b5-1 Program") provided for the sale of only 11,500 shares per day. Mr. Nacchio would have had an incentive to sell more shares per day if he were trading on the basis of material adverse inside information.

G. Mr. Nacchio terminated the First 10b5-1 Program on March 2, 2001 thereby reducing the number of shares sold per day from 11,500 to zero. Mr. Nacchio would have had an incentive to continue selling pursuant to the program if he were trading on the basis of material adverse inside information.

H. The 10b5-1 sales program Mr. Nacchio entered into on May 16, 2001 (the "Second 10b5-1 Program") provided for the sale of only 10,000 shares per day and only allowed sales if the price of Qwest stock was at least $38. Mr. Nacchio would have had an incentive to sell more shares per day without a floor if he were trading on the basis of material adverse inside information.

I. The Questioned Sales are consistent with the economics of diversification because Mr. Nacchio's investment portfolio was not diversified. Under these circumstances, Mr. Nacchio would have had an incentive to sell Qwest stock even if he believed that the value of Qwest stock exceeded the market price because selling Qwest stock reduced portfolio risk.

J. Many officers, directors, and employees of Qwest sold Qwest stock during the period when the Questioned Sales occurred, and in many cases, these sales constituted a larger percentage of saleable holdings than the Questioned Sales.

K. Senior officers of Qwest and other public companies (including, for example, Michael Dell, Michael Eisner, Bill Gates, Ted Turner and Sandy Weill) frequently exercised options and sold substantial amounts of stock during the period from 1998 to 2001 (when Mr. Nacchio was selling Qwest stock).

6. Professor Fischel is expected to testify about the guidance Qwest provided during 2000 and 2001 in relation to its subsequent performance as well as the effect, if any, of Qwest's guidance on Qwest's stock price as well as analysts' recommendations, forecasts and target prices. Professor Fischel will testify that Qwest's performance during the first two quarters of 2001 (i.e., the period in which the Questioned Sales occurred) was consistent with the guidance. He is also expected to testify that Qwest's failure to meet its guidance during the second half of 2001 does not demonstrate that Qwest's September 7, 2000 guidance (or Mr. Nacchio's subsequent reaffirmations of the guidance) was incorrect, but rather reflects the massive economic downturn in the telecommunications industry. Professor Fischel's conclusions are based on: (i) a comparison of the Qwest's September 7, 2000 guidance with Qwest's actual

performance during 2000 and 2001; (ii) analysis of the investment community's reaction to Qwest's September 7, 2000 guidance; (iii) a comparison of Qwest's guidance history during 2000 and 2001 with the guidance history of other telecommunications firms.[1] More specifically, Professor Fischel is expected to testify that:

A. Qwest's stock price declined when it announced its guidance on September 7, 2000.

B. Most analysts did not change their recommendations, target prices or forecasts after Qwest announced its guidance on September 7, 2000.

C. Analysts had their own forecasts, and did not adopt Qwest's guidance as their forecast.

D. Analysts' reports reflected an understanding that economic conditions could cause Qwest's financial performance to be worse than expected.

E. Qwest's stock price did not decline significantly when it reduced its guidance on September 10, 2001.

F. Many other telecommunications companies provided guidance to the investment community during 2000 and 2001 and reaffirmed previous guidance between December 2000 and May 2001. Moreover, due to adverse changes in economic conditions, many telecommunications companies including Qwest reduced their guidance after May 2001. Furthermore, many officers and directors of telecommunications companies sold company stock after guidance which ultimately turned out to be wrong had been provided to the investment community.

7. Professor Fischel is expected to testify that the economic evidence does not establish that information concerning the magnitude of

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[1]. Professor Fischel has included the following telecommunications companies in his analysis: ALLTEL Corp, AT&T Corp, BellSouth Corp, Broadwing Inc, CenturyTel Inc, Citizens Communications Co, Covista Communications Inc, Genuity Inc, Global Crossing Ltd, ITC DeltaCom Inc, Level 3 Communications Inc, Primus Telecom Group Inc, RSL Communications Ltd, SBC Communications Inc, Sprint Corp, Star Telecommunications Inc, Talk America Holdings Inc, Touch America Holdings Inc, Tycom Ltd, Verizon Communications, Vialog Corp, Williams Communications, WorldCom Inc, and 360Networks Inc..

Qwest's IRU revenue would have been material to reasonable investors on the dates of the Questioned Sales. This opinion is based on Professor Fischel's analysis of: (i) the economics of recurring and non-recurring revenues; (ii) the profitability of IRU transactions; (iii) Qwest's projected future sales of IRUs; (iv) the market valuations of telecommunications companies that engaged in IRU transactions as compared to the market valuations of telecommunications companies that did not; (v) the disclosure practices of other telecommunications companies that sold IRUs; and (vi) the pattern of sales by insiders of other telecommunications companies that sold IRUs. In particular, Professor Fischel is expected to testify that:

A. The value of any firm is equal to the present value of the expected future cash flows from the operations of the firm. Therefore, the value of any particular revenue source depends on both the cost of generating the revenues, and the likelihood of future revenues. Transactions that result in revenues in the current period only may be more valuable than transactions that result in "recurring" revenues in many periods depending on profit margins, and the projected ability of the firm to engage in similar "non-recurring revenue" transactions in future periods.

B. Qwest's IRU transactions were much more profitable than its "recurring" revenue transactions as many analysts stated.

C. During the period of the Questioned Sales, Qwest projected that it would continue to sell IRUs in future periods

D. During the period of the Questioned Sales, the revenue multiples of telecommunications companies that sold IRUs generally exceeded the revenue multiples of telecommunications companies that did not.

E. Several telecommunications companies that sold IRUs did not disclose the magnitude of their IRU sales.

F. Several reporting persons of these telecommunications companies sold stock during the period in which the Questioned Sales occurred.

8. In connection with his work in this matter, Professor Fischel and his staff at Lexecon have reviewed:

A. Stock market data for Qwest, other telecommunications firms, telecommunications industry indices, and market indices;

B. Data concerning analysts' earnings forecasts for Qwest and other telecommunications firms;

C. SEC filings and press releases made by Qwest and other telecommunications companies;

D. Filings on SEC Forms 3, 4, 5, and 144 made by officers and directors of Qwest and other telecommunications companies;

E. Press releases and financial press reports concerning guidance made by Qwest and other telecommunications companies;

F. Grant Detail, Grant Lapsed and Stock Option Exercised Reports produced by Qwest detailing employee stock option exercises;

G. Data concerning executive option exercises and stock sales obtained from ExecuComp and Thompson Financial (compiled from SEC filings);

H. Mr. Nacchio's brokerage statements;

I. Financial press articles and analysts' reports concerning executive stock sales;

J. Transcripts of Qwest's investment community conference calls;

K. Documents bates-stamped QDSECAM0439446[2], QDSEC S28764[3], QUSA0036081-87[4],QDSEC S27859-995[5], and QDSECAM0435641-42 & QILL 0006278731- 32[6];

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[2]. Anshutz Trading Activity.
[3]. Nacchio Ownership (as of 4/30/01).
[4]. Fax from SalomonSmithBarney to Rana including January 2, 2001 Form 144 filing.
[5]. Qwest documents concerning "Exercise of Non-Qualified Stock Option."
[6]. Rule 10b5-1 Master Trading Plans.

L. Analysts' reports concerning Qwest and other telecommunications companies;

M. Trial testimony; and

N. Trial exhibits.

Very truly yours,

John M. Richilano

cc: Herbert J. Stern, Esq.