

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF COLORADO

3 Criminal Action No. 05-cr-00545-EWN

4 UNITED STATES OF AMERICA,

5           Plaintiff,

6 vs.

7 JOSEPH P. NACCHIO,

8           Defendant.

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9                   REPORTER'S TRANSCRIPT  
10                   TRIAL TO JURY  
11                   VOLUME TWENTY-SIX

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12                   Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,  
13                   Judge, United States District Court for the District of  
14                   Colorado, commencing at 1:19 p.m., on the 11th day of April,  
15                   2007, in Courtroom A1001, United States Courthouse, Denver,  
16                   Colorado.

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23                   THERESE LINDBLOM, Official Reporter  
24                   901 19th Street, Denver, Colorado 80294  
25                   Proceedings Reported by Mechanical Stenography  
                  Transcription Produced via Computer

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15 P R O C E E D I N G S

16 *THE COURT:* Mr. Stern, you may proceed.

17 **CLOSING ARGUMENT**

18 *MR. STERN:* Thank you.

19 I know I've kind of monopolized time. I know what to  
20 do about that, so I'll keep moving along.

21 I think we had discussed together no matter what these  
22 folks tell you when they came into this courtroom, we've shown  
23 you the documents, the exhibits, the budgets, and what they  
24 were actually saying to each other back then in 2001 about what  
25 their expectations were in terms of making, as they put it, the

1 numbers, that is to say, achieving the publicly stated  
2 financial targets of the company.

3 I don't see how there can be any question about the  
4 fact on April 9, sitting around together, Szeliga, Mohebbi, and  
5 Nacchio, going over the budgets, understood that the current  
6 expectation was that on December 31, 2001, the publicly stated  
7 financial targets would be achieved.

8 Now, is there any guarantee to that? Of course there  
9 isn't. Would anybody want to bet their life on it? Doubtful.  
10 Some people bet money on it, but I submit to you respectfully  
11 to do that with a full appreciation of the fact that there are  
12 risks. That's what the market is all about.

13 I suggest to you that if it were anything else, some  
14 sort of a sure thing, I wouldn't at my age be standing up here  
15 bothering you. I'd be out doing something else.

16 The task here is to decide not only what people say,  
17 but what's in their heart too.

18 How do you reach somebody's heart? You look at what  
19 they do. You look at what they do long before anybody's  
20 promised them immunity or threatened them that maybe they won't  
21 get immunity. You look at the way they conducted themselves  
22 during the period of time that's under your scrutiny.

23 You look at the objective evidence. I've shown you  
24 the budgets. They say they're going to make it. Of course,  
25 they can come in and speak about the fact that they might not

1 make it. It's always possible, but life is decisions. You do  
2 the best you can. It's what's in the heart, as well as the  
3 mind. It's what's in your character. It's what you really  
4 believe. It's what you commit your life to.

5           Any doubt in your mind, folks, that the company was  
6 what it became primarily because of the efforts of Mr. Nacchio?  
7 With all respect to Ms. Szeliga, with all respect to  
8 Mr. Mohebbi, do you think that they're the ones who made this  
9 into the great company that it became?

10           Sure, they helped. Nobody can do it alone. It's not  
11 the task of a single soul. I couldn't be before you now with  
12 all the work that's gone into this without the help of my  
13 colleagues. I'm sure Mr. Stricklin and his colleagues would  
14 say the same thing about each other. Nothing is a  
15 single-person enterprise.

16           Yet, having said that, is there any doubt in your  
17 mind, I, who have no burden, say to you, is there any doubt in  
18 your mind that that man believed in his company? Wasn't  
19 dumping stock because Afshin Mohebbi left a note on his chair?  
20 Or because somebody said, you know, economy might turn down,  
21 and somebody said, well, you know, there might not be enough  
22 IRUs, somebody said there might not be enough recurring, there  
23 might not be enough non-recurring?

24           And who turns out to be right or wrong, that can be  
25 important in the marketplace and has attendant consequences,

1 but not in this room, not on that basis.

2           What matters in this room is what is in your heart, in  
3 your mind, in your character and whether you're about the  
4 business of stealing and lying and cheating.

5           And I respectfully submit to you that Mr. Nacchio  
6 didn't build this company on that basis and wasn't selling any  
7 stock on that basis. And long before the Government got around  
8 to bringing this Indictment, which was brought December 20,  
9 2005, more than five years after he stood up in a public forum,  
10 looked the world in the face and said, I can't -- they won't  
11 extend the life of my options and I've got to sell.

12           There is no way on this Lord's earth that that man  
13 would know that years later Department of Justice would start  
14 dragging in person after person, starting around, according to  
15 the 302s, early '95 -- 2005.

16           And while we're about the business -- that's a  
17 refreshing change for me to look at you and talk to you --  
18 although -- reading all the testimony, although I'm afraid I'm  
19 going to go back to it in a while, we're about the business of  
20 judging what people actually did at the time. Let's take a  
21 look at what Mr. Mohebbi was actually saying, not just at the  
22 conference on April 9 where they all endorsed the budget that  
23 said that they were going to make the targets.

24           He went out into the world. He went to three  
25 conferences that he told you about on direct under questioning

1 from Mr. Stricklin.

2 One was the Merrill Lynch conference, one was the  
3 Morgan Stanley conference. Those two were in March. Then we  
4 had the Bank of America conference. That was in mid May.

5 Now, Mr. Mohebbi didn't want to know anything about  
6 those conferences -- I don't know if you remember that or not.  
7 I had a tough time getting him to even acknowledge the kind of  
8 person in the room who would be attending a conference like  
9 that.

10 Who do you reckon might be attending a Morgan Stanley,  
11 Merrill Lynch and Bank of America conference? Might be some  
12 people who were interested in financial affairs, wouldn't you  
13 think?

14 And by then, of course, he had regained his position  
15 of being chief -- COO, chief operating officer of the company,  
16 so, you know, they wanted to hear him.

17 What do you think they wanted to hear him about?  
18 Well, of course, they wanted to hear him about how the company  
19 was doing, his projections of what the company would do for the  
20 remainder of 2001.

21 And 8-Ks were issued -- you may or may not recall --  
22 based on his presentation. And on direct examination, he said  
23 to you, well, you know, he really didn't say the things that  
24 were in there, because you -- you see, those 8-Ks reaffirmed  
25 and confirmed the publicly stated financial targets of the

1 company, namely, 21.3 to 21.7, as being what the company  
2 reasonably believed it would do at that time.

3 Of course, that's consistent with the documents I just  
4 showed you before the recess. But nonetheless, the man was  
5 unwilling for some reason to say it.

6 Well, the 8-Ks are in evidence. I'm not going to take  
7 you through that.

8 Let's talk about Morgan Stanley. There was at the --  
9 on March the 30<sup>th</sup>, that's right at the end of the first  
10 quarter, "Are you aware of the fact that following your  
11 presentation, Morgan Stanley reported to the investment public  
12 that you appeared and gave an upbeat presentation of the  
13 company's operations of the global -- at the global telecom  
14 conference?"

15 Answer: "Yes."

16 Then I showed him the exhibit, which was a report,  
17 Morgan Stanley.

18 I asked him, "Do you recognize it? Have you seen it  
19 before?"

20 Answer: "Yes."

21 "That's the report of your conference, correct?  
22 Conference you attended and spoke at, right?"

23 Answer: "Yes."

24 So I offered it.

25 But then he changed his testimony.

1           "I think you told us you did see this report after the  
2 conference; am I right?

3           "When did I say that, sir? I don't remember saying  
4 that."

5           I couldn't hear him. That's my usual affliction.  
6 I said, "I -- I can't hear you."

7           Answer: "I don't remember saying that, sir."

8           Question: "You never seen this document before?"

9           He says, "I just saw it," meaning, you know, I just --  
10          Well, we got a certification of the document as a  
11 business record, and we got it into evidence. It is A-1950. I  
12 wonder if you would present that.

13          Could you kind of zero in on the first bullet point  
14 there.

15          This is a Morgan Stanley document. It's a report of  
16 the conference.

17          "Qwest provided an update to investors. Afshin  
18 Mohebbi, Qwest's president and worldwide operations chief, gave  
19 an upbeat presentation of the company's operations at our  
20 global telecom conference."

21          Next bullet point, please.

22          "Company is on track to meet its first quarter and  
23 fiscal 2001 goals. Qwest to meet or exceed its first quarter  
24 guidance," et cetera, and so forth.

25          "The synergies are ahead of schedule. Reentry is on

1 track."

2 Can we turn the page.

3 "Summary and investment conclusion." Could we kind of  
4 make that more readable. Thank you.

5 "Afshin Mohebbi, Qwest's president and worldwide  
6 operations chief, presented today at our global telecom  
7 conference. Qwest remains very upbeat about its prospects and  
8 reiterated that it's on track to meet first quarter estimates  
9 of 11-1/2 to 12-1/2 percent revenue growth. The company also  
10 reiterated its full year guidance of revenues between 21.3 and  
11 21.7 billion and EBITDA," and so forth.

12 Next item, "Reiterate guidance," and then I'll be  
13 done. I won't bother you with any more.

14 "Based on January and February data, the company is  
15 confident it will meet its first quarter revenue," et cetera.  
16 "The company also expects to meet or exceed full year guidance  
17 of 21.3 to 21.7 billion in revenue and EBITDA," and so forth.

18 I think you can take it off. I think -- unless the  
19 folks want to -- I think you can take it away.

20 Well, that's what he said at the time. And it was  
21 justified at the time. That's the way everybody was operating.  
22 That's what everybody believed.

23 And frankly, I suggest to you that Afshin Mohebbi  
24 would not have gone before that conference and said those  
25 things unless he sincerely believed them. It may be in his

1 interest now not to say those things, but it may be in his  
2 interest now to deny that he ever said them. But members of  
3 the jury, he said them. And they were the best judgments that  
4 that group of executives were making at that time.

5 Now, that, if my memory serves me, is March the  
6 30<sup>th</sup>.

7 On, I think it was, May 15, Mr. Mohebbi presented to  
8 the Bank of America conference. This is another, you know,  
9 meeting of people who make a living, I guess, out of analyzing  
10 and trying to get, you know, a handle on companies.

11 And if you kind of throw up 12 -- A-1276.

12 I had a tough time with this one, but he acknowledged  
13 that this was the e-mail traffic between him and Kevin Welch,  
14 who is a fellow who was preparing the slide presentation that  
15 Mr. Mohebbi was going to present.

16 At the end of the day he says, "I like this." I don't  
17 know if you can see that, but -- "growth page is very good.  
18 Certainly like to go with it." So let's turn to page 7 of the  
19 slides.

20 In spite of the fact that Mr. Mohebbi was telling us  
21 here that he wasn't making, you know, financial projections,  
22 there it is. Talks about the first quarter. Talks about how  
23 well they're doing. Ends with the point, "Met or exceeded  
24 consensus expectations for the 16<sup>th</sup> consecutive quarter."  
25 That, of course, is the quarter that ended March 30, 2001.

1           And now comes the good one, page 13, "2001 Outlook."  
2 That's our old friend up there, 21.3 to 21.7 billion revenue,  
3 et cetera and so forth. There can be no doubt about it,  
4 members of the jury, that was the honestly held views of the  
5 top management of that company as late as mid May.

6           By that time, Mr. Nacchio was in an automatic trading  
7 program, trading 10,000 shares a day forever until he could  
8 finish getting rid of about 4-1/2 million options, vested  
9 options, at \$5-1/2, with the only proviso, mind you, they  
10 couldn't be sold under \$38 a share.

11           You know, he was wrong, because after May 29, those  
12 shares never hit \$29 again, ever. So the man they accuse of  
13 having all of this deep insight never got to sell any of them.  
14 That's a fact. Never got to sell his 564,000 shares that he  
15 and his family owned. Never got to sell the 2.25 million  
16 shares at 28.

17           By the way, on January 26, those shares were in the  
18 money by 15 bucks.

19           Well, what's the point? You'll have all of that if  
20 you want to look at it.

21           Yes, he made a lot of money. He built a big company.  
22 His deal was that he would have an entrepreneurial stake in the  
23 future of the company. Those are the terms upon which he  
24 entered it. And this may sound odd to you, and I hope you  
25 won't hold it against me for saying it, but given the

1 responsibilities involved, not an enormous salary, as those of  
2 you who are aware of what goes on in this world.

3 His ability to earn was conditioned on his ability to  
4 produce. He stood behind that, continuously behind it. He  
5 stood behind it even when those around him were saying it was  
6 going to go to hell in a hand basket, if you'll excuse the  
7 expression, because he wouldn't sell under 38. His so-called  
8 good friend and financial advisor, into whose hands he  
9 entrusted his affairs and his confidences, told you that too.

10 And when the stock fell, as it surely did, and when it  
11 reached into August and the industry was getting hammered, as  
12 it did do, Nacchio said to Weinstein, it's just part of the  
13 times. It's what is going on in the economic times. We're  
14 just participating in what is happening to the entire industry,  
15 and it's going to come back.

16 And he refused to go into the exchange program. I  
17 don't know if you folks remember what that was. He could have  
18 gotten rid of even his personal shares, swapped them in without  
19 having even to realize a gain and pay any taxes.

20 I don't know if you recall it, but Weinstein described  
21 it, you know, if -- as a pool of stocks, where people can put  
22 in their own shares, where they're heavily invested in one  
23 company, and achieve diversification. If you had a basket of  
24 stocks, GE, GM, whatever it might be, you've got too much of  
25 one company, you can put yours in and take a proportional share

1 of the rest, and it doesn't realize a gain.

2 Nacchio refused to do it. He said, come back and see  
3 me when the stock is 50, when Qwest is 50.

4 He believed in his company. He believed that he could  
5 overcome the economic forces that were at work. And with the  
6 help of a not -- some not so good friends of ourselves, he was  
7 defeated. But he didn't commit any crimes.

8 So there came a time when they took down the numbers.  
9 Ms. Conry asked Ms. Szeliga about that.

10 Ms. Szeliga said Mr. Nacchio took down the number in  
11 September, the 10<sup>th</sup> of September, 2001. Even in this, there  
12 was great misfortune. For the next day, of course,  
13 September 11, this country fell under attack. The entire  
14 economic center of the company became destabilized. The whole  
15 market was shut down, as you remember, for many days.

16 "Okay," says Ms. Conry. "When did you first" -- then  
17 she stopped herself. "In that time setting, when did you  
18 broach him to discuss that topic?"

19 Answer: "We presented Mr. Nacchio a presentation on  
20 August the 15<sup>th</sup>."

21 Ladies and gentlemen, August the 15<sup>th</sup> they came to  
22 Joe Nacchio, his staff, and said, it's time to take the numbers  
23 down. That's a long time after he entered the last trade  
24 program.

25 "And in that presentation, we presented what I

1 considered enough information to convince him to take down the  
2 numbers. So I recommended to him at that time, we need to take  
3 our numbers down.

4 "And what was his initial response," Ms. Conry asked.

5 "He wanted to look at the detail, and then he wanted  
6 to have business unit reviews, to hear from the business units  
7 where they were as a result of what I was showing them and  
8 their current estimates built into that particular  
9 presentation. He wanted to talk to the individual business  
10 units and confirm or disavow me of the fact that they were  
11 saying that they couldn't make their numbers. So he asked for  
12 those business unit reviews to take place."

13 Is that not a responsible, appropriate response? Is  
14 that a response of somebody who already knows they can't make  
15 the numbers? Or are they going to say that's part of some  
16 grand coverup?

17 "And did you participate in those business unit  
18 reviews?

19 "Yes, I did.

20 "And over what time period did those take place, do  
21 you recall?"

22 Answer: "Between August the 15<sup>th</sup> and the end of  
23 August."

24 Do you realize what that means, ladies and gentlemen?  
25 For two weeks he carefully evaluated with the appropriate

1 people in charge of various divisions within his company to see  
2 whether it would be appropriate then to bring the numbers down.

3 It is not the action of somebody who has already  
4 committed to the knowledge that the future required a takedown.

5 "And over what period of time did these take place, do  
6 you recall?

7 "Between August 15 and the end of August."

8 Question: "And when the" --

9 Answer: "Excuse me. I think they actually ran into  
10 early September.

11 "Okay." Question: "Okay. And when the company  
12 finally took the numbers down, did they issue a press release?"

13 The answer is, "Yes, they did."

14 Now, as far as I know, members of the jury, that is  
15 the first instance in the record of this case of anybody going  
16 to him and suggesting to him that the publicly stated financial  
17 targets of the company should be altered, lowered. We know  
18 that throughout this period, in spite of his denials to you,  
19 Mr. Mohebbi was on the road, in financial meetings, maintaining  
20 that the publicly stated financial targets were achievable and  
21 reasonable, and we have shown you in the budget documents,  
22 which were not created for an outsider to see, which were the  
23 budget evaluations of these people at the time, that while they  
24 worried and while they were concerned and while they evaluated  
25 recurring and they evaluated non-recurring, they maintained

1 that in the mix of the numbers they could make it.

2 I suggest to you that it is just impossible to find  
3 that this man went into the marketplace and selectively sold  
4 these \$5-1/2 options because Mr. Mohebbi or anybody else  
5 stimulated him to do it.

6 In some ways, I think near the end of her testimony,  
7 Ms. Szeliga gave us, albeit a little inadvertently, a little  
8 insight into the kind of saga that these people lived through  
9 at the time and that you, in a sense, have been reliving  
10 through their testimony at this time in this case.

11 You may remember that I asked her about some testimony  
12 that she had given before the House of Representatives in which  
13 she described, before she had to make four proffers to the  
14 prosecution and before she had to plead guilty to anything,  
15 what had really occurred in the industry and with the company.

16 I'd like to remind you of that.

17 I think this is also -- oh, yes, thank you.

18 There it is. I think it's on your screens as well. I  
19 think it's as good a summation -- let me shut up and let you  
20 read it.

21 That's what happened. It is impossible to forecast  
22 such events, as it is impossible to forecast booms. And the  
23 economic cycles and the waves that come, sometimes large,  
24 sometimes small, these are not part of the administration of  
25 criminal justice in the sense of holding people accountable for

1 that.

2 As the judge says, there is good news and bad news.

3 Bad news is I've got one more chart. And the good  
4 news is, it's my last chart.

5 Now, we've heard from some analysts, Mr. Johnstone, I  
6 believe, who you remember very well, he solicited you for  
7 business, and Mr. Khemka, who came all the way from India to  
8 tell us how the defendant confessed to him to being a bad man,  
9 with a smile on his face.

10 The figures here come from the cross-examination of  
11 Mr. Johnstone by my partner, Jeff Speiser. There it is --

12 *MR. STRICKLIN:* Your Honor, I -- I don't believe this  
13 is in evidence. I believe the facts that are shown on this are  
14 not in evidence. And I object to it being shown on the chart.

15 *MR. STERN:* This is based on the cross-examination of  
16 the witness.

17 Didn't I send this to you last night, or yesterday?

18 It's right there, the source.

19 *MR. STRICKLIN:* The questions of attorneys are not  
20 evidence, Your Honor.

21 *MR. STERN:* These were answers.

22 *MR. STRICKLIN:* And refreshing recollection are not  
23 evidence. Questions of attorneys are not evidence.

24 *THE COURT:* Bring me the exhibits.

25 *MR. STERN:* I'm so sorry?

1           *THE COURT:* Bring me the exhibits.

2           *MR. STERN:* This is testimony, Your Honor.

3           This is the testimony of the man pages 2247 to 2248,  
4 about --

5           *THE COURT:* Well, there is also listed an exhibit.

6           *MR. STERN:* Well, that exhibit is easy. That's the  
7 contract that Mr. Nacchio --

8           *THE COURT:* Bring it to me, sir. That is my question.

9           *MR. STERN:* May I -- somebody at my table kindly get  
10 the -- Exhibit 1880.

11           *MR. STRICKLIN:* Can we have that exhibit taken down  
12 while we're sorting it out?

13           Thank you.

14           *THE COURT:* Take it off the jury screen.

15           *MR. STERN:* I'm advised, Your Honor, we can put the  
16 testimony on the screen as well, that that's based on.

17           *THE COURT:* I'm sorry?

18           *MR. STERN:* I'm advised that we could put the  
19 testimony -- are you okay -- the testimony --

20           *THE COURT:* That won't be necessary. You don't need  
21 to put the testimony in front of the jury.

22           *MR. STERN:* No, for you, Your Honor.

23           *THE COURT:* Well, I'll get it myself, if I can put  
24 this together.

25           Which day was it?

1           MR. NATHAN: The 4<sup>th</sup>, Your Honor, morning session.

2           THE COURT: All right. Put the exhibit back on my  
3 screen.

4           Mr. Stricklin, your objection was what?

5           MR. STRICKLIN: I don't believe the stock prices of  
6 all of these companies at these times are in evidence as actual  
7 testimony from witnesses or documents, Your Honor.

8           THE COURT: Well, the transcript reveals that in  
9 response to leading questions of Mr. Johnstone, he acknowledged  
10 that he was aware of all of this. I must overrule the  
11 objection.

12           MR. STERN: Thank you, Your Honor.

13           May I put the exhibit back?

14           THE COURT: Yes.

15           MR. STERN: Ms. Szeliga's testimony before the House  
16 was correct. To the extent it was a problem, it was an  
17 industry problem. To the extent there was devastation to  
18 shareholder value, it was an industry problem.

19           I believe Mr. Johnstone's testimony is that the last  
20 three names on the list were direct competitors of Qwest. You  
21 can see how well they did.

22           This figure on October 24, \$16.81, of course, comes  
23 from the new, not renegotiated, but the new contract that  
24 Mr. Nacchio signed that Mr. Slater told you about, as during  
25 the year 2001 the company was anxious to sign him to a new

1 contract, because you'll recall that his original contract, was  
2 at the end of 1996, was for five years. That means it was  
3 going to expire at the end of 2001. I'm sure you can  
4 understand that when you're dealing with a chief executive  
5 officer of a large corporation such as this one, you try and  
6 get regularized a contract. You don't wait, if you can avoid  
7 it, until the very end moment when the underlying contract is  
8 going to expire, because as a matter of reason and common  
9 sense, that causes a lot of turbulence.

10 But you also know that there was a reason why the  
11 contract -- the new contract, not renegotiated contract --  
12 between Mr. Nacchio and the company took this long, until  
13 October 24. And I'm going to return to that in just a moment.

14 But I'd like to deal with a couple of other issues  
15 first.

16 First of all, I'd like to deal with this IRU, one-time  
17 concept of non-recurring income that's been introduced into  
18 this case.

19 There is nothing secret about the fact that Qwest  
20 derived substantial amounts of income from the sale of  
21 indefeasible rights of use. Indeed, in its earliest history,  
22 that was the majority of its income. All it had to sell was  
23 capacity on its lines.

24 According to its filings in '96 -- and these were  
25 public filings. And it's all in evidence before you. I am not

1 going to go through -- I have them, but I will spare you and  
2 me.

3 In '96, approximately 60 percent of its income was  
4 from that. In '97, 80 percent. In '98, 30 percent. In '99,  
5 20 percent. And, of course, that income began to reduce as  
6 they added companies and they added companies which had a  
7 different kind of income stream. But there is nothing wrong  
8 with the income that they had.

9 Now, this whole notion -- this whole notion of terming  
10 these one time is kind of silly, if you think about it. They  
11 weren't one time. Yes, each individual sale was an individual  
12 sale. But the same customers kept coming back. Let's say you  
13 owned a grocery store. When you sell to customers, is that  
14 recurring, or was it non-recurring income?

15 If you're a car company, you sell cars. Is it  
16 recurring or non-recurring income? Of course, if you lease a  
17 car over a period of years, that's recurring in the sense that  
18 you know exactly what it's going to be each year.

19 And it's certainly true in the case of individual  
20 sales. It may be more difficult to predict than it is if you  
21 have a long-term contract. But manufacturers of all kinds of  
22 things, from cars to airplanes to tanks that they sell to the  
23 government, whatever it may be, you can call it non-recurring  
24 because each sale is a sale. But these businesses manage to  
25 stay in business selling to the same groups of customers.

1           And it is without question that Qwest had almost  
2 unlimited capacity -- it was designed to do it, that was Phil  
3 Anschutz' dream, to -- he told you about it on the stand, and  
4 so did Slater, to define a company that could take itself into  
5 the modern age and to sell capacity. And they did.

6           And it was highly profitable too. Why? Because once  
7 you had the capacity, you see, the cost of doing business was  
8 very small. There is plenty of testimony in the record about  
9 that.

10           It was highly profitable. But there was nothing  
11 special about it, just a form of income in a business like any  
12 other.

13           "Ms. Szeliga, for our purposes right now" -- it was me  
14 questioning her -- "I'm not going to go into any depth, the  
15 term recurring, non-recurring and one time, end quote, but I  
16 would just like to ask a couple of questions about that, okay?"

17           Answer:    "Yes.

18           "Those terms were used differently from time to time  
19 at Qwest and elsewhere; is that true?

20           "I don't know how they were used elsewhere. They were  
21 used at Qwest to determine certain things."

22           Question:   "Well, somebody could get an impression  
23 the one-time thing wasn't defeated by the title "one time." Do  
24 you follow what I mean?

25           "Yes, I do.

1           "That would be false, wouldn't it?

2           "Yes. In fact, one times -- one-timers could happen  
3 another time."

4           Question: "And often did."

5           Answer: "They did."

6           "Mr. Casey, you ever have a conversation with  
7 Mr. Nacchio where he expressed to you that he felt that the  
8 so-called non-recurring income was really recurring because it  
9 came back each quarter?"

10          Answer: "Yes."

11          "How many times did you have such a conversation with  
12 him?"

13          Answer: "Probably would say once or twice."

14          What I'm trying to suggest to you, ladies and  
15 gentlemen, is this: In determining the revenue of a company,  
16 you look at all of it, all of it. And in projecting what the  
17 revenue of a company should be, you consider all of it, all of  
18 it.

19          Recurring and non-recurring, if you want to use those  
20 terms within your own company, you certainly can. But the real  
21 question is not how much recurring versus how much  
22 non-recurring; it's what is the revenue going to be from all of  
23 the sources.

24          And Qwest did not in 2000 and 2001 discriminate. What  
25 it did publicly, it used to -- when sales of IRUs were a

1 significant portion of its income, it defined it in public  
2 filings. That's why I told you in '96 it was 60 percent. '97,  
3 it was 80. '98, it was 30 percent. '99, it was 20 percent.  
4 By the time it hit 2000, with the merger of U S WEST, which has  
5 an essentially different kind of business, the determination  
6 was made by the audit committee -- not Joe Nacchio -- by  
7 Szeliga and the audit committee and Arthur Andersen, that there  
8 was no reason to discriminate or break down the recurring  
9 versus non-recurring.

10           That was not Nacchio's decision. That is clear in the  
11 record. He is not a member, was not a member of the audit  
12 committee. Was not allowed to be a member of the audit  
13 committee. Because -- I don't want to start reading a lot more  
14 testimony to you. I've imposed enough. The testimony from  
15 Szeliga was absolutely clear. Under the modern way you set up  
16 a corporation, the audit committee is separate and apart from  
17 the CEO. The CEO doesn't go there. CFO, chief financial  
18 officer reports there. The outside auditors go there. The  
19 lawyers go there. And they're in charge of determining what  
20 will be filed with the SEC. And they're the ones that made  
21 that determination, and Joe Nacchio had nothing to do with it  
22 and had as much right to rely on that determination by those  
23 people as anybody else.

24           But the point is -- and I'm going to give you the  
25 actual figures based on what is in the record.

1           In the year 2000, the figure, which you call a  
2 non-recurring, was 5 percent. Whole figure, 5 percent. And in  
3 the year 2001, when in August they determined it was going to  
4 reach 8 percent, they decided to file, and did, and report it.  
5 And so by August of 2001, the audit committee determined to  
6 file and report that for 2001 looked like 8 percent, and for  
7 the year 2000, 5 percent.

8           But I sure hope you folks recognize and understand  
9 that those figures mean nothing, that the only figure that  
10 means anything is whether you are going to reach your publicly  
11 stated target, which in this instance was 21.3 to 21.7.

12           If you reach it, no one throws any stones at you. And  
13 if you don't reach it, then there are some folks that look  
14 around for reasons to do otherwise.

15           There are a couple of issues -- and the good news is  
16 I'm pretty close to being done.

17           There are a couple of issues that have been raised by  
18 Mr. Stricklin, and I don't know whether it's -- whether or not  
19 he's going to address them, so in abundance of caution, I am.

20           The first one is this Bell South transaction. We  
21 spilled a lot of paper and ink around here about the fact that  
22 in January the board and Mr. Nacchio determined that rather  
23 than have Bell South sell a billion shares on the market --  
24 withdrawn, a billion dollars' worth of shares on the market,  
25 the company would buy it itself.

1           Mr. Slater testified about that at length. I will not  
2 repeat his testimony. He testified that in his view it was in  
3 the best interests of the company to do it.

4           I think that Mr. Stricklin has been contending that in  
5 his secret effort to pump up the stock so that he would be able  
6 to get rid of the options he was selling, Mr. Nacchio  
7 engineered this purchase so that those shares would not reach  
8 the market.

9           Mr. Slater has said that that was not the reason. The  
10 minutes of the Board of Directors, which you will find in  
11 Exhibit -- Government Exhibit 1002, are very clear. They hired  
12 Salomon Smith Barney, paid them a \$700,000 fee -- this is in  
13 the minutes. I just don't want to have to take you through it.  
14 It's in the minutes -- to assess whether or not these shares  
15 should be repurchased by the company. It was the conclusion of  
16 Salomon Smith Barney that they should. It was their  
17 conclusion. It was under favorable terms. They emphasized  
18 that the price was anywhere from 40 to \$55 in value. The  
19 company was getting it for \$45 in value.

20           I shouldn't have to be doing this. I suggest to you  
21 that it is bizarre to suggest that as part of a scheme of  
22 insider trading Mr. Nacchio engineered the purchase of these  
23 sales from Bell South so the stock price shouldn't fall.

24           There isn't one scintilla of evidence to support it.  
25 All the evidence is that it was carefully considered,

1 evaluated. Experts were retained by the board to determine  
2 whether it should be done, and it was done on that basis.

3 And why anybody would try and keep the price up and  
4 then go into a trading program in February, going to sell  
5 11,500 shares a day for the next two-plus years doesn't make  
6 any sense to me. But that's what we have to contend with.

7 The last issue which gets raised from time to time is  
8 this notion that Mr. Nacchio at a time when he was  
9 renegotiating his contract, which he wasn't, in January or  
10 February -- I believe it was February -- was offered \$38 -- \$39  
11 options. Apparently, it is the theory of the prosecution that  
12 he turned down those options at that time because he was  
13 prescient enough to know, wise enough and far reaching enough  
14 to know that if he just waited until October 24, the company  
15 would give him those same options at a much lower price.

16 I suggest to you that that argument is absurd.

17 Mr. Slater was very clear. In February of 2001, he  
18 was attempting to negotiate a new contract with Mr. Nacchio at  
19 a time when his existing contract was drawing to an end. And  
20 you know why Joe Nacchio wouldn't sign a contract at that time.  
21 And you know why he would not accept the terms of a new  
22 contract at that time.

23 And these positions of the Government have put us into  
24 a position where we had to come into court with some stuff that  
25 we never wanted to deal with.

1           You know that at precisely that time the Nacchio  
2 family was going through a terrible moment. There has been a  
3 stipulation entered into, which has obviated the necessity of  
4 bringing in medical records.

5           That stipulation reads as follows: "Mr. Nacchio's son  
6 David was continuously hospitalized from January 19, 2001, to  
7 February 21, 2001, for the condition referred to in testimony."  
8 And you know what that condition was. We had to bring in Phil  
9 Anschutz to tell you about it. We had to bring in Father Giles  
10 to tell you about it.

11           And members of the jury, make no mistake about it, at  
12 the conclusion of this case, I would not even have done that  
13 but for one reason. Three or four weeks ago, I stood before  
14 you, and I made an opening. And in that opening, I made some  
15 promises to you. I did not know then for sure what Mohebbi or  
16 Szeliga would say on the stand. I did not know then whatever  
17 the Government was going to bring into evidence against us.  
18 And I made the opening that I did without having seen the  
19 evidence. You know, most of these people don't talk to us.

20           And in that opening, I promised you that I would  
21 produce Mr. Anschutz. I don't remember, but I think I promised  
22 the equivalent, if not Father Giles. I did not want to be in a  
23 position of dishonoring my word to you. Not because I feared  
24 for myself, to be sure. But I felt if I did not honor it, you  
25 might feel something against the defendant.

1           The fact of the matter is, that at the precise moment  
2 that the company was trying to get Mr. Nacchio to sign a new  
3 contract to continue as the CEO of the company for another five  
4 years, as a result of the situation at home, he wanted to quit.

5           Now, unless you believe that Mr. Anschutz is lying or  
6 somehow held prisoner by a contract which prevents him from  
7 disparaging, or unless you believe that Abbot Giles has been  
8 unduly influenced by some gift made five or six years ago, the  
9 things I told you are true things.

10           Joe Nacchio did not resist those options at \$38 in  
11 February because he was holding out realizing the company was  
12 heading down so that he should get options at \$16.81.

13           And any suggestion like that, I think, is an affront,  
14 not to us, but I think you can figure out who it is to.

15           And if he had such wisdom, and if he knew for sure  
16 that the options at \$38 were going to collapse, why in the name  
17 of heaven didn't he dump everything he had, his personal stock,  
18 his children's stock, his family partnership stock, his \$28  
19 stock?

20           And if he had a corrupt heart, if he was a man who was  
21 intent on cheating people, covering up, finding ways to slime  
22 on, he had the perfect out. He could have resigned in  
23 February, the end of January, given as a reason his family  
24 condition, and then he could have sold everything he had  
25 without regard to the windows of the company which was a

1 private policy of the company, because David went into the  
2 hospital on January 19. That's even before this chart begins.  
3 And that stock, according to this chart, was over \$43.

4 I think I am basically done. I want to remind you,  
5 please, of two legal principles, one I've already told you.  
6 The crime which this prosecution has sought to bring requires  
7 them to prove beyond a reasonable doubt that Joe Nacchio  
8 actually used material non-public information in deciding to  
9 trade, in other words, that was a significant factor in his  
10 decision. I submit to you that you know that that's not true.

11 The second legal principle that I want to leave you  
12 with is something that I believe the judge is going to tell you  
13 when he charges you. Whether that's today or tomorrow, I don't  
14 know. But I do know what he's going to say because he's been  
15 kind enough to tell us in advance.

16 It speaks of a person's good faith, and by that I  
17 mean, as I refer to, the heart. The good faith of a defendant  
18 is a complete defense to the charge of securities fraud  
19 contained in each count of the Indictment, because good faith  
20 on the part of the defendant is simply inconsistent with the  
21 intent to defraud alleged in each count of the Indictment.

22 And make no mistake, each one of the 42 counts alleges  
23 that Joe Nacchio intended to defraud.

24 A person who acts on a belief or an opinion honestly  
25 held is not punishable under the statute merely because the

1 belief or opinion turns out to be inaccurate, incorrect, or  
2 wrong. An honest mistake in judgment does not rise to the  
3 level of criminal intent.

4 I cannot stand before you and tell you that Joe  
5 Nacchio was prophetically correct in how the numbers turned out  
6 on December 31, 2001. But I respectfully submit to you that  
7 his conduct, the way he treated his own shares, his public  
8 announcements many months before there is any allegation of  
9 anything as to what he was selling and why he was selling  
10 establishes on our behalf his good faith.

11 And members of the jury, it's not for us to establish  
12 his good faith. They must establish beyond a reasonable doubt  
13 that it's not there.

14 You have been exceedingly patient with me, and I thank  
15 you for it. I probably exceeded your unlimited budget, as a  
16 friend of mine long ago once said.

17 The responsibility for this case has not been a light  
18 one or an easy one. Yet, it has been an honor and an honorable  
19 one. I've done the best I can, and so have my colleagues. I  
20 will not be allowed to speak to you again. Mr. Stricklin will  
21 speak in rebuttal to what I have said. He's been very  
22 courteous to me in only making one objection, and I will,  
23 unless he goes completely south, try to return the compliment.

24 I thank you very much on behalf of myself and my  
25 colleagues and Joe.



1           And you've learned how Joe Nacchio actually used the  
2 information that he knew by virtue of his inside position to  
3 sell Qwest stock and to take his chips off the table while risk  
4 abounded. And sometimes while even encouraging or demanding  
5 others to buy their shares of Qwest stock, he was taking his  
6 off the table. And he did so because of that inside  
7 information that he had and the buyers didn't.

8           Now, we brought a number of pieces of evidence to you  
9 in the form of witnesses and testimony and exhibits and  
10 documents. But we've also brought to you evidence of not just  
11 the crime itself, but also of other things in addition to the  
12 material non-public information that Joe Nacchio claimed didn't  
13 play a part in his decision.

14           We brought you things that -- evidence of some things  
15 that he claimed that he was relying upon in selling his stock.  
16 Brought you evidence of expiration date, that is, the use them  
17 or lose them idea.

18           We've brought you evidence of diversification, that  
19 is, don't keep your eggs in one basket. And we've brought you  
20 evidence of taxation. That's that -- that one of the great  
21 certainties in life, of taxation. And I want to just take a  
22 few minutes and talk to you about those things and how they fit  
23 into the evidence that we've presented to you over the last  
24 three weeks.

25           The first area I want to talk you about is expiration.

1           You heard evidence that when Qwest became a public  
2 company that Joe Nacchio received stock options. Those stock  
3 options eventually became \$5.50 stock options. And when he  
4 received those stock options, they are for a grant period, had  
5 an expiration date of six and a half years in advance. Six and  
6 a half years in advance. That's three and a half years shorter  
7 than your typical expiration date, which is ten years.

8           And I just want to make clear, I think Mr. Stern  
9 misspoke yesterday, and I just want to make clear, I don't  
10 think it was intentional, but if we could put up Government's  
11 Exhibit 1801. And this is -- thank you.

12           This is that contract that gave Mr. Nacchio his  
13 options. The expiration and termination date of those options  
14 says, "Shall expire on June 30, 2003," not 2002. Mr. Nacchio  
15 had until June 30, 2003, to exercise those options.

16           And remember, once he exercised the options, he could  
17 hold them. And once you exercise the option, there is no  
18 expiration date. Once you have that stock in your hand, it's  
19 yours for life. You can hold it as long as you possibly want  
20 to, and there is no expiration at all.

21           One thing I want you to consider is, this contract,  
22 just like every other contract at Qwest between Qwest and Joe  
23 Nacchio, is something that he negotiated.

24           You heard testimony from Mr. Slater and Mr. Anschutz.  
25 He was a tough negotiator, and he was very capable, very

1 skilled, and he was always negotiating for more.

2           This is something he asked for. And he had -- as of  
3 January 1 of 2001, he still had two and a half years to  
4 exercise the options that had vested.

5           And remember, once they were exercised, he could hold  
6 them forever. He didn't have to get rid of them.

7           Now, you heard yesterday that having all of these  
8 options was somehow a problem for him. Let me tell you, I've  
9 got problems. Having stock options is not a problem. It's a  
10 privilege. But they call it options for a reason.

11           If you're an executive at a corporation, you're a  
12 fiduciary of that corporation, you have responsibilities to the  
13 shareholders of the corporation. And if you have the  
14 opportunity to make money, and if you can do it lawfully,  
15 ethically, legally, that's great. But your first obligation is  
16 to the shareholders, not yourself.

17           With this expiration issue, there was an answer.  
18 You'll recall Mr. Slater came here, member of the compensation  
19 committee of the Board of Directors, and he told you there was  
20 an answer. Do you recall, Mr. Weinstein also talked about  
21 this, and the answer was a 10b5-1 trading plan. This trading  
22 plan -- it was brought up to Mr. Weinstein in December of 2000.  
23 Remember, Mr. Weinstein, in his memo, wrote, I thought about it  
24 for a minute, and then I told Joe I was 100 percent for it. I  
25 was 100 percent for it.

1           And you also know that Mr. Weinstein went ahead and  
2 it -- said it didn't really matter -- he had said earlier to  
3 Joe Nacchio, and thought he agreed, he said it didn't matter  
4 what the stock price was, because on these 5.50 options, the  
5 swing was so huge, if any of the stock plummet to 10 bucks a  
6 share, it really didn't matter, because you'll recall -- we'll  
7 talk about this in a minute, Mr. Weinstein was a big  
8 diversifier. He believed in the idea of diversification.

9           And this also -- the problem itself is that it rode  
10 out any bumps, the ups and downs that might occur in the stock  
11 market. You're going to get an average price. You can sell  
12 this over a long period of time. It solved yet another  
13 problem. The board said they had a problem with this as well.  
14 And their problem was, Mr. Nacchio lumping his sales. Lumping  
15 his sales.

16           Do you remember the testimony on that, lumping your  
17 sales meant going out and making these big dumps of shares?

18           And the problem that caused -- causes is people look  
19 at what the CEO is doing. Investors are trying to figure out  
20 what the CEO is doing, and if they're not comfortable with the  
21 actions of the CEO, they're going to start asking questions.  
22 We'll talk about that more later. That's exactly what happened  
23 in this case. People started asking questions.

24           And this plan solved that problem. It -- it handled  
25 publicly and in the open, and you tell people exactly what

1 you're going to do. It allows you to get rid of all of your  
2 shares within the expiration date. You've seen the testimony  
3 of that. If he had just stuck with that plan, it would have  
4 allowed him to get rid of all of his shares within the time of  
5 the expiration of those options.

6 It would have satisfied the desires of the board, not  
7 to have him lump his options -- selling his options or selling  
8 his shares at any one particular time.

9 And even in the exhibit that you heard -- I think it  
10 was yesterday, October 30 -- the October 31, where Joe Nacchio  
11 was talking about selling some of his shares, even he said he  
12 would be trickling them out. Trickleing them out. He was even  
13 aware of the need to not dump these in the market, because of  
14 the appearance of what that would look like and because of the  
15 scrutiny that people would give if an executive starts dumping  
16 his shares.

17 This 10b5-1 plan that he entered into in February  
18 solved every problem for Joe Nacchio but one. And that one  
19 problem it didn't solve is it didn't get rid of his shares fast  
20 enough.

21 After just a mere days in that program, he stops the  
22 program. He stops the program. And he does so -- he does so  
23 only to, when the window opens again, dump seven times as many  
24 shares as he would have sold if he had stayed with the program.  
25 Seven times as many.

1           The plan would have solved any issue dealing with  
2 expiration of these options. He still had two and a half  
3 years.

4           And you know what, here is the bottom line on that  
5 plan. If you're an executive and you negotiate, you're a tough  
6 negotiator, and you want, as Mr. Stern is fond of saying, an  
7 entrepreneurial chance to make a lot of money, that's great.  
8 You have the right to negotiate for that. But you don't have  
9 the right to break the law.

10           Even if the stock options are going to expire, when  
11 given a choice between letting stock options expire and not --  
12 he doesn't lose money, because, remember, if you don't exercise  
13 on them, you don't pay anything for them, you don't lose money.  
14 Given the choice between not exercising those options, losing  
15 the potential value you have in them, and staying within the  
16 bounds of the law, you have to choose the law. You cannot hide  
17 behind the idea of expiration.

18           Now, the second area is diversification. We brought  
19 you evidence of diversification. Remember, Mr. Weinstein said,  
20 that's his favorite word, and such a favorite word, he's been  
21 talking with Joe Nacchio about that since 1986, I believe it  
22 was, whenever it was they first met. For years, they've talked  
23 about diversification. This is nothing new. And it's  
24 certainly not new to Mr. Nacchio. He is a very accomplished,  
25 smart person. He knows -- you know, all of us know -- I mean,

1 we've all heard, don't put your eggs in one basket, right?  
2 It's not a surprise to any of us. So this is not a new concept  
3 that just dawned on Mr. Nacchio in January of 2001. This is  
4 something he's known about all along.

5 And you know what, if you look at the evidence in this  
6 case, Joe Nacchio is pretty well diversified.

7 Now, we put in some evidence from Ayco Corporation, if  
8 you will recall, and from Ayco Corporation about his net worth  
9 and about his standings with regard to diversification, where  
10 his money was located. I mean, we did that for a very strict  
11 evidentiary purpose.

12 And I want to take a step back and tell you something  
13 right now, and I mean it from the bottom of my heart.

14 This is a great country. And one of the things that  
15 makes this country so good is that you can follow your dreams.  
16 If you want to go out and your goal is to make as much money as  
17 possible, if that's what you want to do, and if that's your  
18 goal to go out and have an entrepreneurial chance to make a lot  
19 of money, you can do it, and I'll be first to wish you good  
20 luck and Godspeed. But you can't violate the law to do it.

21 There are -- in this country, there are just a few  
22 things we require and few things -- we keep a level playing  
23 field for everybody. Everyone has to have the same chance.

24 No guarantees here, no handouts, but you have to have  
25 the same chance. You can't bend the rules in your favor.

1           And the evidence that we -- that we chose to bring on  
2 this regard has nothing to do with the -- Joe Nacchio's a rich  
3 man. I think this case is about money, obviously. We're  
4 talking about -- we can't be afraid to talk about money. But I  
5 want to tell you something. I don't want you to convict Joe  
6 Nacchio because he's a rich man. I want you to convict him in  
7 the end based upon the evidence that we have shown you that we  
8 have proven beyond a reasonable doubt that he's guilty of the  
9 charges that we have charged him with.

10           Let's just talk briefly -- if I could -- Mr. Denno, if  
11 we could show Government's Exhibit I think it's 225. Thank  
12 you.

13           And this is the diversification page that shows where  
14 in December of 2000 -- in December of 2000, Joe Nacchio had  
15 approximately 45 percent of his assets somewhere else than  
16 Qwest stock.

17           You saw pages -- I went time -- for a few minutes with  
18 Mr. Weinstein and showed pages and pages of how many different  
19 companies he owned shares of stock in. That was -- that's a  
20 very definition of diversification. You also saw he had cash  
21 and international shares, and just a number of different areas.  
22 He had his money in lots of different places.

23           You know, that's fine.

24           You'll recall that Mr. Weinstein told you -- this is a  
25 person that deals with CEOs all the time. And he testified

1 that most of his clients, CEOs of major corporations, have  
2 somewhere between 55 and 90 percent of their net worth in their  
3 own company. If you think about it, that makes sense. That  
4 makes perfect sense.

5 First of all, it's good for the company. They want  
6 people to know that you actually believe in the company, that  
7 are working for the company. It's called, you know, where I  
8 come from, having skin in the game. You're invested in the  
9 company. You're going to have to be able to watch that company  
10 much more carefully, invest you into that company.

11 And that's just part of leadership and part of having  
12 skin in the game. It makes you accountable for your actions as  
13 head of the company.

14 Now, the third area I want to talk to you about is  
15 this idea of taxation. Of course, we all know that all too  
16 well, especially in this time of year.

17 And everybody has to pay taxes, and you can't avoid  
18 them. You know, that's part of our system too. You know, it's  
19 a good system.

20 Our -- on the -- on typical options, you have a tax  
21 obligation. The evidence has shown, you have a tax obligation  
22 when the -- when the option is actually exercised. When you  
23 exercise that option, you're going to have a tax obligation.

24 Now, I want you to recall that one of the things that  
25 Mr. Nacchio could have done if he was so afraid of the

1 expiration of those shares, he could have exercised those  
2 shares, and he could have held them. If you really believe in  
3 the company, that's what you would do. Makes sense. You think  
4 the stock is going to go up, you're afraid it's going to  
5 expire, exercise them, hold them, wait for the stock to go up.

6           There is a tax obligation there when you do exercise  
7 them. You'll recall that Mr. Weinstein told you that in  
8 February of 2001 Mr. Nacchio had \$70 million in cash. And the  
9 testimony -- if we could show that in Government's Exhibit 213.

10           This is the memorandum to file. He followed up the  
11 next day with a letter to Mr. Nacchio and his family directly.  
12 He says, he is sitting well on over \$70 million of cash. He  
13 had the cash necessary. If he was really concerned about the  
14 expiration, if he was really concerned and thought the stock  
15 was going to go up, he could have exercised on those options  
16 and held and paid the taxes with cash.

17           You know, remember, once you exercise and you have  
18 those shares, you can hold those shares forever. And, you  
19 know, it puts real skin in the game. Once you've exercised on  
20 those options, you're holding those options, you're like a  
21 regular investor. Your fortunes are going to depend on how the  
22 stock in that company do. If it goes up, you're going to make  
23 a lot of money; if it goes down, you're going to lose. You're  
24 not quite like a regular investor. You've got them at a  
25 discount. You're in a better position than a regular investor.

1           Again, I don't think Mr. Stern meant to say this, but  
2 I think I -- it came out wrong, but when we're talking about  
3 the board not being able to extend the life of these options,  
4 said there was going to be a \$300 million fee, some sort of tax  
5 fee or something, to the company. He said Mr. Nacchio would  
6 get stuck with that if he had exercised and held. If you  
7 exercise 120 in options, you're not going to get a \$300,000,000  
8 tax bill. I don't think the taxes in New Jersey are even that  
9 high. It's not a 300 percent tax rate.

10           Talked just a minute about the growth shares, the  
11 common stock that came from growth shares. You'll recall that  
12 they used something called share withholding. Remember, I  
13 asked several witnesses about that. You know, it's not that  
14 complex of a term. Bottom line is that when you're -- share  
15 withholding is if you're issued a certain number of shares --  
16 get a certain number of shares coming to you, and figure out  
17 what the tax is on the share -- what the shares are -- the tax  
18 is on the shares, and they calculate the cost of the shares,  
19 and just hold back a certain number of shares, they give you  
20 the shares minus the withholding tax. Okay.

21           So you don't have an immediate tax burden that you  
22 have to -- to deal with right then and there when you get the  
23 shares. It's a pretty nifty deal.

24           I think there is also evidence that shows that means  
25 that the company and CEO don't have to report as many shares

1 being sold right now. Even though you're entitled to a number  
2 of shares, they've held back some. You, the CEO, Mr. Nacchio  
3 is only selling a certain number of shares in the open market.  
4 It's kind of a nifty deal. You don't have to report it all,  
5 because, remember people are watching what you do. You don't  
6 have the immediate tax burden. It alleviates that tax pressure  
7 from you. It's been very clear, that's part of the growth  
8 shares, the way that worked especially in January of '01.  
9 There is no tax pressure to sell.

10 But I want to show you something that Mr. Stern talked  
11 a lot about, taxes, yesterday. And I want to show you  
12 something that he chose not to.

13 And if you'll look -- I want to show you the options  
14 agreement -- go back, we already looked at this briefly, but  
15 Mr. Nacchio's options agreement from back in '97, and if you  
16 look at it, go to -- this is from June of '97, go to paragraph  
17 6 -- excuse me, paragraph 10 on page 6, I want you to read  
18 something. This is part of the regular stock options, not  
19 growth shares. This is where those 5.50 options come. Says,  
20 "The issuance of the stock pursuant to the exercise of this  
21 option shall be subject to the requirement that the option  
22 holder, Mr. Nacchio, shall make appropriate arrangements with  
23 the company to provide for the amount of additional income and  
24 other tax withholding applicable to the exercise of the  
25 option."

1           So he has to pay the withholding tax is what that is  
2 saying.

3           You go on, "The option holder shall have the right to  
4 elect" -- this is an election of the option holder -- "to have  
5 the company withhold from shares of stock otherwise issuable to  
6 the option holder, shares of stock having the equal -- shares  
7 of stock having a value equal to the amount required to be  
8 withheld."

9           You know what that is? It's share withholding. If  
10 Mr. Nacchio had thought it was in his financial interests to  
11 exercise and use share withholding so he wouldn't have that  
12 immediate tax pressure, he could have chosen to do so. It was  
13 in the contract that he negotiated, that he got from the  
14 company.

15           There was no tax pressure to sell on the growth  
16 shares, and there was no tax pressure to sell on these options.

17           He made a choice when selling these options. He made  
18 a choice, and he should be held accountable for it. And you  
19 can't blame taxation on it, you can't blame diversification on  
20 it, and you can't blame expiration on it. Those are excuses.

21           The evidence clearly shows that expiration,  
22 diversification and taxation do not excuse a violation of the  
23 law. In fact, the -- you'll -- the judge is going to instruct  
24 you on the law.

25           But the law forbids anyone, including Joe Nacchio,

1 from trading in stock on the basis of material non-public  
2 information.

3 He must have actually used the information, the  
4 material non-public information in deciding to trade. But here  
5 is the thing, here is the thing: The inside information does  
6 not have to be the sole cause of the trade. It's enough that  
7 it's a significant factor in the trade. Okay.

8 So Joe Nacchio could have been motivated in part by  
9 diversification. He could have been motivated in part by  
10 expiration. He could have been motivated in part by trying to  
11 save taxes, whatever value you think those deserve. But if the  
12 material non-public information, if he actually used that, and  
13 that was a significant factor in his decision, then he's guilty  
14 of the crime of insider trading.

15 Now, another brief area I want to touch upon is this  
16 idea that somehow these sales of stock were forced by the Board  
17 of Directors. I think that was one of the promises Mr. Stern  
18 made in his opening statement that he was going to prove that.

19 We brought in Craig Slater to testify about that very  
20 issue. We drilled down that very question.

21 If I could show the relevant testimony of his  
22 testimony there.

23 I asked it every single way I could possibly think to  
24 ask it; that is, "Did the board ever require Mr. Nacchio to  
25 sell any shares of stock?"

1            "We did not require.

2            "And did you demand it?

3            "We did not demand, to my recollection.

4            "Did you ever force Mr. Nacchio to sell any stock?

5            "No, we did not force."

6            This gets back to the idea that options are a good  
7 thing. It's a great way to compensate executives. It really  
8 is. The idea behind it is you give them -- when they come in,  
9 the price is hooked to the price they come in, and they get to  
10 share in the growth of the company.

11           It's a great thing. But it's not a guaranteed thing.  
12 There are plenty of executives that have great jobs where  
13 companies haven't done very well. Plenty of executives that  
14 have gone the other way. Probably not good executives, but the  
15 company has done very good, they made a lot of money. They're  
16 not guaranteed. They're called options for a reason.

17           When making that decision, Nacchio, like every other  
18 executive, like every other insider, has a duty as a fiduciary  
19 of that company to put the interest of the shareholders and the  
20 law ahead of his own.

21           Again, these shares were sold because Mr. Nacchio had  
22 a choice. And he sold them to take advantage of the material  
23 non-public information that he had by virtue of his position as  
24 being an insider.

25           Now, a lot of the trial has been spent on the growth

1 shares. Part of that have been because of their origin.  
2 They're a little more complicated. There are a few other  
3 reasons I'm going to talk about here in a minute. And I  
4 promise not to keep you long. I just have a few more things to  
5 say, and I'll sit down and let you go about your business.

6 But there are some things I need to point out about  
7 this. One of the things I want to talk to you about the growth  
8 shares, the defense has been speaking a lot of time to show you  
9 how different the growth shares are, and I want to tell you,  
10 you know, in some regards they are different. In some regards,  
11 they're very similar to stock options. I kind of want to walk  
12 you through a chart that shows the difference -- and the  
13 similarities between the two.

14 First of all, the stock options are in common stock.  
15 And so are the growth shares, right. We call them growth  
16 shares, because that's where they came from. The fact of the  
17 matter is when they are issued, they are issued as common  
18 stock, just like stock options. When you exercise those stock  
19 options, they are exercised in common stock.

20 And the second area, they're both subject to the  
21 insider trading laws. There is no exception to the growth  
22 shares from the insider trading laws of the United States.

23 Third, as you've now learned, they're both subject to  
24 share withholding. That means, there is no tax pressure to  
25 sell on these options. Makes it much easier to have many more

1 choices and many more opportunities with these options.

2           And you know what? You sell them. They're both sold  
3 to investors. They're both sold to investors. Obviously,  
4 common stock, you take it out in the market. You sell it to  
5 investors. Investors do not care where the stock came from.  
6 It's stock -- they're making an investment in the company, and  
7 they don't care if it came from the growth shares. If they  
8 lose money on it, it came from the growth shares, they don't  
9 care. What matters to them is they have the same information  
10 the person selling it to them had or the person selling it to  
11 them does not take advantage of them or their lack of  
12 knowledge.

13           Some differences, the stock options are for a share  
14 amount. You get a certain number of shares. With the growth  
15 shares, it's for a dollar amount certain. It's a certain  
16 dollar value, once Qwest went public, that let Mr. Nacchio know  
17 how much he was going to be receiving, the value of stock.

18           Another thing, there is a strike price with the stock  
19 options, right. You had to pay for them, right. You have on  
20 to -- if you buy them -- if it -- actually buy them, and it's a  
21 strike price, they come at a cost.

22           Look at growth shares. They cost nothing. They cost  
23 nothing. You don't have to expend any of your resources or any  
24 of your funds. You're just going to get them.

25           You can sell in an open window with the stock options,

1 or if you're under a plan, you can sell through a closed  
2 window, 10b5-1 plan. And apparently, in the growth shares, we  
3 haven't seen any evidence of it, but we know it was sold in a  
4 closed window. Apparently somewhere along the way, that  
5 happened somehow, you can sell them in a closed window with the  
6 growth shares apparently.

7           You know, with the stock options, they have an  
8 expiration date. We talked some this afternoon about that  
9 expiration date. With the growth shares, look at this, there  
10 is no expiration date. There is no expiration date. Once  
11 those shares are given to Mr. Nacchio, he can do with them what  
12 he please. He can hold them 10 years, 20 years, 100 years, if  
13 he wanted to pass them down. There is no expiration date for  
14 those.

15           If you look at that, there is no reason to sell the  
16 growth shares, the common stock that came from the growth  
17 shares. There is no reason, if you think the stock is going to  
18 go up, there is absolutely none. There is no urgency. There  
19 is nothing -- there is no pressure, no tax pressure. There is  
20 no cost to you to sit there and hold those growth shares.

21           Remember, there is no reason at all, if you think the  
22 stock is going to go up.

23           You know, I just want to take just a minute -- and I  
24 don't want to belabor this point at all, but just a minute to  
25 correct something that Mr. Stern told you yesterday and he's

1 gone back to at least once today, and that is, this -- the  
2 example that he used yesterday was that if on January 1 a stock  
3 had dropped to \$1, it wouldn't have mattered a bit to Joe  
4 Nacchio, because it was for an amount certain. That's not  
5 exactly right.

6 I want to show you how these shares came about and  
7 were calculated. That's because if we go to Government's  
8 Exhibit 1707, this is a sheet, Ms. Oneth got this into  
9 evidence, and this shows the calculation of the 1/2/01 growth  
10 shares. And look at the highlighted portion there at the  
11 bottom. It says, "Average stock price for the last 20 days,  
12 12/1 to 12/29." That's in the growth share contract. That's  
13 in the agreement. That's how the -- that's how the stock  
14 price, the value of these growth shares -- not the value, but  
15 the way they were going to compensate in stock came about.

16 It's because it was -- it was a 20-day trading period,  
17 and they took the average price over that 20-day trading  
18 period, and they came out with the price -- average price was  
19 \$39.35, 39.35. Well, that's how they calculated, took that  
20 39.35, divided it into \$14,035,936, and came out with rounded  
21 shares down there, 356,723. If the stock had dropped to one  
22 dollar on January 1, Mr. Nacchio would have lost \$13.5 million.

23 If the stock had gone up, and it did go up, it go --  
24 go up -- these shares weren't sold in one day. They were sold  
25 in two days. They were split, 196 on one day, 160 on another,

1 and the stock did go up. And because that stock went up,  
2 Mr. Nacchio made an extra, like, \$2,060,000.

3 So it did matter.

4 Now, I tell you that just so you understand how these  
5 came about.

6 And there is some arguments to be made, I guess, if  
7 the stock in that 20-day period were trending downward, how  
8 there is an advantage. That is not an argument we've made.  
9 That is not an argument. It's called in the legal business a  
10 straw man. You say my opponent is arguing this, and you make  
11 this argument for me, and you knock it down. We have never  
12 once said -- when Mr. Hearty stood up here and gave the opening  
13 statement some four weeks ago, he did not say that the reason  
14 for the December 21 phone call was to prop up the stock so he  
15 could get a better price for the growth shares that were being  
16 sold on the 2nd and 3<sup>rd</sup>. He did not say that.

17 The purpose of that evidence, and the purpose of that  
18 phone call on the -- to show you that phone call on the 21<sup>st</sup>  
19 was -- the most important part was that Mr. Nacchio knew that  
20 he -- he knew that what he said impacted the stock price.

21 That's to show -- because we have to show intent here.  
22 We have to show what goes on in somebody's head, and that's  
23 really a very challenging thing to do. Unless you have a  
24 videotape or a confession, it's a difficult thing to do. If  
25 you have a videotape or confession, you're not often standing

1 right here.

2           It's a very difficult thing to do.

3           One of the ways we do that is show by his actions --  
4 we'll talk more about his actions later. This shows that he  
5 knows. Getting on the phone call after WorldCom has taken down  
6 the numbers, AT&T, SBC has taken down their numbers, he is  
7 getting on the phone call and showing that he -- by yet  
8 affirming the numbers, he can make sure the stock price stays  
9 up.

10           Secondly, he knew that he had sales coming. He knew  
11 that he wanted to get rid of these shares because of the  
12 brewing storm ahead that he had learned about in the weeks  
13 prior to that phone call. And he couldn't afford to let the  
14 stock go down too much.

15           And he also wanted to make the point that Qwest was  
16 different than AT&T. Qwest was different than WorldCom. Qwest  
17 was different than SBC. He wanted to try to make that point,  
18 which he had been trying to make for two years. That was the  
19 purpose of that evidence, of that phone call.

20           Not that it was somehow connected to the sale of a  
21 pump and dump of the growth shares. In fact, that's not  
22 appropriate in this case at all.

23           If you have good faith in your company, if you really  
24 believe in your company, if you're really bullish on the stock,  
25 and you think the stock is going up, then Joe Nacchio would not

1 have gotten rid of these growth shares. You know he kept them  
2 in the past. He held onto the shares in the past. You know he  
3 did that. You know there is not a tax issue. There is not an  
4 expiration issue. You know that Joe Nacchio had plenty of  
5 cash. He didn't do it because he needed the money. And he  
6 had to get rid of them because of what was in the funnel, what  
7 was in the pipeline, what was coming up, that he wanted to get  
8 rid of and take that big swing to make a lot of money.

9           Now, the reason that he went -- and the reason Joe  
10 Nacchio went to such great lengths to dump these growth shares,  
11 when he did, was because of the winds of the approaching storm  
12 that he had learned about in the weeks and days ahead.

13           He had been through the budget process and saw just  
14 how unreasonable that his raised guidance was. He had received  
15 and discussed Afshin Mohebbi's warnings. And he knew he had  
16 other stock that he was going to have to get rid of.

17           He -- he exercised -- I should say, sold those options  
18 to clean them off the table and to clear the table, starting --  
19 so later in January he could begin getting rid of the stock  
20 faster than he ever had before.

21           Now, I told you just a little while ago that one of  
22 the things we have to show is what goes on in someone's mind.  
23 We have to show intent in this case.

24           You know, you have a lot of tough jobs, you do. You  
25 have a very difficult job. One of your jobs that has been

1 difficult, and I know this, is to be -- have to sit through a  
2 lot of tedious testimony and listen to a lot of lawyers talk.  
3 At times -- I apologize. At times, it's all necessary, from  
4 both sides. There is nothing that either one of us, I'm  
5 confident, hasn't felt was necessary to bring to your  
6 attention.

7           But one of the hardest things you have to do is try to  
8 figure out how do I figure out what is going on in somebody's  
9 head? You know, one of the things you can do is you can listen  
10 to the words. Hear what someone says.

11           Now, we all know, especially if you have been a kid or  
12 have kids, that's just about everybody here, you know that  
13 sometimes words can lie. And people when they've done  
14 something wrong have even more motive to lie. And so words  
15 aren't often the best way to see what is going on in somebody's  
16 head. But you know what, there are times when words in  
17 unguarded moments, in unguarded moments, you don't have time to  
18 really think about what you're going to say, perhaps you do  
19 have a time, you want to plan something out, that they can  
20 provide some insight into what is going on in your head.

21           And in unguarded moments in this case, we've caught  
22 glimpses of what Joe Nacchio intended and what he knew from his  
23 words.

24           For instance, you remember when -- when Lee Wolfe said  
25 that he should -- Mr. Nacchio should disclose more where the

1 IRUs were and the IP data buckets, the analysts were wanting  
2 more disclosure, finding out, how were they doing this, how are  
3 they making their numbers, and Mr. Nacchio's response, you  
4 remember? He said, can you guarantee me the stock price won't  
5 go down? Can you guarantee me the stock price isn't going  
6 down?

7           The important part about that is you can see what Joe  
8 Nacchio's intent was in not disclosing. In his mind, he  
9 attached disclosure and letting people know how they were  
10 making their money with the stock price going down.

11           He knows there is a risk, and if he tells the public  
12 the truth, the -- that Qwest -- how they're making their  
13 numbers, the stock price will drop, and he's going to lose  
14 money.

15           Later, when they disclosed in the 10K, in August, they  
16 actually disclosed how the IRUs are playing a role, the stock  
17 price does drop. And Joe Nacchio says, see, this is what  
18 happens when you disclose. Once again, it shows his intent.  
19 He knows. He has knowledge and intent of -- connecting the  
20 disclosure of the IRU sales with the stock price and how that  
21 impacts him personally.

22           And when told by Lee Wolfe that the analysts -- he  
23 should tell analysts about the role that one-timers play so  
24 that they could make an informed decision, just like he was  
25 making when he was selling his stock, he said, screw them.

1 Tell them to buy. That gives us almost more insight than any  
2 other phrase uttered during the four weeks of testimony --  
3 three or four weeks of testimony that you've heard. It -- it  
4 about says it all.

5 In the real hypocrisy here, the real hypocrisy with  
6 that statement is, when he's telling Wolfe to go back to the  
7 investors and say, screw them, tell them to buy, it's a time  
8 when he is selling. He's taking his chips off the table.

9 And it's like the Bell South buyback. That's kind of  
10 the issue with the Bell South buyback.

11 You recall the testimony of Mr. Mohebbi. He's out --  
12 he was planning on taking some time off to be with his wife and  
13 child. In fact, the morning of the 3<sup>rd</sup>, of January 3<sup>rd</sup>, he  
14 was on the way to hospital to take his child for a checkup, or  
15 whatever it was, and got the urgent call that Joe Nacchio wants  
16 him for a meeting, and he's to be there immediately. And he  
17 makes arrangements, gets down to the Qwest headquarters, and  
18 the meeting is already in progress. He walks in.

19 And the fuss is about, because Joe Nacchio has learned  
20 that Bell South was going to dump 22 million plus shares on the  
21 market. And Joe Nacchio, the testimony was, Joe Nacchio was  
22 angry. He was upset. He was concerned.

23 Nothing was worked out that day, but you know from the  
24 evidence, you know from the evidence, that later -- a few weeks  
25 later, in January, there was a special meeting of the Board of

1 Directors, and Joe Nacchio presents the idea of the Bell South  
2 buyback.

3           And the board goes into debt for an unplanned buyback,  
4 spends 1 billion -- that's with a B, billion dollars to keep  
5 these shares from hitting the market. Mr. Slater told you that  
6 if those shares hit the market it would have declined the stock  
7 price. Other people, as well.

8           And you know, this is at a time -- the real irony is,  
9 the very day of this meeting when Joe Nacchio is so mad, that's  
10 the exact same day he dumps 160,000 shares on the market.  
11 Didn't think a word of it.

12           And right before -- right after the buyback occurs is  
13 a time when the window opens, in January, and he starts his  
14 selling frenzy.

15           As I said before, really, words are not the best way  
16 to determine what is going on in somebody's mind, and mostly --  
17 the most reliable way is through actions.

18           You know, and one of the main reasons we have been --  
19 spent so much time and bring you so much evidence -- couple of  
20 reasons, really, spent so much time of bringing you evidence of  
21 Government's Exhibit 100, is -- and how this document was  
22 backdated, goes right to this point. It goes exactly to this  
23 point. I think you have the document before you. This was the  
24 original copy taken from Mr. Rana's office. You're welcome to  
25 take this back to the jury room and look at it.

1           And by backdating an instruction that wasn't finalized  
2 until sometime after September 12, we catch a firm view of  
3 what's going on in Joe Nacchio's mind.

4           By using the fraud that occurs when you backdate a  
5 document, Joe Nacchio tries to go back in time, almost -- the  
6 almost complete budget process, and certainly go back in time  
7 over the warnings that Mohebbi had given him, and leapfrog back  
8 there before he learned of -- before he had evidence that he  
9 had learned of the huge stretch and that the recurring revenue  
10 gap and the vital shift was unlikely to occur unless certain  
11 factors happened.

12           And I just want to take a step back for just a second  
13 here.

14           You know, Mr. Stern did not -- we talked about  
15 openings some, but Mr. Stern -- if you'll recall and look back  
16 at your notes, Mr. Stern did not open on the backdated  
17 instruction. And he doesn't have -- I want to make perfectly  
18 clear, he's told you many times, he, who has to prove nothing,  
19 Sure, he has an obligation to prove nothing. And if he chooses  
20 to, and he chose to make an opening statement, he chose not to  
21 address Government's Exhibit 100.

22           *MR. STERN:* I now am afraid I have to object.

23           *THE COURT:* Overruled.

24           *MR. STRICKLIN:* And the defense story as to this  
25 document did not come out until just a few moments ago. Prior

1 to that, the questioning set up several possible stories of how  
2 it could have happened. You recall that.

3 *MR. STERN:* I must object.

4 *THE COURT:* Overruled.

5 *MR. STERN:* Okay. But I'm preserving my record,  
6 right.

7 *THE COURT:* I understand. But your objection is  
8 overruled.

9 *MR. STERN:* Different objection.

10 *THE COURT:* What's your objection?

11 *MR. STERN:* I can't -- I would have to come to side  
12 bar.

13 *THE COURT:* No, you can state it in open court.

14 *MR. STERN:* No.

15 *THE COURT:* This is perfectly proper comment on this  
16 case.

17 *MR. STERN:* Okay. You ruled, and I'll sit down.

18 *THE COURT:* Okay.

19 *MR. STRICKLIN:* I tell you what, if we had learned  
20 earlier that they were going to admit that this was a backdated  
21 document and Joe Nacchio signed the backdated document, we  
22 could have saved a lot of time. I would have brought in a lot  
23 fewer witnesses for you. But that's okay, because it's my  
24 burden to prove this case, and it's something we gladly  
25 shoulder and try to be conscientious of your time and bring in

1 just the witnesses we needed to prove our case to you.

2           What I want you to think about just for a minute is to  
3 go back with me just for a minute to the 52<sup>nd</sup> floor of the  
4 Qwest building just down the street.

5           I want you to think of a time, sometime in mid to late  
6 December, walk into Joe Nacchio's office, see him sitting at  
7 the desk with this document before him. This document seated  
8 there before him, without his signature on it yet. And it's  
9 placed before him, and he looks it over. And there it says  
10 November 3, 2000.

11           And he has his pen, and he takes his pen out of his  
12 drawer, maybe his coat pocket, and the pen is over that  
13 document, and at that very moment, Joe Nacchio has a choice,  
14 one of the many choices he had during the course of this trial.

15           And that choice was to be honest, scratch out the date  
16 and add the date of whatever date in December, sometime  
17 between, you know, December 12, 13, 14, somewhere around there  
18 and the end of the year, the true date of when this was, or to  
19 choose to make an intentional deception, choose to do something  
20 that would cheat people, and to sign it with the November 3  
21 date.

22           And in this case, Mr. Nacchio put his signature on  
23 this document because he knew what others -- other investors  
24 outside the company did not know.

25           Now, you know this document is backdated, and I guess

1 the main reason you know it now is because Mr. Stern concedes  
2 that it is.

3           The other way you know it, though, is just a brief  
4 timeline -- if we could show, Mr. Denno, how he knew this.  
5 If -- in all of those memorandums Mr. Weinstein was careful to  
6 take, almost every time he talked to him included almost every  
7 ad nauseam detail. The first time they talked about the growth  
8 shares contained in the memorandum is November 27. Nacchio and  
9 Weinstein have a phone call that date and discuss the growth  
10 shares, November 27 of the year 2000.

11           And in that conversation, they talk about the growth  
12 shares, but they don't mention -- there is no mention of any  
13 kind of irrevocable election or instruction.

14           The next time you hear anything about this is an  
15 exhibit that came in through Mr. Weinstein yesterday, and it's  
16 a phone call that Mr. Weinstein has with Yash Rana. And in  
17 that phone call -- it's to discuss the growth shares,  
18 December 7. In that phone call, Yash Rana says, Joe previously  
19 made an irrevocable election to sell the shares during the last  
20 window period. That's the first time you heard of some kind of  
21 irrevocable instruction.

22           You know what? You now know that is not true. And  
23 the way you know that is because of the other evidence in this  
24 case. If we could show December 8.

25           You know on December 8, that Rana contacts O'Melveny &

1 Myers, one of the largest law firms in America, and gets a  
2 passel of lawyers starting to work on drafting something like  
3 this because it's never been done before. You heard Mr. Patti,  
4 who is a good friend with Yash Rana, long-time working  
5 relationship and personal relationship. Surely if Mr. Rana  
6 already had something, if he said, we're just papering a deal,  
7 here is what Mr. Nacchio orally told me earlier, this is what  
8 he told me in the secret confines of our -- my office, or  
9 somewhere. It couldn't have been Yash Rana's office, because  
10 you'll see Mr. Nacchio was in New Jersey November 3, from his  
11 calendar. This is what he told me, okay.

12 He didn't say that. He said, I need to get an  
13 irrevocable election. Can you help me with it? Patti runs  
14 around and spends enough time on it where he feels guilty about  
15 billing Qwest for all the work he did on it, he spends so much  
16 time on it. He finally finds some language. He buffs it up on  
17 Friday. This is Saturday.

18 So while this is in a rough draft form and in a drawer  
19 at O'Melveny Myers somewhere, there is a phone call. And that  
20 phone call is between Mr. Nacchio and Dave Weinstein. And in  
21 that phone call, Mr. Weinstein said -- he was very careful in  
22 his memorandum, this is what Joe Nacchio told him, not some  
23 young lawyer at Qwest, who later proved to be wrong. This is  
24 what Joe Nacchio tells Weinstein directly. He said that he is  
25 signing an irrevocable election to sell the shares now. Okay.

1           The fact of the matter is, that was a little  
2 optimistic, because this still wasn't done yet. He may have  
3 learned from somebody else, I guess, that the assignment had  
4 been coughed up from O'Melveny the day before. It wasn't until  
5 the next day, Sunday, that Patti comes into the office,  
6 finished the document and e-mails it to Yash Rana.

7           And you saw the similarity -- in fact, to some  
8 regards, exactly the same, of this document and the other  
9 document that you now know came from O'Melveny original, and  
10 that this document now you know for certain is a backdated  
11 document.

12           And the interesting part that you know of -- we can  
13 kind of start pinpointing -- we don't have all the information  
14 still, but we can kind of start pinpointing the date. And the  
15 date is -- the way we know it's after December 12, if we could  
16 show that, that's the date that Patti and Rana have a phone  
17 call with Salomon Smith Barney to discuss. Remember at that  
18 time the broker was not contacted yet. They didn't have a  
19 decision on who the broker would be. Remember Patti's  
20 discussion, he didn't have that broker filled out yet.

21           Now, I want you to see something. I think if you go  
22 to Government's Exhibit 100, Mr. Denno -- let me just say, this  
23 shows the similarity of how these -- it's not as important now  
24 that you know it's back there. If we could go directly to  
25 Government's Exhibit 100. There it is. Thank you.

1           And the -- the top there, it's to Salomon Smith  
2 Barney. It says Qwest Communications International underneath  
3 that. I want to go to the third paragraph, in the very first  
4 sentence.

5           And the third paragraph, first sentence, if you could  
6 highlight that for us, Mr. Denno. Thank you. It says, "You  
7 are instructed to sell 100 percent of the common stock of the  
8 company issued to me by the company."

9           That is an instruction to Salomon Smith Barney. That  
10 is not an instruction to Qwest. That is not an instruction to  
11 some low-level lawyer at Qwest. That is not an instruction to  
12 some third party out there that we don't even know about yet.  
13 That's an instruction to sell shares by the only people who can  
14 sell them, which is his broker, okay. That's how you know that  
15 the -- approximately the date of this document.

16           And that's how you're going to know the rest of the  
17 story, as they say, about this document.

18           And this is where I want to talk a little bit about  
19 whether there is any evidence, any evidence -- and I'll just  
20 take this head on, if there is any evidence of any oral  
21 instruction given by Mr. Nacchio to anybody. There is none.

22           And let's look at the facts in this case, the facts  
23 that have been presented to you over the course of the last  
24 week -- last few weeks.

25           First, as I just showed you, this is an instruction to

1 Salomon Smith Barney. And we called everyone we could who  
2 could have possibly received this instruction from Salomon  
3 Smith Barney to come and testify. Do you remember Doreen  
4 Buller who came in and testified in this case? She -- she  
5 said -- she told you she never -- this is a 10b5-1 plan. It  
6 says so right on the document. If you don't believe me, go  
7 look at the document. She said she never received any 10b5-1  
8 plan, said she never received this instruction, and if she  
9 would, she would have sent it to executive financial services  
10 in New York. Doreen Buller is in California. She said she  
11 would have sent it to New York.

12           From Executive Financial Services in New York, we  
13 brought in Marni Rosenblum and put her up there. She was the  
14 one who worked on the 10b5-1 plan for Mr. Nacchio and later the  
15 May 10b5-1 plan for Mr. Nacchio. She told you the very first  
16 time she worked on any 10b5-1 plan ever, not just for  
17 Mr. Nacchio, was the February 10b5-1 plan. She also told you  
18 she never saw this document and doesn't -- never received any  
19 type of oral instruction for anybody to sell any of these  
20 shares of stock sometime in the future, certainly nothing that  
21 was irrevocable.

22           And there is no evidence of anything -- of either oral  
23 or anything in writing to either of these folks.

24           The second thing you know is, if you're trying to  
25 figure out what happened in this case and whether there is an

1 oral instruction, you can go back and determine, who did  
2 Mr. Nacchio talk with on November 3?

3 We know two people he spoke with on November 3. Dave  
4 Weinstein, his trusted financial advisor that I guess he  
5 doesn't care much for now because he's answering a subpoena in  
6 a criminal case.

7 And another person that I guess they're going to cut  
8 off now from selling shares, according to Mr. Stern, and that's  
9 Rick Olson, from Salomon -- his own broker from Salomon Smith  
10 Barney.

11 And we know that with Mr. Weinstein -- if you could  
12 show Government's Exhibit 206, please.

13 This is a -- this is a recording of a -- one of  
14 Mr. Weinstein's recording of a phone -- of a phone call that he  
15 had with Mr. Nacchio on November the 3<sup>rd</sup>. See, it says on  
16 November 3, I spoke with Joe, right?

17 And I want you to study that just for a second. You  
18 can look at that all you want, and you won't see anything about  
19 the growth shares, and you won't see anything about any oral  
20 instructions.

21 And don't you know that if Mr. Nacchio had, in fact,  
22 made or was going to make that day an oral instruction to  
23 Salomon Smith Barney or anybody else for that matter, he's  
24 going to tell Dave Weinstein, I'm going to talk about the  
25 growth shares, I'm getting ready to enter into an irrevocable

1 oral instruction, and I'm going to sell the shares. There is  
2 no mention about this. He didn't talk to Dave Weinstein about  
3 it at all.

4           The other person we brought in evidence he spoke to on  
5 that day is Rick Olson, his broker. This is the guy at Salomon  
6 Smith Barney who deals with selling his stock. And we brought  
7 Mr. Olson in just the other day on this very issue. And he  
8 told you that he never ever took an order to sell from  
9 Mr. Nacchio to sell stocks two months in advance, ever. He  
10 told you that he doesn't know what is an irrevocable  
11 instruction is, and never heard of one, and he has never seen  
12 Government's Exhibit 100 prior to me showing it to him.

13           Okay. This is the guy that's supposed to be -- as you  
14 can see on the confirms -- look at the confirms that are in  
15 evidence, the guy that is making the sale of these. So the guy  
16 that's making the sale, that this irrevocable instruction is  
17 supposed to be, has never seen it, never heard of it, never  
18 talked about it. And the reason is because it doesn't  
19 happen -- did not happen on November 3.

20           This backdated document was a way to cover his tracks  
21 and to prevent someone from looking -- if they ever looked too  
22 closely to be able to pull it out and say, oh, no, oh, no, I  
23 didn't make those trades based on information that I heard  
24 during the budget process or Mr. Mohebbi's warning or anything  
25 bad that I knew about going on in -- in November and December,

1 because I had already made an irrevocable election.

2 Another thing I'd just like to point out briefly to  
3 you is, how do you give an oral irrevocable election? Ask  
4 yourself that. Okay. If you're -- if it's between you and  
5 somebody else, and you say, I want you to do something for me  
6 in the future, and then two months later, the time comes, and  
7 you say, you know what, I change my mind, I don't want to do  
8 it, what's the other person going to do? Are they going to  
9 take you to the police, report you to court? They're going to  
10 say, okay. And then the worst-case scenario, it's your word  
11 against theirs, right. You could see a situation where  
12 Mr. Nacchio could say, oh, no, Salomon -- it was an instruction  
13 to sell, but I've changed my mind. Well, I think you told us  
14 it was an irrevocable instruction. And he could say, no, no,  
15 it isn't irrevocable. Then where are we?

16 An oral irrevocable instruction doesn't even make  
17 sense. It can't be done. To be effective, it has to be in  
18 writing, and it took lawyers at one of America's premier law  
19 firms to make an appropriate instruction. Plus, if you're  
20 making an oral instruction, what are you saying when you make  
21 the oral instruction? Are you -- because one of the  
22 requirements is you not be in possession of non-public  
23 information, do you make that attestation to somebody else? Do  
24 you say when you do this that this is promulgated -- this oral  
25 instruction is promulgated under the Securities Exchange Act of

1 1934 to make sure that all sales pursuant to the oral  
2 instructions I'm giving you will not be made on the basis of  
3 material non-public information concerning the company, that  
4 may be in possession of the undersigned at the time the  
5 transaction occurred? Do you say that? Of course not. You  
6 didn't know to say that. It took three lawyers to come up with  
7 that language.

8           There is no way that there was any kind of oral  
9 instruction ahead of time, and there is absolutely no evidence  
10 of it.

11           And don't you know that if there was one shred of  
12 evidence, one shred of evidence of any kind, you would have  
13 heard it. Some of the finest lawyers in America are in this  
14 courtroom. And if there had been one piece of evidence, you --  
15 they would have brought it to your attention. Now, the defense  
16 doesn't have to put on a case, but they chose to here, and  
17 nothing they brought you touched upon some sort of oral  
18 irrevocable election.

19           If they had had any kind of evidence of that, you  
20 certainly would have seen it.

21           I want to talk to you, one more thing about the growth  
22 shares before I move on.

23           And that's the Form 144 that Joe Nacchio filed to  
24 support the sell. Remember, he's an insider. You heard  
25 Mr. Grossman come in from O'Melveny, explained a lot of rules

1 about how that works. And one of the things you do is a Form  
2 144, and you file that with the SEC.

3 If we could show that document. This is the front  
4 page. This is the 144 from the sales of the growth shares on  
5 January 2 and January 3, right.

6 If we could go to the last page first real quick.  
7 This is -- the date on this is -- signed is January 2, 2000.  
8 Signed by Yash Rana as attorney in fact.

9 I want to tell you something right here, right now.  
10 That signature is the same as that man's right there, Joe  
11 Nacchio's. When he gave Yash Rana the power of attorney to  
12 sign things on his behalf, that's his signature, just as good  
13 as his. It's connected directly to this false, deceitful,  
14 backdated document, and it's connected directly by this  
15 attestation. We're going to come back to this.

16 This is what you have to sign when you sign a Form  
17 144. There is a reason behind that. This is a public document  
18 that gets filed with the SEC -- not this, this is a public  
19 document that gets filed with the SEC. And the SEC requires  
20 that you attest -- this is what it says, it says, "Attention,  
21 the person for whose account the securities to which this  
22 notice relates are to be sold hereby -- are to be sold hereby  
23 represents by signing this notice that he does not have any  
24 material adverse information in regard to the current and  
25 prospective operations of the issuer" -- issuer in this case

1 being Qwest -- "of the securities to be sold, which has not  
2 been publicly disclosed," and here there is a line through that  
3 attestation. A very telling line. And below the line that  
4 marks out the offensive language, it says, "See attached."

5           You go to the attached page.

6           Just blow up the top portion, Mr. Denno, please.

7           And this is the language that says, no, no, no, not as  
8 of January 2 am I, Joe Nacchio, or I, an attorney at Qwest,  
9 Yash Rana, willing to attest and put my signature on a document  
10 that's going to the SEC, that Joe Nacchio doesn't have any  
11 material non-public information.

12           No, on November 3, he didn't have any material  
13 non-public information, and there was a previous election on  
14 November 3, which you now know is false.

15           That -- by his refusal -- if -- let me back up. If  
16 Mr. Nacchio truly believed as of the date of the growth shares  
17 that he did not have any material non-public information, why  
18 not sign the document? Why -- the document -- this document  
19 has nothing to do with windows, trading windows. The SEC  
20 doesn't care about trading windows. That's an internal  
21 corporate thing. Some of that information came out, the judge  
22 gave you an instruction on that already.

23           If you truly believe that you were not in possession  
24 on January 2 of material non-public information, you'd go ahead  
25 and sign the document. You wouldn't strike it out.

1           This is -- shows you that by refusing to sign this on  
2 January 2, Joe Nacchio could see how he was admitting that on  
3 this date he was in possession of material non-public  
4 information and by deceiving and cheating to make this sale, by  
5 concocting the story to make this sale and to protect himself,  
6 you know that he is making the sale on the basis of material  
7 non-public information he has learned since November the 3<sup>rd</sup>  
8 of 2000.

9           There is no other reason for the sale of these shares  
10 unless you believe the stock price is going to go down.

11           With Government's Exhibit 100, this document here,  
12 Government's Exhibit 110, the 144, you can step actually inside  
13 the mind of Joe Nacchio, and you can find out what he truly  
14 believed as of January 2 and January 3 of 2000, and how he made  
15 those sales. And you can see the beginning of the big selloff,  
16 how he begins this whole large selloff with deceit and with  
17 manipulation and with cheating.

18           Now, one of the areas that Mr. Stern spent quite a bit  
19 of time with you on was trying to say, basically, paraphrasing  
20 slightly, that there were two separate sets of numbers. There  
21 is public numbers and private numbers. And the two don't mix.  
22 And you know through the testimony, as you've heard, that that  
23 is not true. In Joe Nacchio's own words, the numbers are the  
24 numbers.

25           The fact is, there is several different numbers that

1 are set as guidance, as targets. But there is only one plan to  
2 reach those numbers. And if that plan doesn't work, the  
3 numbers are in jeopardy.

4 Now you hear that the fact that Joe Nacchio, I guess,  
5 was wrong -- he made a mistake about the numbers was because he  
6 listened to DLJ, Donaldson, Lufkin & Jenrette, in the merger  
7 process, that it's really all their fault, and the merger  
8 process, that he shouldn't have listened to them.

9 Now, you might recall Mr. -- the testimony of  
10 Mr. Wolfe, who was very involved with Mr. Nacchio during this  
11 time. And the -- the part of DLJ who put together the report  
12 that's been referred to for such a lengthy time under  
13 Government's Exhibit 502, the DLJ report, that was the  
14 investment banking division. And they were paid, as you heard,  
15 handsomely for making the merger happen. They get paid for  
16 making mergers happen. If the merger doesn't happen, they're  
17 not going to make near as much money.

18 The reason you pay them is not for a set of sheets of  
19 paper. The reason you pay them is so you can go up to their  
20 office in New York on the other side, and you can hammer things  
21 out with their investment bankers and their lawyers, a process  
22 we don't want to see. If they can make the merger happen,  
23 they're going to make a lot of money. And DLJ did make a lot  
24 of money.

25 But you also heard the testimony that Mr. Wolfe

1 brought in broker analysts from DLJ, who works with investors,  
2 and those are the people that talked with Mr. Nacchio and told  
3 him the targets were too aggressive. These were different sets  
4 of people with different sets of concerns. The investment  
5 banker wants to see the deal come through, and the investment  
6 people are much more concerned about having realistic numbers.

7 Now, the other thing is -- about this is, Mr. Stern  
8 accused Mr. Wolfe of lying to you, coming into this court and  
9 lying under oath.

10 But you know what, he didn't ask Mr. Wolfe about that  
11 on cross-examination. If you're going to accuse someone of  
12 lying in front of a jury, you talk to them about it in  
13 cross-examination, ask them about it. He chose not to.

14 Now, Mr. Wolfe told you that he tried to talk Joe  
15 Nacchio down from setting such high numbers. You know what,  
16 speaking of that, a couple of occasions, there is evidence that  
17 Wolfe and others tried to talk Joe Nacchio -- to take the  
18 numbers down.

19 Give you an example.

20 First of all, when the numbers are set on September  
21 the 7<sup>th</sup> of 2000, Mr. Wolfe testified that because the access  
22 had been limited to the U.S. -- access to information had been  
23 limited under the U S WEST/Qwest merger and Wolfe said that he  
24 told Nacchio, why don't we take this -- why don't we take --  
25 since we couldn't get access to the information, why don't we

1 take this opportunity to lower our growth targets, okay.

2           Right after the first quarter analyst call on April  
3 the 24<sup>th</sup>, there is testimony from Mr. Wolfe that Mr. Nacchio  
4 and he went out to Los Angeles to -- well, I'll just read it to  
5 you, "The issue was raised after the announcement, on  
6 April 24." This is the next day. "In fact, that same day, we  
7 flew to Los Angeles to meet with investors in Capital Research,  
8 one of our largest owners. Were very pointed and direct in  
9 their questioning to Mr. Nacchio in terms of how we were going  
10 to make the numbers. And they made the comment at one point  
11 saying that they thought now was the time for us to take our  
12 numbers to believability.

13           Investors were telling him to take his numbers down.  
14 People on the inside, Mr. Wolfe, saying, don't set them so  
15 high.

16           But you know what, it's Mr. Nacchio's job. That's --  
17 that's what he did. He -- even Mr. Anschutz told you that. It  
18 was Mr. Nacchio who set the guidance at the company. It wasn't  
19 Lee Wolfe. It wasn't Afshin Mohebbi. It wasn't Robin Szeliga.  
20 It was Mr. Nacchio.

21           Now, this all started before DLJ even got involved.  
22 The blame has been cast in DLJ's direction for their report,  
23 Government's Exhibit 500. It's not a press release. It was  
24 something that was presented to members of the media and to  
25 investors and analysts and people in New York.

1           And prior to that, though, you will recall the  
2 testimony of Afshin Mohebbi of how -- when it got out that  
3 Qwest was interested in merging with U S WEST, that it got out  
4 and the stock price began to drop. 25, 30 percent, the stock  
5 price dropped. And this concerned Mr. Nacchio, so much so they  
6 got on a plane, they flew up to Boston, and that's where  
7 Mr. Nacchio began his story to the investors, that we are going  
8 to be different. We are going to be a large cap high growth  
9 company. We're going to continue the growth we had as Qwest,  
10 and we're going to be a large cap company as well. It's going  
11 to be all things in one, and it was after that that you see the  
12 big arrow on Government's Exhibit 500, growth, a month after  
13 that. The same message, before DLJ ever got involved, that  
14 Mr. Nacchio took to the investors in Boston.

15           And that's the point, really, if you stop and think  
16 about it, where Mr. Nacchio began to paint himself into a  
17 corner, for a full month before DLJ gets involved. Instead of  
18 letting that paint dry and walk out, Joe Nacchio kept on  
19 painting. He raised guidance on September the 7<sup>th</sup> of 2000.  
20 And where was the DLJ then? They were nowhere around when he  
21 raised the guidance. There is no evidence of that at all. It  
22 was just Joe Nacchio and his handpicked advisers, the people  
23 that he chose to surround himself with. And just like every  
24 other point in the trial, he had a choice. And when people  
25 were telling him, don't raise guidance, he chose, you know

1 what, I'm going to do it my way. I'm going to raise the  
2 guidance. And he chose to do that on September the 7<sup>th</sup>.

3 Now, Mr. Stern wants -- a couple of things, he wants  
4 to give credit and say, he was right to set those numbers high,  
5 and, look, they made their numbers in 2000.

6 I want to show you, if we can go to Government's  
7 Exhibit 205, this is the second memorandum that Mr. Mohebbi  
8 gave to Joe Nacchio. And in it he has some captions on it.  
9 This is fourth quarter -- remember, it was in December, sent on  
10 December 20, he faxed it, and put it in Fed Ex, to Joe  
11 Nacchio's home. Joe Nacchio was in New Jersey on the 21<sup>st</sup>.  
12 And you see here exactly what is going to happen, likely  
13 scenario for fourth quarter of 2000, and how they are making  
14 their numbers in 2000. We can all say it together if you want  
15 to at this point, one-timers, right. The one-timers. Over a  
16 half a billion dollars of one-timers.

17 And this is something -- this is something that you  
18 know, because you do know the rest of the story now. You know  
19 that the public did not know this is how they were making their  
20 numbers. And the public did not know this because Joe Nacchio  
21 chose not to disclose this.

22 Now, you also know that with regards -- well, with  
23 regards to the numbers that were set on September 7 for the  
24 year 2001, you also know that they didn't make their numbers in  
25 the third and fourth quarter of 2001. They didn't.

1           And -- one second, please.

2           The public didn't know about the reliance upon the  
3 IRUs until much, much later, until August of 2001. And Qwest  
4 was -- was doing these one-timers -- the way they made their  
5 numbers up to that point until the disclosures, and you heard  
6 this from several different witnesses, including Mr. Casey,  
7 including someone from the outside, Mr. Khemka, the way Qwest  
8 was making their numbers was through the one-time transactions,  
9 IRUs or equipment sales, and through what are termed the bogus  
10 swaps, that -- that's how Mr. Khemka described the swaps, and  
11 that's how Mr. Casey told you that they were making the numbers  
12 in the first half of 2001.

13           Now, Mr. Stern wants you to give Mr. Nacchio a break  
14 because he was just doing the best he could. He just set these  
15 numbers a little high. And you can't expect him to be a  
16 fortune teller to find out what is going to happen the next  
17 year. He got stuck in some bad economic circumstances. And he  
18 can't expect to be held accountable for that.

19           Well, let's look, once again, at Mr. Nacchio's  
20 actions, not what he said, but what he did.

21           If we could go to demonstrative 59A.

22           December 7, Mr. Nacchio sets his guidance.

23           And look how he -- I want you to look how many times  
24 he affirms guidance. Okay. So you say, sure, he can't be held  
25 accountable. It's a fortune teller to say what is going to

1 happen at the end of 2001 by September 7 of 2000. No one can  
2 do that.

3 Well, he affirms guidance on the 31<sup>st</sup> of October of  
4 2000. He goes -- this budget process where the truth is  
5 revealed, there is no way they're going to make numbers without  
6 reliance on one-timers, and that pond is drying up. We'll talk  
7 about that later. And on December 21, there is no need to, and  
8 he goes out, affirms again. Then on January 24, he affirms  
9 again. April 24, he affirms again.

10 Ladies and gentlemen, he is getting -- loading up and  
11 with bad news and bad information, and he keeps affirming time  
12 and time again. June 19, July 24, he affirms. He is to be  
13 held accountable for those decisions. If he had made a mistake  
14 on September 7 when his business unit leaders, the people he  
15 chose to surround himself with, came to him and said, there is  
16 no way we're going to be able to make the numbers, and he took  
17 those numbers down, like the competitors did in December,  
18 right, like their competitors did, SBC, AT&T, WorldCom, at that  
19 time, no problem. What he does is chooses to affirm and affirm  
20 and affirm and affirm and affirm.

21 He chooses to keep up the story to the public for as  
22 long as he possibly can.

23 It's one thing to make a mistake, but this is  
24 conclusive evidence beyond a reasonable doubt that he  
25 intentionally -- that this conduct was intentional and willful

1 with all the information that he had.

2 Now, this was at a time -- these decisions were given  
3 out, and he was affirming guidance at a time when he was  
4 repeatedly warned that recurring revenue was not taking off,  
5 that one-timers were going away, and that there was a billion  
6 dollars of risk in the budget, one billion dollars of risk in  
7 the budget.

8 Let's look at a Government's exhibit one more time,  
9 April 9 document, Government's Exhibit 929A. Do you recall  
10 this at the meeting? He was in that meeting, and Mr. Stern  
11 cites as an example of how everything is going just fine,  
12 right, everything is going just fine. Let's look at this  
13 document more closely, then we'll relate it to the testimony.

14 "Current estimate includes a shortfall of recurring  
15 revenue growth of 19 percent." This is the language Mr. Stern  
16 points to, the 2001 CE. CE stands for current estimate. And  
17 you'll recall the testimony that current estimate is a snapshot  
18 of where we are at this very moment, at this very moment, not  
19 about what is going to happen in the future, any kind of  
20 projection of what is going to happen in the future. It's  
21 where we are at this very moment. Total revenue 21.5. Mr.  
22 Stern says, that puts them in the sweet spot, right where they  
23 want to be.

24 A couple of things about that. That 21.5 is made up  
25 for the vast large part of non-recurring, one-time revenues.

1 If we could go to page 2.

2 And -- make it a little bigger. There you go.

3 The current estimate -- if you look at the fourth  
4 bullet point out, "Current estimate indicates that the shift is  
5 not occurring at the rate expected, annual short falls." It  
6 goes to product, "Annual gaps to be filled by IRUs, 329 million  
7 or 30 percent higher than planned."

8 You will recall that this is the document Joe Nacchio  
9 heard a few pages on and slammed it down and blew up, got  
10 angry. Remember that? Mr. Mohebbi told you that's why he only  
11 has marked on some of these pages, because that was presented  
12 and angered Joe Nacchio so much.

13 He knew exactly what this was saying, just as you now  
14 know. He knew exactly the shift was moving, referring to the  
15 move away from non-recurring and go to recurring. Recurring  
16 had to take off by the April time frame. And if it wasn't,  
17 they were doomed. There was no hope of making their numbers.  
18 And this document is conclusive evidence that that shift was  
19 not occurring. It was not happening.

20 This was the danger that Joe Nacchio has known about  
21 since he set the numbers originally. It was the danger that  
22 Mohebbi put in writing to confirm to him that was going to  
23 occur. And it was a danger that anyone who knew this business  
24 well can -- and make no mistake about it, Joe Nacchio knew this  
25 business well. It was the danger -- the winds were no longer

1 blowing. The storm was no longer coming. It was there. And  
2 Joe Nacchio knew that when he saw this document.

3 And then if you recall, just a few days later, Greg  
4 Casey told him, the IRUs are going away. The pond is dry. And  
5 then began the life-after-IRUs meeting. Good luck with that.  
6 Good luck with that.

7 This document, you know, 30 percent more than they've  
8 done, they're already stretched to capacity on IRUs, and they  
9 need 30 percent more. Casey says, not only can we not get the  
10 30 percent more, we can't keep up with what we have. The IRU  
11 market is gone. It's a death knell for the numbers that  
12 Mr. Nacchio had set and refused to take down.

13 Let me show you how this, along with the billion  
14 dollars in risk, one last time, how this impacted all the  
15 numbers, whether they were internal targets, external guidance,  
16 that were set by the company. The plan is clearly affected.  
17 The plan is going to reach both of these. But let's look at  
18 Government's Exhibit 69G. We can look at this one more time.

19 And you can see how this billion dollars in risk, this  
20 swap, no matter -- the internal budget got set high and came  
21 down just a little bit because of whatever, and then on  
22 April 9, you can see the current estimate, the current  
23 estimate, right, not based on what they know is going to  
24 happen, which is the IRUs going away. And you can see with a  
25 billion dollars in risk how it wipes out every one of the

1 numbers. It's big enough to take everything with it.

2           And I think -- I think Ms. Conry told you, it's like a  
3 good parlor card trick. The billion dollars of risk has been  
4 around since September, and the billion dollars -- and they  
5 eventually took down the numbers. It's a billion dollars they  
6 took it down by. You can see what that does to any of their  
7 numbers. It was something that everybody in the company knew  
8 and everybody in the company were telling Joe Nacchio, but they  
9 weren't telling him something he didn't already know. He knew  
10 it himself ahead of time, and he took advantage of it by  
11 selling his stock.

12           He had painted himself into a corner in '99, and he  
13 continued with phone call after phone call of analysts to  
14 continue to paint himself in the corner, and he refused to  
15 change it until his lies had found him out. He refused to  
16 change because he wanted to be his old company, AT&T. He  
17 wanted to prove that he could be a big boy and play with the  
18 top executives of America. He could be different. He could be  
19 aggressive, get out there and just -- you know, get out there  
20 and set the number as high as you want and show that we're  
21 going to be different and make as much money. He wanted that  
22 entrepreneurial chance to make a lot of money.

23           If you want a chance to make a lot of money, as we  
24 said before, that's fine. But you have to do it -- you have to  
25 do it a fair way. You -- it is not fair for you to take your

1 money off the table when you know of risk that other people  
2 don't know about.

3           And to sell them your stock while you're taking off --  
4 you're making them take it, and they don't know about the risk  
5 that you have -- that the others have, and that's flat --  
6 flatly, that's cheating.

7           Now, we heard about the warnings. I just talked to  
8 you a little bit about Mohebbi's warnings, and let me just tell  
9 you, Mohebbi's warnings are just one piece of the evidence that  
10 we gave you. The interesting thing, if you hear that language  
11 again somewhere, if you see it during the course of trial,  
12 interesting thing is Mohebbi may not be real good at speaking  
13 in public, but he's pretty good when he puts his thoughts -- he  
14 leaves out different words here or there and may say things a  
15 funny way, but he's pretty good about communicating ideas. He  
16 tells you he feels bad about writing. And he put ideas in  
17 writing that everybody else knew about. And he put ideas in  
18 writing that that man already knew about. He didn't tell  
19 anybody anything they didn't already know.

20           And what we're -- while we're talking about  
21 Mr. Mohebbi, just briefly, when you're evaluating his  
22 credibility -- that's part of your job. Your job is to  
23 evaluate ever witness' credibility. And when you're evaluating  
24 his credibility, I'd ask you to consider that during this time  
25 from January 1 to May, his net worth, he testified, was about a

1 million dollars. That's a lot of money. It is, but it's --  
2 it's a lot of money, but -- it's a million bucks. The options  
3 he had available to him were over \$7 million. He could have  
4 increased his net worth by seven times by selling. And Afshin  
5 Mohebbi did not sell.

6           The Indictment in this case, you know, I encourage you  
7 to look at every word in that Indictment. I don't know exactly  
8 right now how much is going back to you. My stance would be  
9 the whole thing should go back to you, but that's just me. Any  
10 word that comes back in the Indictment, you look at it. Look  
11 at paragraph 6 that Mr. Stern talked about. Look at paragraph  
12 7. Look at 1, 2, 3, 4, 5 too. Look at it all. I'm sure you  
13 can find some similar ideas in there contained in Mohebbi's  
14 warnings.

15           There is also some other ideas, ideas that you've  
16 heard three weeks of evidence about, every nook and cranny of  
17 the charges in this case.

18           Now, one area I want to briefly touch upon is the idea  
19 of Mr. Stern talking to you about how Mr. Nacchio believed so  
20 much in the company, and that's why he quit selling under the  
21 February plan and entered another plan with the \$38 floor.

22           Remember, the plan dealt with all the issues that  
23 Mr. Nacchio was concerned about. But the evidence reflects  
24 just the opposite. The evidence reflects that as soon as  
25 Nacchio -- after he cancels the plan, as soon as he could

1 trade, trading window opens, because he could trade under the  
2 plan through the closed window, he stops it, and as soon as he  
3 could, he makes his largest sales of shares. He dumps seven  
4 times as many shares on the street as he would have had he just  
5 stayed in the plan.

6           And then secondly, if we could go to Exhibit 1050,  
7 page 2 and page 4.

8           On February 15, you know that the board approved -- if  
9 you could blow that up. "Upon motion duly made and  
10 seconded" -- this is the compensation committee of the board,  
11 February 15. The committee approved the grant of options to  
12 Mr. Nacchio and the increase in Mr. Nacchio's base salary and  
13 target bonus as proposed. They approved both. Let's look at  
14 the options package real quick.

15           The term sheet, this is what was proposed. This is  
16 what was approved by the board. It says, number, 5 million  
17 shares. The exercise price, which is the fair thing to do,  
18 exercise price, as of the date, 2/14/01 \$39.08. 39.08, and  
19 they weren't to expire for ten years. That's the good news  
20 about those, and that they were ten years to -- before they  
21 would expire.

22           It's interesting in this case that Mr. Nacchio  
23 conveniently did not sign the options agreement. Now, he gave  
24 no formal notice to the Board of Directors. He sent no letters  
25 to tell them, I reject your offer. Thanks, but no thanks. He

1 didn't call Phil Anschutz and say, you know, I really don't  
2 want these options. He didn't call Craig Slater and say, no,  
3 I'm going to negotiate for something else here. I want more --  
4 I don't want any more options. I want cash.

5           The other things that were given to him, increased  
6 options and increased bonus, he accepted, put in place, they  
7 were there. It's because he was not confident in the stock  
8 price. If he had thought the stock price was going up, he  
9 would have accepted these options just like any other options.  
10 What's wrong with getting credit -- that's the whole idea,  
11 remember? What's wrong with getting credit for the work you  
12 put in the company from that day forward. 39.08, you take it  
13 to 60, you've made a lot of money. Good for you. He reflects  
14 those 39.08 options without any notice to anyone.

15           You know what? In an unguarded moment, he brags to  
16 Mr. Weinstein about this. If you look at Government's Exhibit  
17 215, and look at this document, this is one of the -- a phone  
18 call in August, right, five, six, ten months later, in August  
19 he spoke with Joe and he says, "I believe Joe has 5 million  
20 options that mature in 2004 and 2005. These options were  
21 granted at 39 per share." Weinstein is acknowledging that Joe  
22 has 5 million options that are going to mature and at 39 per  
23 share. He says Joe -- this is what Joe told him, remember the  
24 testimony. Joe never signed the agreement because he had a  
25 discrepancy about a specific issue. I suggest the specific

1 issue he had a discrepancy about is not the expiration date,  
2 ten years. Remember, that's what he always wanted. He got the  
3 ten years.

4           The specific issue he had the problem with was 39.08,  
5 and he says, "Given the fact that he never signed the  
6 agreement" -- funny thing, turns out Qwest can reprice the  
7 option now, "and he told me this need not be disclosed."

8           If this is something that's just in the ordinary  
9 course of business and is all above board, why doesn't he want  
10 to disclose? Why is he worried about that? If there is an  
11 issue about those options, you know, I just didn't like a part  
12 of them or whatever, tell that to the press, put out a press  
13 release. Why does that matter? He knows that he's gotten away  
14 with one here. He's gotten away with one, because he took a  
15 chance, and it paid off big. And the way it paid off big was  
16 an -- Government's Exhibit 1805. It paid off big because in  
17 October of that year he gets those options and then some. He  
18 gets 7.25 million options, and look at the price, \$16.81,  
19 because the Qwest price tanked. He has gotten the benefit of  
20 what he knew all along.

21           Ask yourself -- ask yourself this for instance: What  
22 do you think would have happened if after Joe Nacchio gets the  
23 agreement for the 39.08 options, doesn't sign it, sitting on  
24 his desk once again, and the stock price takes off, goes to  
25 \$60, do you think he still had specific disagreement with it

1 and not signed those stock options and taken 7.25 million at 60  
2 bucks? No way. We would be talking about another backdated  
3 document if that were the case.

4           If Joe Nacchio really believed that \$38 was a great  
5 price and if he was bullish on the company, he would have  
6 snatched those 5 million options up. The 38 floor didn't come  
7 into the picture of the second plan until after his big selloff  
8 in the second quarter, in the April selloff. That's when it  
9 came into the plan. And that's after he had made -- that short  
10 window time frame of the -- when the second quarter trading  
11 window opens, and that's when he made in a few days  
12 \$50 million, \$50 million. And that was when stock was trading  
13 at about -- somewhere around 52-week low, and investors were  
14 beginning to ask questions.

15           This was something that Joe Nacchio did to put some  
16 distance between him and his sales. He knew that people were  
17 curious. He knew that people were asking questions. And a 38  
18 floor was a way to put some distance between he and his sales.  
19 It's also gravy.

20           I mean, think about it, if you're a teller at a bank,  
21 and a teller -- you don't take the whole bank drawer at once.  
22 You don't dump it into your purse or workout bag and walk out  
23 of the bank that one day. You take a little every day. When  
24 the auditor starts coming by, boss starts coming back, you  
25 start -- they start checking the till, you don't still take

1 some. You want to put as much distance between you and the  
2 time you did take some. That's what happened here. It's all  
3 about putting distance. This is a strategy that Mr. Nacchio  
4 knew a little something about.

5           You recall that he had a conversation with Lee  
6 Wolfe -- excuse me, Lee Wolfe overheard a conversation on the  
7 corporate jet between Mr. Nacchio and Mr. Tempest and how they  
8 plotted to let some time pass after they told investors in  
9 Boston everything was just fine, basically affirmed where they  
10 were, they wanted some time to pass before they took numbers  
11 down.

12           And that's the thing about a lie. You have to cover  
13 it up again and again.

14           The other thing about a lie, though, what I found out  
15 in life, you eventually get found out.

16           Now, jump back real quickly to Government's Exhibit  
17 100.

18           I've already told you the major importance of this  
19 document, and we've talked about it really too much, probably.  
20 But it shows you what is inside of Joe Nacchio's mind about  
21 whether or not he believed material non-public information that  
22 he received between November 3 and late December.

23           But another thing this shows is that it drives a stake  
24 through the heart of the good faith defense. This document  
25 right here ends any kind of good faith defense that Joe Nacchio

1 would claim.

2           You can't -- you cannot be dishonest and have good  
3 faith at the same time. It's like oil and water. The two  
4 don't mix.

5           Mr. Stern read you some of the instructions of good  
6 faith. He left out a part. I'm going to read that part to you  
7 now. A defendant does not act in good faith if even though he  
8 honestly holds a certain opinion or belief he also knowingly  
9 employs a device, scheme or artifice to defraud.

10           The backdating this document, to leapfrog back in time  
11 over the bad news he receives, is an artifice to defraud, and  
12 it kills the good faith defense in and of itself.

13           What else kills the good faith defense? The  
14 conversation between Joe Nacchio and Drake Tempest I just told  
15 you about, where they're plotting to put some time in between  
16 things. That kills it. It's a dishonest and fraudulent act.

17           The telling comment that Mr. Nacchio made to Prashant  
18 Khemka, he says, let me give you a word of advice. Never  
19 believe a word of what management says at the time of a merger.  
20 Management says things in order to get the merger done. He's  
21 saying, you know what, we say what we got to say to get it  
22 done. Truth, doesn't matter.

23           And you also know he doesn't have the best reputation  
24 for honesty. Mr. Weinstein told you that, when I -- that he  
25 told you that Joe Nacchio asked him to do a dishonest act

1 involving Qwest.

2           And you know, Steve Grossman even told you that  
3 starting and stopping a trading plan like Mr. Nacchio did can  
4 be evidence of bad faith.

5           Joe Nacchio did not have any good faith when he was  
6 making these sales. He did these sales to take advantage of  
7 others and take advantage of the inside information he knew by  
8 virtue of being an insider at Qwest.

9           Now, I want to talk to you about something right now.  
10 And I've got to admit I really have struggled with this and  
11 have taken my pen out and marked through this part of what I  
12 want to talk to you about and taken it out of the notebook and  
13 set it aside and put it back in. What I want to talk to you  
14 about is the issues of mental health of Mr. Nacchio's son that  
15 he's injected in the trial.

16           The reason I decided to talk to you about it is  
17 because I told you before, you have a hard job, you really do.  
18 One of the hardest jobs in America. Jury service is one of the  
19 few obligations we still have in America, and it's a very tough  
20 obligation.

21           And I want to talk to you about this because as part  
22 of your job and part of your tough obligation, you deserve all  
23 the facts. And we're all adults here. We can talk about  
24 everything. We've talked about money and talked about taxes,  
25 and, unfortunately, now I want to talk about a personal

1 situation involving Mr. Nacchio.

2 And one of the reasons I struggled with this is  
3 because I'm a father too. And there is nothing I wouldn't do  
4 for my kids.

5 But I wouldn't lie for them, and I wouldn't steal.

6 You know, the judge is going to tell you, you're not  
7 to let sympathy or prejudice enter into your verdicts.

8 That's the basic premise of being a juror. You have  
9 to take that and set it aside and judge this case by the facts.

10 And what I want to do is talk to you about the facts  
11 of this situation. And obviously it's a heartbreaking  
12 situation for anybody. But the facts are this, the facts are  
13 when this incident happened, Mr. Nacchio took some time off, as  
14 he should, to be with his family.

15 But I want you to look at Government's Exhibit 901,  
16 that's his calendar, and see where Mr. Nacchio was and see what  
17 he was doing. The facts are that he continued to commute to  
18 Denver in the corporate jet, to take care of business at  
19 Denver -- in Denver with Qwest. The facts are that he stayed  
20 at Qwest. He did not leave. If he had wanted to leave, he  
21 could have left, I guess, but he stayed at Qwest. He did not  
22 leave.

23 The facts are that he received more money, a bigger  
24 bonus, more options, soon thereafter, and seven months later,  
25 he got a bigger contract still.

1           The facts are that he called his broker to sell 13  
2 times between the first -- January 26 and February 13.

3           And the facts are that the defense -- once again, they  
4 don't have to present a case, but if they choose to present a  
5 case, we can comment upon it. And the facts are that Mr. Stern  
6 chose not to talk with you about the backdated instruction in  
7 opening, but he chose to bring this and inject this into the  
8 trial. The facts are, the only two witnesses they bring in  
9 this case are to bring this issue before you and to try to hold  
10 it out as some sort of an excuse.

11           The facts are that they cross-examined any witness  
12 that they could that might know something about this. They  
13 injected that with those witnesses.

14           You know, like many other times in this case, in this  
15 situation, that man, Joe Nacchio, had a choice. And in this  
16 situation, Mr. Nacchio chose, just as he had chosen, as you've  
17 seen in the evidence time and time again, and he made the  
18 choice to have, as Mr. Stern is so fond of saying, an  
19 entrepreneurial chance to make a lot of money.

20           Before I send you back to the jury room to begin your  
21 deliberations maybe later today, I want to show you the -- kind  
22 of a synopsis of the charges that we have presented before you.  
23 If I could show Government's Exhibit 62, demonstrative -- if  
24 you can just look at this, I want you to see this. You know,  
25 if you could find this, if you think this is helpful in your

1 deliberations at all, great; if not, put it aside and don't  
2 think about it anymore.

3           But the first two counts, Counts 1 and 2, the growth  
4 shares and backdating. At that time -- a couple of points I  
5 want you to take, there is lots of information and lots of  
6 evidence we presented time and time again. But I want you to  
7 remember at this time when Mr. Nacchio sold this, he knew the  
8 targets were a huge stretch. He knew that major shift must  
9 occur by material -- by early on in the year for them to reach  
10 the 2001 targets, and he knew the IRU market was going away.  
11 It just got worse.

12           The second set of sales, the first quarter trading  
13 window where he had dumped so many shares, the February trade  
14 plan, Mr. Nacchio knew that the -- that there was a billion  
15 dollars, one billion dollars in risk in the 2001 budget. And  
16 you've seen that graphically depicted, how that \$1 billion  
17 swallows up any number issue in this case, it's gone.

18           And then the final set of sales there, through the  
19 second quarter trading window, in the May trading plan, the  
20 accelerated sales, the shift is not occurring. He knew that.  
21 He knew that the targets for recurring revenue had missed. He  
22 knew the IRU market was going away. In the words of Casey, the  
23 pond was dry.

24           Now, ladies and gentlemen of the jury, this is a clear  
25 case of insider trading. You'll hear the law given to you by

1 the judge, and you've heard the facts that we have presented to  
2 you.

3           And now it's your time to go back and to put those  
4 facts with the law. And that's a heavy burden, as we've  
5 discussed.

6           To listen to the defense's case is to elevate Joe  
7 Nacchio to the level of victim. He blames DLJ for setting the  
8 numbers he raised and affirmed for two years. He blames the  
9 Board of Directors for forcing him to sell. He blames  
10 defeat -- this is what I just heard a few moments ago. He  
11 blames defeat on some not so good friends. His plan was  
12 defeated by some not so good friends. I don't know what that's  
13 a reference to, but it's a blame. And he blames having six and  
14 a half years to trade instead of ten. I want you to remember,  
15 unexercised options don't cost him one cent. He loses nothing  
16 if he doesn't exercise those options. When you've already  
17 cashed out 100 million and you have a net worth of nearly a  
18 half a billion, how much of a victim can you be?

19           You may have rode some shares to the ground, 3,500  
20 shares of his sons', 3,500 shares, but when you're talking  
21 about \$100 million, what's the big deal? What -- you know,  
22 with that amount of money, how does it possibly matter?

23           And let's not forget that Joe Nacchio had a choice.  
24 He negotiated for these options. He wanted to have an  
25 entrepreneurial chance to make a lot of money.

1           And that choice had a risk. We've talked about it  
2 before. But he's an insider. And as an insider, it comes with  
3 a special responsibility of a -- it's a special relationship of  
4 trust and of confidence between an insider and the Qwest  
5 shareholders, including the ones who bought his stock without  
6 virtue of the information that he knew.

7           He had to put the interest of the company and of the  
8 shareholders ahead of himself, and he failed in that task.

9           Even if that meant making a few less million dollars,  
10 maybe not reaching that 100 million peak as soon as you wanted  
11 to, you can't trade if you have material non-public  
12 information.

13           And that's a risk you take and the choice you make  
14 when you take those options and when you take on the mantel of  
15 CEO of the company. That's why they call them options.

16           You know what? There are plenty of -- there are  
17 plenty of victims out there. For every share of stock -- and  
18 you can see shares depicted upon a little stock chart here.  
19 For every sale of stock that Joe Nacchio made -- and that's  
20 represented by those little yellow boxes surrounded in red  
21 there -- there is somebody on the other side giving them --  
22 giving him their hard earned money.

23           They invested money in Qwest and on Joe Nacchio's  
24 word. You remember in the case -- in the case of  
25 Mr. Johnstone, he is the analyst from Davenport who came here

1 and testified. Some people invested money based on what  
2 Mr. Johnstone told others, and he put his integrity on the line  
3 based on what Mr. Nacchio told him.

4           And more than that, those investors who didn't know  
5 the inside story that Joe Nacchio knew, they invested their  
6 dreams, their hopes, maybe early retirement, maybe college for  
7 their kids, I don't know. But ask yourself, when fraud and  
8 theft occur at a company, what chance do investors have? When  
9 it comes down to it, it's a question of fairness. As an  
10 insider, Mr. Nacchio can't benefit from trading on inside  
11 information intended to be used for corporate purposes, and  
12 that's exactly what he did, and it's not fair. It's also  
13 against the law.

14           Joe Nacchio, the former CEO of the former great Qwest  
15 Communications, knew what investors didn't, and he used that  
16 information to get rich.

17           We've talked a lot about choices, and when it comes to  
18 Joe Nacchio, he's no different than anyone else. Just like you  
19 and me and everybody else in this room, he is accountable for  
20 the choices he makes, and he has to live by them.

21           He chose to cheat in order to make a lot of money.  
22 And the only thing that stands between him and that money is  
23 you. You have the power to set the standards of justice in  
24 this community.

25           We have presented evidence to you that demands a

1 verdict. And the verdict that this evidence demands in the  
2 name of justice is guilty, not on one count, not on two counts,  
3 but all 42 counts of insider trading.

4 Thank you.

5 *THE COURT:* The hour of 4:25 has arrived. These  
6 instructions cannot be given to you in a half an hour, and so  
7 rather than have you listen to one more lawyer today, this one  
8 wearing a robe, I am going to let you go home for the evening  
9 and give you the instructions first thing tomorrow morning.

10 You've heard all of the evidence now, and you've heard  
11 the closing arguments. What you haven't heard are the  
12 instructions of the Court, and you haven't heard the views of  
13 one another on the evidence and the weight and effect of that  
14 evidence.

15 So it is still important for you to obey the  
16 instructions that I've already given you. Do not discuss this  
17 case with anyone, that includes among yourselves. If anyone  
18 attempts to talk to you, contact me immediately.

19 Be careful not to read or listen to press accounts.  
20 Do not speak to any party or witness or attorney. And keep an  
21 open mind. There are still things that you have to consider,  
22 instructions of the Court and the views of your fellow jurors.

23 Go home. Have a pleasant evening. We'll get started  
24 with the instructions at 8:45 tomorrow morning. And then the  
25 case will be in your hands.

1 Have a pleasant evening.

2 (Jury out at 4:28 p.m.)

3 All right. Is there anything that we need to discuss?

4 *MR. STRICKLIN:* No, Your Honor.

5 *MR. STERN:* Yes, I believe that the prosecutor's  
6 comments about victims was improper, and I move for mistrial.

7 *THE COURT:* Motion denied.

8 *MR. STERN:* May I ask a housekeeping question, Judge?

9 *THE COURT:* Yes.

10 *MR. STERN:* When Mr. Stricklin and I were back in your  
11 chambers, feels like a week or two ago, but I think it was only  
12 a couple of days, you were talking about what you wanted to do  
13 with the jury in terms of Friday. The reason I'm asking is  
14 many of us are from out of town, and --

15 *THE COURT:* I believe they're going to deliberate on  
16 Friday, but I -- I think they're going to deliberate on Friday,  
17 but I'm not sure.

18 *MR. STERN:* You mentioned they were going to vote on  
19 it. Did you communicate with them?

20 *THE COURT:* No, I didn't communicate. But I did ask  
21 them to talk among themselves and try to rearrange their  
22 schedules so they can do it on Friday.

23 *MR. STERN:* Thank you.

24 *THE COURT:* Court will be in recess.

25 (Recess at 4:29 p.m.)

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REPORTER'S CERTIFICATE	

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 11th day of April, 2007.

s/Therese Lindblom

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Therese Lindblom, CSR, RMR, CRR