

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.

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

12 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
13 Judge, United States District Court for the District of
14 Colorado, commencing at 8:45 a.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
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15 P R O C E E D I N G S

16 *THE COURT:* Good morning. We're reconvened in case
17 05-cr-545, United States v. Joseph Nacchio. All counsel is
18 present. The jury is not present.

19 I had a conversation off the record a moment ago with
20 counsel for both sides. And it concerned one of the jury
21 instructions. One of the elements of securities fraud, the
22 third element, is that the defendant used any means or
23 instrument of transportation or communication in interstate
24 commerce, or the mails or any facility of any national
25 securities exchange in furtherance of the conduct. That, of

1 course, is the jurisdictional hook here.

2 It is not a matter that has been at issue, and the
3 Court is satisfied that a jury could find beyond a reasonable
4 doubt that the mails are a facility of a national securities
5 exchange was used in this instance; therefore, I understand,
6 with the agreement of both sides, the jury will be instructed
7 that there are two elements that must be proven. Therefore
8 will not have to give the legalistic, drier jurisdictional
9 instruction.

10 Mr. Stricklin.

11 MR. STRICKLIN: I have no objection with that, Your
12 Honor.

13 MR. STERN: No objection, Your Honor.

14 THE COURT: Very good. We'll do that.

15 Are we ready for the jury, then?

16 Do you know whether the jurors are all here?

17 COURTROOM DEPUTY: I haven't --

18 THE COURT: We'll wait. If they're not here, we'll
19 take a little more time.

20 MR. WISE: Your Honor, perhaps while the jury is
21 coming in, we had filed a response to the motion that you asked
22 us to.

23 THE COURT: Right. I've got the -- you mean, the
24 classified motion?

25 MR. WISE: Yes, Your Honor.

1 price of the stock. That's simply not true. He didn't even
2 set them at all in the sense that it wasn't his origination.

3 Now, I opened to you, it feels like quite a while ago.
4 I opened to you on the first day of the trial, after you were
5 impaneled as jurors, and I told you in my opening statement to
6 you that those figures, along with the projection of
7 18.5 billion for the year 2000 and 21 billion for the year
8 2001, emanated from the Donaldson, Lufkin & Jenrette report
9 which had been commissioned by Qwest, worked on with Lehman
10 Brothers as well, and would form the basis of what the new
11 company thought the future held in store.

12 There was a purpose to my doing that. I knew that
13 this was going to be important. I knew that it would be
14 meaningful to you in this case as to whether or not the
15 guidelines and the projections and the publicly stated
16 financial targets of the company were set on the basis of
17 reasonableness, concern, care, prudence, and I felt that that
18 might fall under attack.

19 And so in my opening to you, I actually read from the
20 report. I didn't have the skill yesterday to find the exact
21 page. With your forbearance, I will refer to it again.

22 Candy, it is handwritten page 67 on 502. Do you have
23 that? Thank you.

24 Probably too much to expect you to remember, but this
25 is, in fact, the page of that study.

1 And if you, Candy, would be kind enough to highlight
2 under financial summary the revenue page, just the top line, we
3 could probably make it even bigger. I don't know, whatever.

4 In the Donaldson, Lufkin & Jenrette report, not only
5 were the projections of 15 to 17 percent done, as I showed you
6 yesterday, but the projections for the year 2000 were revenue
7 of 18.5, I'm rounding out, 18.5 billion, and for the year 2001,
8 21,033,000,000.

9 I want you folks to be satisfied that what I am
10 telling you is accurate, truthful, and what actually occurred.

11 During the course of the opening by the prosecution,
12 you were shown not this document, which was the fruit of the
13 labors of weeks of the investment bankers who studied the two
14 companies and what their prospects would be. You weren't shown
15 this document that I've shown you now.

16 You were shown the press release, Exhibit 500. And
17 would you put that on the screen.

18 Candy, you probably remember the page number that
19 Ms. Conry used. Would you show that to the jury as well. It's
20 Exhibit 500.

21 Remember that? That's what you were shown. And you
22 were told by the prosecutor that this came out of Joe Nacchio
23 in an effort to pump up the stock.

24 Now, this press release was, in fact, to be sure
25 issued in the name of Nacchio and Trujillo, the two chairmen of

1 the two companies. But what lay behind it on the same day was
2 the Donaldson, Lufkin & Jenrette report.

3 Now, you can take that off the screen if you like.

4 You remember that after -- if you do, it will be
5 amazing, but I say it that way. After I opened to you, and
6 after I told you where the figures came from, and after I
7 showed you that chart, and after I showed you that column with
8 the 18.5 and the 21 billion for the year 2001, the first
9 witness that the prosecution called to the stand was Mr. Wolfe.
10 Do you remember he was the investor relations man. And he was
11 questioned by Mr. Wise.

12 And here is what the testimony was:

13 "Mr. Wolfe, I think yesterday you testified that
14 investors were asking for information how Qwest met its numbers
15 as you've just done now. You also testified that Qwest -- the
16 investors were asking questions about how Qwest was growing. I
17 want to ask you some questions about that.

18 "First, you testified, U S WEST merged. When was the
19 merger announced?"

20 Answer: "It was announced in July of 1999.

21 "And where -- where was that announcement made?

22 "In New York.

23 "And who made the announcement?

24 "There was a press release issued jointly by U S WEST
25 and Qwest. And then there was an analyst meeting and

1 conference called hosted by Mr. Nacchio and Sol Trujillo, who
2 is the chairman and CEO of U S WEST.

3 "Mr. Wolfe, would you please turn to Government
4 Exhibit 500, please.

5 "I'm there," is the answer.

6 "Do you recognize this document?"

7 "I do, I do."

8 Not just one I do, I do.

9 "And when did you -- when did you first see it?"

10 "When we were developing it in July of 1999.

11 "And when you say, quote, when we were developing it,
12 end quote, who are you referring to?"

13 Answer: "The investor relations organization and
14 Mr. Nacchio.

15 "Was it prepared at that time frame in July of '99?"

16 Answer: "It was.

17 "Was it maintained in investor relations file?"

18 Answer: "Yes."

19 And then Mr. Wise moved it into evidence without
20 objection.

21 So at that point, all we had was all you had yesterday
22 when Ms. Conry showed you the press release.

23 "Now, if we could go back" -- this is the question
24 from Mr. Wise. "If we could go back to Government's Exhibit
25 500, already admitted, I believe you were at page 10."

1 Answer: "Okay."

2 Let's go to page 10 with Mr. Wise and Mr. Wolfe.

3 This was the page that was presented to Mr. Wolfe and
4 to you.

5 "I believe you were on page 10."

6 Answer: "Okay. This slide lists -- well, it lists
7 revenue and EBITDA.

8 "What information is this giving investors about
9 revenue and EBITDA?"

10 Answer: "It says that the -- the Qwest financial
11 targets are to grow revenue by 15 to 17 percent over a
12 five-year period and to grow on a compound annual rate and to
13 grow EBITDA by 20 percent.

14 "And whose decision" -- the question is, "and whose
15 decision was it to tell investors these two measures were going
16 to grow by those amounts?"

17 Answer: "Mr. Nacchio.

18 "Were you involved in the preparing of this slide to
19 communicate that to investors?"

20 Answer: "I was.

21 "And describe, who did you prepare it with, who were
22 you working with?"

23 "Well, as I said, with Mr. Nacchio, in terms of
24 actually developing the number, but I did have several
25 discussions with him in the process."

1 Question: "And when it came finally to putting the
2 numbers down, what was your reaction to these targets, 15 to
3 17?"

4 Answer: "I thought they were still too aggressive."

5 Question: "Who did you communicate that to?"

6 Answer: "To Mr. Nacchio."

7 Question: "Were you the only person that
8 communicated that to Mr. Nacchio?"

9 Answer: "No.

10 "Who else did?"

11 Answer: "Because I learned somewhere along the way
12 that the best way to communicate with Mr. Nacchio is to have --
13 I tell him -- I tell him what I thought, but then I got -- I
14 also got somebody from the investment community to tell him the
15 same thing, or whatever. I didn't put words in their mouths,
16 but I would know in advance they thought basically the same way
17 I did. It was the same thing I was hearing from them. That's
18 how I got the sense.

19 "But I also know how aggressive the internal targets
20 were, so I got the brokerage analysis from both investment
21 houses, both sides of the transaction, DLJ was inviting" --
22 withdrawn, "advising Qwest, and Lehman Brothers was advising
23 U S WEST. And I got each of those analysts in separate
24 meetings to tell Mr. Nacchio they thought the targets were
25 aggressive and should be reduced. And they didn't need to be

1 this aggressive."

2 Question: "Were you present at those meetings
3 between Mr. Nacchio and the DLJ advisor and the Lehman Brothers
4 advisor?"

5 Answer: "Yes, I was."

6 Question: "And when did those meetings occur in
7 relation to this announcement?"

8 Answer: "The announcement was on Monday, and these
9 meetings -- Monday, the 19th of July. And the meetings
10 occurred Sunday, the day before."

11 By Mr. Wise, I think the question was, "When you were
12 in these meetings with the DLJ person and Mr. Nacchio and the
13 Lehman Brothers person and Mr. Nacchio, what did the people
14 tell him about the targets?"

15 Answer: "They told him that they thought the targets
16 were too high. They didn't need to be that high. It was
17 better to have targets more easily met. That we just get as
18 much credit, if not more, longer term life if the numbers were
19 more easily and consistently met. And there was an awareness
20 in the investment community that we were stretching to meet the
21 goals that we had for the individual Qwest at the time."

22 You now know that that cannot be true. You now know
23 that the report which underlies that chart in the press
24 release -- would you kindly put 502 up.

25 Written by Donaldson, Lufkin & Jenrette and issued the

1 day after this purported meeting, is replete with charts,
2 graphs, studies and financial analysis made to support DLJ and
3 Lehman Brothers' assessment that those were the growth targets
4 that were appropriate and the financial targets of 18.5 billion
5 for the year 2000 and 21 billion for the year 2001.

6 It is simply impossible for Mr. Wolfe to have been
7 telling you the truth. It is simply impossible that the night
8 before this massive report was issued, all -- with all of these
9 computations, such a meeting would take place.

10 I don't have any burden of proof in this case. It's
11 not supposed to be me that has to straighten this sort of a
12 thing out. But members of the jury, I'm sure you could have no
13 doubt that the 15 to 17 percent, the 18.5 billion that was
14 forecasted for the first full year that these two companies
15 would finally be together, that is the year 2000, and the
16 21 billion that was forecasted for the year 2001 was not the
17 work of Joseph Nacchio. It was the work of a study made by
18 Donaldson, Lufkin & Jenrette which Mr. Mohebbi told you they
19 were paid \$31 million to do.

20 As a matter of fact, Mr. Mohebbi was at the meeting on
21 July 18. He was called to the stand by the prosecution. His
22 calendar was put into evidence.

23 Question: "Would you take a look at July 18." And
24 then I -- this is cross-examination by me.

25 "Could you make that big. The only entry -- there is

1 nothing in the morning that indicates that you worked with them
2 on that day to some degree."

3 And I was referring to Donaldson, Lufkin & Jenrette as
4 you will hear.

5 Answer: "July 18 is the day before the merger was
6 announced."

7 Question: "Yes."

8 Answer: "That's when all the cleanup was being done
9 on the paperwork, so I was in New York City, and we were at
10 DLJ's office. That's where we stayed."

11 Question: "That is, in fact" -- and I was referring
12 to 502, you know, the big report that I've shown you. "That
13 is, in fact, the report of Donaldson, Lufkin & Jenrette as you
14 point out issued the next day, July 19, 1999; am I correct?"

15 "It appears that way, sir."

16 "Now, in compiling this report, whether you personally
17 worked with them or not, as the COO of the company," in that
18 period of the time he was the COO of the company, "you were
19 aware of the fact, weren't you, that between June 11 and the
20 date of this report, July 19, numerous representatives of DLJ
21 spent enormous numbers of hours going over the books and
22 records of Qwest, interviewing Qwest personnel, both in
23 operations and financial and sales, and in all of its
24 manifestations? That's a fact, isn't it?"

25 Answer: "I don't know the extent of the work. I can

1 tell you the DLJ team worked with people at Qwest on the
2 project. I know that much.

3 "Do you remember how much they were paid for this
4 work?"

5 Answer: "I don't remember, sir.

6 "Does the number \$31 million help refresh your
7 recollection?"

8 Answer: "31 million, I don't know the exact number,
9 but that sounds about right."

10 Now, why am I taking the time to do this? It is not
11 the most enormous point in the case, but it is a substantial
12 one. And why? They tell us that the numbers that were issued
13 don't matter. They tell us that that's not what this case is
14 about. They tell us that the integrity of those numbers is not
15 it at all. They tell us the real issue in the case is, you
16 can't sell if you don't tell, which is an incorrect statement
17 of the law, as I'm about to tell you. That is not correct.

18 And the judge, I believe, will tell you at the end of
19 the case that that is not the standard for insider trading.

20 While we're at it, I might as well tell you what it
21 is.

22 A person trades on the basis of inside information if
23 the Government proves beyond a reasonable doubt that that
24 person actually used material non-public information in
25 deciding to trade.

1 In other words, merely because you might know
2 something is not sufficient to establish a crime. You have to
3 use it, you have to believe it, you have to rely on it. That's
4 the crime. It's not, don't tell, don't sell.

5 But I diverted myself.

6 Why, then, is it important to demonstrate that
7 Mr. Wolfe lied to you? Why, then, is it important to you to
8 show you that although we, the defendant, keep trying to show
9 you the actual report, all the prosecution is doing is showing
10 you a press release? Because it's not true that they're saying
11 that it doesn't matter what the numbers were.

12 They are, in fact, accusing us of pumping the stock,
13 hyping the stock. And that's not true.

14 You're going to hear this again when it comes time for
15 the growth shares. You remember, I put that on hold for a
16 little while. Maybe it will be more than a little while, but
17 you have my solemn assurance, I'm coming back to it.

18 Might as well give you a little clue, although I
19 hadn't intended to. They also say we pumped up and hyped the
20 stock on December 21. Remember that? We did that to beef it
21 up because the growth shares were going to be sold on January 2
22 and 3rd. And you now know that that is impossible.

23 Why is it impossible? Because it was a matter of
24 complete indifference as to what the price of that stock would
25 be on January 2 and January 3. You know that. You've heard

1 that ad infinitum, and I'm afraid I'm going to have to tell you
2 again, but I'm getting ahead of myself.

3 You know because you heard from Weinstein -- Wolfe was
4 a man that wouldn't speak to us. Weinstein was a man who
5 proclaims himself to be our financial advisor, wouldn't speak
6 to us. We even had Rick Olson who is our current broker, he
7 wouldn't talk to us either.

8 What's going on here?

9 But even Weinstein told you when I asked him that he
10 and Mr. Nacchio were in a confidential relationship -- I don't
11 mean by that as a matter of law. I'm not asserting any
12 privileges. I merely mean when one speaks with one's own
13 financial advisor, you know, there is a degree of integrity and
14 honesty, because it makes no more sense to lie to your
15 financial advisor than it would make sense to lie to your
16 doctor.

17 And I asked him, "And you knew, therefore -- in terms
18 of the \$5-1/2 options, but you did know that they would expire
19 in June of 2003?"

20 "Yes.

21 "And you knew, therefore, he was in a position where
22 he had to either exercise them or lose them, correct?"

23 Answer: "Correct."

24 This is a man I haven't spoken to in my life, doesn't
25 want to speak to me.

1 "And you know, did you not" -- withdrawn, "and you
2 knew, did you not, that he wanted to extend the period of the
3 options, right?"

4 Answer: "I knew he was trying to extend the period,
5 yes."

6 This is the inside trader who is anxious to dump the
7 stock because, as we'll learn, Mr. Mohebbi left a note on his
8 chair.

9 "And you did know that Joe Nacchio wanted to extend
10 the time of those \$5-1/2 options, and it was your strong
11 recommendation that he not do that?"

12 Answer: "Yes.

13 "So we know, don't we, your client, Mr. Nacchio, did
14 not wish to follow your advice and diversify, did not wish to
15 follow your advice to execute and sell the options? Instead,
16 he wished to extend the life of those options by seeking
17 permission from the Board of Directors. That's a fact, isn't
18 it?"

19 Answer: "Yes.

20 "It was your recommendation that Mr. Nacchio exercise
21 and hold, correct?"

22 "No. My recommendation was to exercise" -- withdrawn,
23 "it was not your recommendation that Mr. Nacchio exercise and
24 hold, correct?"

25 "Yes, my recommendation was to exercise and sell."

1 And so my question is, "Whatever his net worth,
2 however much money he had" -- you know, I had to ask about that
3 because the prosecution here put in the entire net worth of the
4 Nacchio family, with an enormous figure, mainly based on
5 unvested options.

6 "And so whatever his net worth, however much money he
7 had available to exercise and hold, it was your position that
8 he shouldn't do it, right?"

9 Answer: "Exercise and sell, yes.

10 "And he followed your advice to some degree, did he
11 not?"

12 "Yes, he did.

13 "Instead of exercising and holding, whenever he
14 exercised, he basically exercised and sold; is that a fact?"

15 Answer: "Yes.

16 "And that was in part your suggestion, correct?"

17 Answer: "Correct.

18 "Now, at the same time you were telling him to
19 exercise and sell, he was, in fact, conveying Qwest shares to
20 his children, true?"

21 Answer: "Yes.

22 "And that was the family limited partnership that you
23 mentioned, correct?"

24 Answer: "Correct."

25 And while we're at it, in these conversations, just

1 the two men discussing what was good or what was bad for the
2 financial future of the Nacchio family, with no motive on the
3 part of Mr. Nacchio to say something about his own financial
4 condition in terms of Qwest shares that made no sense, I asked
5 Mr. Weinstein about the kinds of things that Nacchio was saying
6 to Weinstein during the very period that is under scrutiny in
7 this case.

8 In respect to his view of the prospects for the
9 company, I asked him, "And he was entirely and completely
10 bullish for the entire" -- withdraw that.

11 "From the time he became CEO, I'm going to limit it
12 for a period of time only for my own purpose, until August 13,
13 2001" --

14 Answer: "Yes.

15 -- "he was entirely bullish.

16 "Yes, and you know that because you had many
17 conversations with him about what he should be doing with the
18 very substantial holdings he had, whether by way of vested
19 options, unvested options, shares owned outright and even
20 shares that he had given to his children, correct?"

21 Answer: "Correct.

22 "Now, you understood, did you not, that he understood
23 that there would be no purpose in him trying to deceive you
24 about the prospects about the company, correct?"

25 Answer: "Correct.

1 "And it's true, isn't it, and you've told the
2 Government, that at no time did Mr. Nacchio say things to you
3 in these private, intimate, confidential circumstances that he
4 was not saying to the street publicly, correct?"

5 Answer: "Correct.

6 "And so the views that he expressed to you all the
7 months of 2000 and 2001 about the prospects of the company were
8 the same as what he was saying publicly, correct?"

9 Answer: "Yes."

10 And this is the man I had never spoken to before
11 Mr. Stricklin called him to the stand.

12 I know in her opening argument to you Ms. Conry said,
13 and I wrote it down, on September 7, 2000, Mr. Nacchio, quote,
14 raised the guidance without any basis. That's what she said.

15 Now, if all they're talking about is trading on inside
16 information, which I gather is this Mohebbi memo -- and I'll
17 come to that in a bit -- I don't know why she has to say things
18 like that. But it's part of their position that there is Joe
19 Nacchio pumping up the stock, lying to the public, when he's
20 saying exactly the same thing to David Weinstein in the privacy
21 of Weinstein's office back in New Jersey, where they're
22 conferring about Nacchio's personal financial planning.

23 So now I've got to go through an exercise which you
24 heard me do before, but which is entirely necessary, because it
25 leads not only to the refutation of what Ms. Conry said, but to

1 this whole growth share issue and a lot of things that
2 Mr. Stricklin is going to be talking about when I'm done.

3 This is a little awkward. You have no way of telling
4 me if you can't hear me, so I'll just try to do the best I can.

5 You know that on June 30 of the year 2000 the merger
6 which had been announced on July 19 of 1999 was finalized. The
7 companies had been put together, and they issued their first,
8 you know, 8-K. You've come to learn what 8-Ks are, you know,
9 announcements.

10 And so on that date, the first 8-K for the new -- you
11 know, the new Qwest -- we've been calling classic Qwest, the
12 one before the merger took place with U S WEST -- first 8-K was
13 issued.

14 And it was either there or very early in July. But I
15 think it was there that the first target was announced for the
16 year 2000. 18.5 billion.

17 I'm sure you will recall that. I'm sure you remember
18 that I went through this with Ms. Szeliga -- I'm afraid you're
19 going to have to hear a little bit more about that in a minute
20 too -- and Mr. Mohebbi.

21 So where did that number come from? Can there be any
22 doubt in your minds where it came from? I think you'll throw
23 things at me if I try to show you again where it came from. It
24 didn't come from Joe Nacchio. It came from Donaldson, Lufkin &
25 Jenrette, from the report and the study that they prepared.

1 Now, on July 7, 2000 -- I think I've got the date
2 right, could be wrong, but not by much -- \$21 billion was
3 issued as the publicly stated financial target of the new Qwest
4 for the year 2001.

5 And you know where that number came from too. And it
6 wasn't from Joe Nacchio pumping up any stock. Those were the
7 numbers that had been given to him one full year before --
8 well, one full year less 19 days.

9 And I think it was on that occasion that the
10 guidance -- did I have -- this is wrong, 2001. Sorry. And on
11 that occasion, for the year 2000, the guidance was raised from
12 18.5 to 18.8 to \$19.1 billion.

13 Why was it raised? Because the company was doing
14 better than DLJ had predicted it would do merged a year before.
15 Can there be any doubt about that? I suggest not. And you
16 know why there can be no doubt about that.

17 There can be no doubt about that because we've come to
18 learn that on December 31 of the year 2000, the company, in
19 fact, exceeded 18.5 billion and did 18.954 billion,
20 \$454 million better than the initial projections.

21 That is not a matter of taste, opinion, and not in
22 dispute in this case. That company within a few months, five
23 months after projecting 18.5 based on Donaldson, Lufkin &
24 Jenrette, in fact, did \$18,954,000,000.

25 What has this got to do with the case? Well, a great

1 deal. Because on September 7, 2000, an additional 8-K was
2 issued. And that 8-K puts forth the publicly stated financial
3 targets which are in the Indictment and which are on trial
4 before you.

5 And on September 7, the company -- and there is no
6 dispute about it. Joe Nacchio announced and reaffirmed that
7 for the year 2000 they would, in fact, do a range of 18.8 to
8 19.1. And for the year 2001, the 21 billion guidance which had
9 been in the original DLJ report on June 19, 1999, was raised to
10 a range of 21.3 to \$21.7 billion.

11 And that was done on the basis of the way the company
12 was performing. And in fact, the September 7 guidance was met,
13 18.95 billion, right in the middle of the range, as projected.

14 Unfortunately, by the end of 2001, 16 months later,
15 because that's how far a distance it is between September 7,
16 2000, and December 31, 2001, that target was not made.

17 And let me assure you, folks -- let me assure you what
18 I think your common sense already tells you. Had that target
19 been made, nobody would be here today.

20 But let me also tell you what your common sense tells
21 you, the issue is not whether with the vicissitudes, the
22 unforeseeable economic turmoil that took place in 2001, the
23 issue is not whether on December 31, 21 -- 27.3 to 27-point --
24 21 -- whether 21.3 to 21.7 was made. The issue is whether Joe
25 Nacchio was in good faith, whether he was being honorable --

1 whether he was being honest, whether he was doing his best to
2 forecast based on what was actually happening at the time.

3 And mind you, ladies and gentlemen, he's not charged
4 with forecasting wrong. They've told you, the numbers are not
5 involved. But somehow it gets spaghetti'd up in the whole case
6 constantly, so I have to meet it, even though it's not really
7 part of the allegations in the case.

8 If I don't meet it, you might think I was running away
9 from it, and I can't afford that.

10 So let us in our mind's eye recall Robin Szeliga to
11 the stand for a little bit of testimony.

12 "The fact of the matter is that the raising of the
13 publicly stated financial target which was made in July was
14 accurate."

15 Answer: "Yes."

16 We know she had to answer yes, because the raised
17 target was met.

18 "Now, isn't it a fact that this newly merged company
19 exceeded the DLJ" -- that's Donaldson, Lufkin & Jenrette --
20 "projections by 450 some odd million dollars? That's a fact,
21 isn't it?"

22 Answer: "Yes."

23 "Let's take a look at Government's Exhibit 530."

24 Members of the jury, Government's Exhibit 530 is, in
25 fact, the 8-K on September 7, the one with the publicly stated

1 financial targets of -- I think it's on an earlier one,
2 21-point -- 21.3 to 21.7.

3 "Let's take a look at Government's Exhibit 530, the
4 one with the official seal. You see he also reaffirmed the DLJ
5 projections of 15 to 17 percent revenue growth and 20 percent
6 EBITDA, correct?"

7 Answer: "Yes."

8 I'm not going to bother flipping through this, because
9 I believe you all know, that's in the document.

10 "He also projected cost savings through the year 2005,
11 correct?"

12 Answer: "Yes."

13 "And those statements were made in the year 2000,
14 right?"

15 Answer: "Yes."

16 "And they were just estimates about what would happen
17 by the year 2005?"

18 Answer: "Yes."

19 "And he went on to explain how he intended to achieve
20 some of these things, didn't he? He spoke about realigning
21 resources, correct?"

22 Answer: "Got it. Now, I see it. Thank you."

23 "And that was part of the synergy plan, wasn't it?"

24 Answer: "Yes, it was."

25 Question: "Synergy means you can -- in this

1 context -- you can save some money when you put two
2 corporations together and eliminate dual jobs, right?"

3 Answer: "In this context, it does, yes.

4 "Now, on that day, did Mr. Nacchio also announce in
5 his own terms under the title, quote, service improvement, did
6 he say, quote, Qwest has established aggressive internal goals
7 for improving basic residential service?"

8 Answer: "Yes, I see that. He said that.

9 "And that was a real problem, wasn't it?"

10 Answer: "It was a big challenge."

11 Question: "As a matter of fact, yesterday the
12 Government played a clip of Mr. Nacchio speaking. Do you
13 remember?"

14 Answer: "Yes, I do.

15 "And do you remember him saying that -- what was this
16 at the all-hands meeting?"

17 "Yes.

18 "Do you remember him saying that even more important
19 than making the numbers would be, quote" -- and I was quoting
20 now from the transcript. By the way, folks, the transcripts of
21 these clips that you've heard, whether played by the Government
22 or played by us, are not in evidence. But the clips themselves
23 are. I don't know what you intend to do, what you want to do,
24 it's none of my business. But I thought it might be helpful
25 for you to know that anything you want to hear you have to

1 hear. The transcripts themselves are not available.

2 "Do you remember him saying, quote, I just want to
3 remind everybody that after we fix the service the most
4 important thing we do is to meet our numbers, right?

5 "Yes, I remember that.

6 "And he told the employees that they had to fix the
7 service to the public?

8 "Yes.

9 "Now, on September 7, 2000, the same time that he
10 raised the guidance, he explained that he was going to change
11 the compensation system. Do you remember that?"

12 Answer: "I don't remember that. Could you refresh
13 my memory?"

14 So I did. I pointed out to her that the reason why
15 Qwest had been so successful in being aggressive -- after all,
16 folks, they made 17 consecutive quarters. That's four years
17 and a quarter of their publicly stated financial targets.

18 I pointed out to her that one of the reasons why Qwest
19 had been so successful is because the way the management of the
20 company compensated even high executives. And I think you know
21 what I'm referring to at this stage of the game. They set up
22 internal targets, internal targets which were higher by far
23 than any external publicly stated financial targets. And they
24 compensated people extremely well, even to the point of
25 Mr. Mohebbi at one point to 105 percent of his base salary, I

1 believe he so testified, and it's in the record.

2 And not him alone. Others, other people, obviously,
3 as you went down the chain of authority, there may have been
4 less of a bonus, but all of them got substantial bonuses if
5 they could reach or exceed the internal business plans, the
6 internal targets.

7 And we spoke about this, Ms. Szeliga and I.

8 "And you know that these internal budgets that we're
9 talking about, that you were talking about yesterday, were very
10 important towards setting the compensation goals of individuals
11 involved in making those budgets, true?"

12 Answer: "True.

13 "But those were internal numbers, weren't they?"

14 Answer: "Yes.

15 "They were never released to the public, were they?"

16 Answer: "No.

17 "They were proprietary information, weren't they?"

18 Answer: "Yes.

19 "As a matter of fact, the whole purpose of setting
20 internal budget numbers higher than external budgets would
21 have -- would be to have people exceed the publicly stated
22 financial targets, true?"

23 Answer: "Yes, I think so.

24 "And on September 7, Mr. Nacchio announced that
25 compensation would now be linked with Qwest performance, didn't

1 he?"

2 Answer: "Yes."

3 Because by then I had shown her in the 8-K, Exhibit
4 530, which you'll have in your room, but I don't want to burn
5 up all the time just showing you this, because I'm confident
6 that do you remember, that he stood before the public, and he
7 said, look, from now on, in this merged company of 65,000
8 people -- because, you know, Qwest had consumed -- because
9 Qwest had ingested, you know, a company much larger than
10 itself. Nacchio was bringing the culture of classic Qwest with
11 its aggressiveness and effort to achieve results for
12 shareholders to a more monopolistic kind of environment, and he
13 was achieving that or attempting to achieve that with the same
14 sort of compensation system, and he publicly announced it,
15 folks. I give you my word. If you look at the 8-K of
16 September 7, you'll find it in there.

17 Question: "Now, the projections which Mr. Nacchio and
18 Qwest put forward for the year 2000 were met, correct?"

19 Answer: "Yes."

20 "Better put, the publicly stated financial targets of
21 Qwest were met even though they had been raised beyond what DLJ
22 had predicted, correct?"

23 Answer: "Yes."

24 "And it's a fact, isn't it, that that was an important
25 factor in your company raising its projections for the year

1 2001?"

2 Answer: "Give me a moment to think about that,
3 please.

4 "Yes, it's a factor.

5 Question: "It did better than you thought you'd do,
6 right, for the year 2000?"

7 Answer: "Yes.

8 "Now, would you not agree" -- I would ask you, please,
9 to -- this is kind of a key answer.

10 "Would you not agree that it would be just as wrong to
11 set publicly stated financial targets too low as it would be to
12 set them too high?"

13 Answer: "Yes, I think that's correct."

14 And then I pointed out, that's because you have two
15 sides of every transactions, you have buyers and sellers, and
16 it would be unfairly prejudice, one or the other, to
17 deliberately set too high or deliberately set too low.

18 And, folks, it really isn't easy to set publicly
19 stated financial targets 16 months into the future. And I
20 think we all can allow for the fact that the investing public
21 had some common sense, that when they see projections going out
22 that far, they understand that as long as people are in good
23 faith -- and that is an essential, setting targets in bad
24 faith, that's wrong. But as long as people are in good faith,
25 how much can one expect? I wish I knew someone who can tell me

1 where the American economy is going to be 16 months from now.

2 Well, you know that the -- sorry, I got myself a
3 little mixed up. But I'll get myself together.

4 You know that the methodology that was used by Joe
5 Nacchio was to set stretch budgets. And very early in the
6 presentation, when Ms. Szeliga was on the stand, I addressed
7 that with her. And why? Because I knew that there was a
8 fellow named Afshin Mohebbi that was going to be coming. And I
9 knew that the Government would be offering into evidence a
10 letter that he wrote someplace between December 1 and
11 December 14, because it doesn't have a date on it. And I knew
12 it was a letter that he left on Joe Nacchio's chair. And I
13 knew that the Indictment in this case charges Joe Nacchio with
14 having this as the material inside information that he used to
15 trade on.

16 Yes, folks, that's what the Indictment charges. I
17 know you've not seen it, but I'm going to show it to you.

18 But first, let's talk a little bit about stretch
19 budgets.

20 Just give me one minute. There was a time when I
21 could have done this more easily.

22 I talked with Ms. Szeliga about how performance was
23 evaluated at the company, about how the targets, the incentive
24 targets were made up of different parts. There was a whole
25 company part, there was an individual part, and I think you

1 remember there was a business unit part.

2 And that's the part I want to concentrate on right
3 now.

4 "But you also mentioned, if I heard you correctly,
5 business unit performance."

6 Answer: "That's correct.

7 "And would that mean how close the business units came
8 to reaching their internal budget targets?"

9 Answer: "Yes.

10 "So I'm correct, then, that the individual business
11 unit heads and their principal assistants had a personal
12 interest in not having those targets set too high?"

13 Answer: "Yes, you are correct.

14 "On the other hand," I asked, "On the other hand, top
15 management, if they wished to exceed the publicly stated
16 financial targets, would try to push those up" -- meaning, you
17 know, the internal budgets, "right?"

18 Answer: "It's setting them higher originally, yes."

19 Question: "And there was a terminology within Qwest
20 for that sort of thing, wasn't there? They were called
21 stretch."

22 Answer: "Stretch budget, comp targets." I believe
23 she means compensation targets.

24 So -- question: "So the word stretch within Qwest had
25 a kind of special meaning, didn't it?"

1 Answer: "Yes."

2 Question: "It was the amount -- it was the amount
3 that the business unit heads and those underneath them were
4 being pushed up, right?"

5 Answer: "Pushed to make their targets."

6 Question: "Not only to make their targets, but in
7 setting of the targets, true?"

8 Answer: "Yes."

9 And here it comes, ladies and gentlemen, this is the
10 question that I wanted very carefully to ask her.

11 "And, indeed, the amount of extra that was put into
12 the target was called the stretch, wasn't it?"

13 Answer: "Some amount, yes, was called the stretch,
14 yes."

15 And that is Ms. Szeliga, who I had never spoken to,
16 who the Government took four proffers from. Remember?

17 Remember Ms. Szeliga, relatively young woman, at least
18 from my point of view, couple of young children. She committed
19 a great crime. She sold 10,000 shares of stock to remodel her
20 kitchen. She had to enter a plea agreement, subjecting her to
21 up to 10 years' imprisonment for one count of insider trading
22 concerning the sale of 10,000 shares of stock for the purpose
23 of remodeling her kitchen.

24 But before she could enter that deal, she had to make
25 a proffer. She had to tell the Government what she would say.

1 I wonder who she had to proffer about? I think you
2 know. It's a simple matter of her walking down and saying,
3 okay, I don't want to fight, let's make a deal, here is what I
4 got to say, no, no, no. She had to use a lawyer. Remember
5 him? He sat here. He kept popping up objecting every time I
6 tried to inquire in the area. Remember? Mr. Marella.

7 Four times he went, four times he proffered, back and
8 forth, back and forth, until they got the proffer they wanted.
9 Then she was allowed to make her deal.

10 So Weinstein wouldn't talk to us.

11 Rick Olson, our current broker, for a while, anyway,
12 won't talk to us.

13 Mr. Wolfe, who Mr. Nacchio took from Mr. AT&T, brought
14 him over, flew him back and forth so he could still live in New
15 Jersey while working here in Denver -- and I don't think
16 Mr. Wolfe had the kind of problems that Mr. Nacchio had, which
17 is why Mr. Nacchio was going back and forth. He wouldn't talk
18 to us.

19 I've never spoken to Mr. Mohebbi. So here we are, but
20 we've got one thing, we have this system, and we have the
21 truth. And it's walking into this courtroom and make no
22 mistake about that.

23 I often -- I also reminded her of her testimony on
24 another occasion.

25 "Do you recall being asked this question, making this

1 answer? Question: What do you mean by stretch goals?"

2 Answer: "I mean, the targets whenever -- you know --
3 I mean, the targets were never -- you know, just simply go to
4 work every day and go home at night, and you had a great day,
5 and you were supposed to make your budget. You really had to
6 work hard on that. That's how Joe believed in running the
7 business."

8 See, that was her testimony from an earlier time.

9 "And the business units generally didn't know that
10 they were for sure going to make their budgets until they made
11 them. And in that regard, I think that most everybody put
12 together initiatives. But I would say that there could have
13 been times when not everybody did, where they would send in
14 their page and just say, here is my budget, here is my actual,
15 and I'm going to make it."

16 I'll have more to say about this as we go. But what
17 this prosecution is doing is taking this budget process and
18 attempting to equate it to the publicly stated financial
19 targets of this company in an effort to persuade you people
20 that that man used that information to trade on when I believe
21 you know that he didn't believe their projections, that he
22 believed his job was to push them up, not to accept what they
23 were saying, and that he certainly did not run to the
24 marketplace to trade because this one or that one told him he
25 couldn't make the budget.

1 And you also know that the budget that was approved on
2 December 1 by the Board of Directors was \$21,991,000,000, which
3 was 700 million -- nearly, maybe a few million less,
4 700 million more than the low end of the enhanced range, the
5 21.3 to 21.7 that had been enhanced over the DLJ projections
6 because of the success that they were having in meeting the
7 projections for the year 2000.

8 So let us now turn to the next principal Government
9 witness, Mr. Mohebbi. He was, like Mr. Wolfe, another
10 immunized witness, whose immunity depended, of course, on his
11 telling the truth. We know that all of these immunities depend
12 upon the witness telling the truth, but depend upon whose
13 evaluation that they tell the truth, the people who are giving
14 them the immunity and deciding whether or not the immunity
15 covers the things that they are saying.

16 Now, this is an important part of the case because it
17 was at this point that Mr. Stricklin, who called the witness to
18 the stand, introduced us to the first Mohebbi letter, Exhibit
19 904.

20 May we put that on the screen.

21 You'll recall that even though it was undated, and
22 even though Mr. Mohebbi testified that he didn't hand it to
23 Mr. Nacchio personally, and even though he testified that he
24 left it on the chair, it was admitted without objection.

25 Why? Because as -- there is nothing in it to disturb

1 anybody who sits on this side of the room.

2 Members of the jury, you are going to be amazed to
3 know that this is the letter that is specifically referenced,
4 not by name, but by quotations, in the Indictment as the
5 non-public material information that Mr. Nacchio is supposed to
6 have traded on.

7 The reason that I think you'll be shocked to learn
8 this is because you'll recall that during the course of the
9 examination, the following points were brought out.

10 First of all, this memo does not address the publicly
11 stated targets -- financial targets of the company. Number
12 two, it is an effort by Mr. Mohebbi to show Mr. Nacchio how he
13 can make the internal higher number of \$21,991,000,000.

14 And, folks, this is -- this is what is charged in the
15 Indictment as being the non-public material information which
16 drove Nacchio to sell his growth shares, the shares where he
17 would get the same amount of money -- oh, believe me, the same
18 amount of money irrespective of the price of the stock.

19 First, let's establish what this memo addresses.

20 "Joe" -- maybe we can do it paragraph by paragraph,
21 because I don't think anybody could read this.

22 "Joe, the purpose of this memo" -- but he -- what he
23 didn't say, the purpose of this memo is to tell you that the
24 publicly stated financial targets are too high. Can we agree
25 on that? It doesn't say that.

1 It says, "The purpose of this memo is to share with
2 you some ideas of how we can efficiently run Qwest in 2001."

3 Now, what is Mr. Mohebbi doing? You understand,
4 probably don't remember, but he was no longer COO. He had been
5 demoted. Remember -- probably you don't, but started out as
6 COO, and didn't -- then was demoted at the time of the merger,
7 didn't get back into that job until April of 2001. I represent
8 to you that that is the fact. And the title of president was
9 not president of the whole company. It was president of one
10 division.

11 In any event, here's what he tells us he wants to do.

12 He wants to tell Joe how we, that means Mohebbi and
13 him, can efficiently run Qwest in 2001.

14 "In doing so," he says, "I have talked to Drake and
15 Steve" -- well, who are Drake -- who is Drake and who is Steve?
16 Drake Tempest, you will recall, is the general counsel. He
17 told us that.

18 "And I believe I have their support for this as well."
19 Oh, well, of course, he didn't at the time. Now, you probably
20 won't remember this, but he hadn't yet talked to them.
21 Remember, he told you from the stand he sent a memo -- a copy
22 of this, a version, he said, it wasn't exactly identical, to
23 Drake Tempest sometime later.

24 Nonetheless, he tells Nacchio, this is how we can all
25 run the company better together. And I've already talked to

1 these other fellows.

2 "I have also listed some key issues we need to deal
3 with."

4 That's interesting. You remember later on, he tells
5 you he's not a forecaster. This is none of his business. I
6 don't know if you remember that testimony or not. But don't
7 worry about it, I'm going to read it to you.

8 Now, next paragraph.

9 "As we discussed this week, the revenue and EBITDA
10 numbers for next year are huge stretch, and they require
11 day-to-day monitoring as well as close cooperation between the
12 units."

13 That is a very interesting sentence. It doesn't say
14 that anything is a huge stretch. It speaks about huge stretch.
15 And you know what, ladies and gentlemen? Mr. Mohebbi told you
16 from the stand under direct examination from Mr. Stricklin, he
17 was talking about the internal budget.

18 And he is not saying that they can't do it. What he
19 is saying is that this amount of stretch, namely -- well, you
20 know what that is -- requires monitoring and close cooperation
21 between the units.

22 "We need our recurring business to literally take off
23 by April/May time frame or the amount of one-time business
24 required to fill the gap will just be too large to deal with.
25 Our track record in this area is not that good, as you know."

1 First of all, there was no track record. The company
2 was now in existence in terms of completely merged for less
3 than four months, because the merger was finalized and
4 integrated on June 30.

5 But in any event, that's what he says.

6 And then the rest of his memo is devoted to how to
7 implement the methodology necessary to achieve the budget of
8 21,991,000,000.

9 "Here are our proposals" --

10 Will you make that -- "here are our proposals."

11 Now, that's not accurate, because at that time he
12 hadn't spoken to the other people. Hadn't even sent them the
13 memo. But those were his proposals. And now we go down the
14 list.

15 "Organizational." Ladies and gentlemen, is not the
16 fair reading of the memo a plan on how to reach the internal
17 business plan of Qwest, namely, \$21,991,000,000.

18 And ladies and gentlemen, there can be no doubt about
19 it, because, if I have the strength to do so, I'm going to take
20 you through the testimony of Mohebbi in which he flatly says
21 that that, in fact, was the purpose of this memo, and I'm going
22 to take you through the memos or the memo that Nacchio wrote in
23 response. And I am going to take you through all of the
24 implementations of the organizational recommendations that
25 Mr. Mohebbi -- Mr. Mohebbi made in this memo in an effort to

1 achieve the internal budget number of \$21,991,000,000.

2 Judge, I --

3 Do you need a break?

4 I do.

5 *THE COURT:* All right. Are you okay?

6 *JUROR:* I'm all right.

7 *MR. STERN:* Don't say that.

8 Well, like a good soldier, I'm soldiering on.

9 And before getting into all the organizational
10 recommendations and before demonstrating to you that rather
11 than -- that rather than ignoring this memo, which Nacchio
12 would have every right to do -- the man was not part of any
13 financial unit, told you under oath this was none of his
14 business. Instead of doing this, Joe Nacchio, in fact,
15 implemented just about every one of the recommendations that
16 was made in an effort to try and listen and hear what important
17 subordinates were saying to him.

18 Even though, members of the jury, the real purport of
19 this memo is to tell Nacchio to back off. Oh, there is no
20 doubt about it, and I'm going to read you the testimony of
21 Mohebbi where he said so.

22 The purpose of this memo is to take authority from Joe
23 Nacchio and to give it to two counsels, one headed by
24 Mr. Mohebbi and one headed by Mr. Steve Jacobsen, and there is
25 no doubt about that. I'm going to take you through it. And

1 you're going to see that that happened. You're going to see
2 the pushback that they got. You're going to see that people
3 didn't want to listen to Mr. Mohebbi. And you're going to see
4 the memo that Mr. Nacchio wrote saying they got to listen to
5 Mr. Mohebbi and they've got to implement Mr. Mohebbi's plan to
6 achieve the internal plan budget.

7 I'm sure you folks remember that, but it's my duty to
8 remind you, and I will.

9 But what I want to show you now is what I tried to
10 tell you in subtle ways throughout the course of this trial but
11 now I have the right to look into your faces and tell you now.
12 This Indictment charges this memo as the material inside
13 information concerning the inability of Qwest to make not its
14 internal budget, but its publicly stated financial targets.

15 Would you put paragraph 6 of the Indictment.

16 "No later than December 4 through and including
17 September 10, Nacchio was aware of material non-public
18 information about Qwest business" --

19 *MR. STRICKLIN:* Excuse me, I'm going to object at this
20 time. There -- he's showing them a copy of the Indictment that
21 he's redacted certain portions of it. I'll object to him not
22 showing a complete document to the jury.

23 *THE COURT:* Sustained.

24 *MR. STERN:* I have to show the entire Indictment?

25 *THE COURT:* I sustained the objection.

1 MR. STERN: I guess I can't show it to you.

2 THE COURT: Just move on. Don't comment on my ruling,
3 sir.

4 MR. STERN: Yes, sir.

5 The Indictment charges -- take it off the screen --
6 that Qwest's publicly stated financial targets, including its
7 targets for 2001, were extremely aggressive and a huge stretch.
8 And huge stretch has quotation marks around it.

9 And members of the jury, when you get this Indictment,
10 I've been told you will have it, and it is in your jury room,
11 favor me, if you will, by reading paragraph 6A and seeing that
12 Joseph Nacchio is charged with knowing the material non-public
13 information about the publicly stated financial targets being a
14 huge stretch.

15 "That in order to achieve its publicly stated
16 financial targets for 2001, Qwest would require -- would be
17 required to significantly increase its recurring revenue during
18 the first few months of 2001.

19 "That Qwest's experience or track record" -- track
20 record has quotes on it, members of the jury -- "in growing
21 recurring revenue at a sufficient rate to meet its publicly
22 stated financial targets was poor."

23 Members of the jury, I suggest to you that this
24 Indictment copies the words of the Mohebbi memo in making the
25 accusation that Joseph P. Nacchio, given this Mohebbi memo, ran

1 to sell stock because Mohebbi wrote that memo to him sometime
2 between December 1 and December 14, 2000.

3 Make no mistake about it, that's what they said, and
4 in a moment, I'll show you, that's what they are still saying.

5 Because now, members of the jury, I'm able to turn
6 to -- excuse me just a moment.

7 I don't think I'll turn to the growth shares just yet.
8 I'll leave that marker in place. But I promise you that I
9 will. And I'll promise you this, that I'm going to demonstrate
10 to you it is the position of this prosecution that Nacchio sold
11 those growth shares because he got that memo, that he not only
12 did that, but he held a press conference on December 21 to beef
13 up the stock, that he not only did that, but he so-called
14 backdated documents, and that the linchpin of all of this is
15 this memo.

16 Well, let's finish with the memo.

17 Can we put Government's Exhibit 904 back on the
18 screen, please.

19 As I've represented to you, this memo doesn't talk
20 about publicly stated financial targets, is not addressing it,
21 and is an effort by Mohebbi to get increased authority for the
22 purported reason of being able to meet the business plan, that
23 is to say, the internal budget.

24 You have my word on it. I will read you his testimony
25 in a few minutes in which he plainly says that is true.

1 As a matter of fact, just so there is no doubt about
2 this, when Mr. Stricklin first called him to the stand and
3 questioned him about whether or not 904 addressed the publicly
4 stated financial targets or the internal numbers, he said, "I
5 meant the series of" -- let me read you the question.

6 The Court, the question was, "Was he referring to
7 internal or external?"

8 Question by Mr. Mohebbi -- question by Mr. Stricklin,
9 "Mr. Mohebbi, what do you mean by the use of the word numbers?"

10 Answer: "In the letters, as you can see, I'm not
11 specifically breaking out any numbers. I'm not saying one way
12 or the other. However, what I am saying as we discussed this
13 week that by that I mean the series of meetings that were held
14 by the business units. And what was discussed in the business
15 unit meetings were the internal numbers that were presented to
16 the business units."

17 But I'm going to make that even clearer during
18 cross-examination, I promise you.

19 Let's go back to the memo. "Here are our proposals."
20 As I say, they were not proposals of anybody at the time but
21 Mr. Mohebbi, but nonetheless.

22 "Organizational." First line, "Complete the
23 reorganization to reduce the number of direct reports to Joe."

24 Just what I told you, get Nacchio out of some of the
25 granulation, some of the details.

1 "Move it over to Afshin," that's Mr. Mohebbi. And he
2 proceeds with the detail of that suggestion.

3 And then he has several more, which you can read for
4 yourself if you care to, because I want to conserve my voice if
5 I can.

6 "Governance. Have a weekly Qwest operating team" --
7 now, you notice the word "operating" is capitalized, the O --
8 "an operating team meeting to manage the day-to-day affairs of
9 the business and initiate corrective action required."

10 And guess who is to chair that? The last sentence
11 tells us, Afshin to chair that team.

12 Next sentence, "Since making the top line is probably
13 the most critical part of company's challenge, a revenue
14 generation team is created." By that he means, I take it, that
15 if Joe Nacchio agrees with him, such a thing will be done. But
16 this is a plan of action put forward by Afshin Mohebbi.

17 That team is to include Steve, Afshin and some other
18 folks.

19 "Revenue generation meetings will be right after the
20 operational meetings, but will be held every other week. Steve
21 will chair this team.

22 "As always, Joe is welcome to join and/or chair any of
23 these meetings when he's available."

24 But obviously, the purpose of this memo is to push Joe
25 further away, not, I suggest to you, for any bad purpose. I do

1 not say that. If it had the ancillary benefit of increasing
2 Mr. Mohebbi's authority, well, so be it. My point is a simple
3 one. The purpose of this memo is to show Joe Nacchio how to
4 achieve the internal budgets, not attacking the publicly stated
5 financial targets of the company, as I suggest to you is
6 alleged in this Indictment.

7 And so we go.

8 "2001 key issues, decisions and other recommendations.

9 "Breakthrough in the systems area, the key here is
10 development. Aside from reducing costs, if we don't develop
11 new products we have on the list, we have a big risk in making
12 the top line and staying competitive. I think this is a huge
13 challenge for 2001.

14 "Head count, we need to make some decisions in terms
15 of outsourcing.

16 "Wireless, I believe this unit needs closer scrutiny
17 during the year. A good way to help Peter is to create an
18 internal Board of Directors for the unit." And then he
19 suggests who the board should be.

20 "Small business, as you have identified, this is one
21 of our biggest challenges in 2001. A lot has been lost in
22 organizational finger pointing and shuffles."

23 Could this memo not be found, or its moral equivalent,
24 in any of the top ten dozen companies in the United States?
25 People jockeying for position, blaming each other, suggesting

1 ways to improve things, asking for greater role, and this is
2 the non-public material information that Mr. Nacchio, the CEO
3 of the company, is accused of trading on.

4 He closes with the thought, "Hope you find these
5 thoughts helpful."

6 Question by Mr. Stricklin to Mr. Mohebbi: "What was
7 the purpose of this memorandum that you gave to Mr. Nacchio
8 during this time frame, sir?"

9 Answer: "The purpose of this memo was to share with
10 him some ideas on how to run the company in a better way."

11 Question: "And why did you choose this time to share
12 this with Mr. Nacchio?"

13 Answer: "Well, the timing was, the new year hadn't
14 started yet. We had just come up for one of those phases of
15 business processes, and that I was -- I was done with the memo,
16 so I sent it to him."

17 That was the question, and that was the answer.

18 Question by Mr. Stricklin, the answer by Mr. Mohebbi.

19 I don't know what your pleasure is, Judge, but I've
20 been speaking for an hour and a half, and -- while the jurors
21 are obviously in good shape, I'm not, so if we could take a
22 recess, I would appreciate it.

23 *THE COURT:* All right.

24 *MR. STERN:* Thank you.

25 *THE COURT:* We'll be in recess until 10:30.

1 MR. STERN: Thank you.

2 (Recess from 10:14 a.m. to 10:32 a.m.)

3 THE COURT: Mr. Stern, you may proceed.

4 MR. STERN: Thank you.

5 All right. I feel now that I am able to, with the
6 background, deal with the growth shares, the -- where I first
7 wrote it down on the board, when I first began the summation to
8 you.

9 On August the 13th, in the document that is in
10 evidence before you, the company advanced the timing of the
11 \$24 million that was going to be received. There is no dispute
12 about that. Take a look at 1009, page 6.

13 You will recall that about the time of the
14 announcement of the merger between U S WEST and Qwest, senior
15 Qwest employees were given some extra compensation. Remember,
16 Mr. Mohebbi got an extra 1,100,000 options. And Mr. Nacchio
17 got some benefits too.

18 If you would highlight the "upon consummation of the
19 merger," see the paragraph.

20 That provided -- gave him a bump up in raise. And --
21 he had been making about 680,000. You remember he started out
22 at the end of 1986 making 600. Most of his money, and he made
23 a considerable amount of money, came from the increased value
24 that he brought to the company. That was the deal. It was an
25 entrepreneurial deal.

1 So he got a raise to a million dollars. He got a bump
2 up in his own bonus target from 110 to 150 percent.

3 He got something very important in the first
4 paragraph, if you just do the first sentence of the first
5 paragraph.

6 Received a grant on August 13, 1999, which is, of
7 course, the date of the letter, of 9 million options at \$28.50,
8 and we've covered that, and you remember Professor Fischel
9 covered that. And that was to vest quarterly, each year,
10 commencing with the next year. And you'll recall that that is
11 on the 2000 chart, vesting 8/13, was granted 8/13/99 per the
12 letter. The first tranche of 2,250,000 at 28.50 vests the next
13 year.

14 But for purposes of the discussion we're about to
15 have, it is the third paragraph that is of interest, and if you
16 could highlight that. Maybe make -- can you make it bigger or
17 something?

18 "It's also agreed that the growth share payment," with
19 the calculation at the time -- because he hadn't taken the
20 last, you know, 20 percent of 20 percent, \$25 million and
21 change, "payable to you during calendar year 2001 will be paid
22 in full on January 1, 2001." So what they did was, they
23 advanced the term of the payment.

24 But they said it would be paid in dollars. And that's
25 what Nacchio wanted. Slater said he wanted dollars. Slater

1 said he really wanted dollars each time he took 20 percent of
2 20 percent, and Slater testified that Nacchio went to Slater,
3 and Slater said no. We've got to follow the plan. And the
4 plan is that you get this money in shares.

5 So on the 13th of August of 1999, Nacchio knows he's
6 going to get a sum of money which by a certain period of
7 time -- if you throw up A-1731, please. It's not in? Okay.
8 Never mind.

9 You can take that off, then.

10 By the time the money is due, because of the periodic
11 payments that he takes along the way, he's due \$24,374,091.

12 Now, one thing we know for sure, and I don't think
13 anybody can rationally dispute this, when those shares are
14 paid, or when the money is paid in shares on January 1, the
15 price of the stock is irrelevant to Nacchio, because he is
16 going to get \$24 million worth of stock, whatever the price is.

17 I will go over that testimony with you. That was the
18 testimony of Mr. Weinstein. That was the testimony of
19 Mr. Slater.

20 "Mr. Slater, isn't it a fact that on August 13, '99,
21 the company committed itself to give Mr. Nacchio 25 million
22 some odd dollars in Qwest stock on January 1, irrespective of
23 the value of the shares?"

24 Answer: "I believe that's right."

25 Question: "Isn't that what that says?"

1 Answer: "Yes. You're right."

2 Question: "So that if on January 1, 2001, the value
3 of Qwest stock on the market was a dollar, under the promise of
4 this letter, he would get 25 some odd million shares, correct?"

5 Answer: "Yes. You're right."

6 Question: "In terms of your own share holdings, if
7 the price of the stock went down because the whole telecom
8 industry went down, that would affect you, wouldn't it?"

9 Answer: "Yes.

10 "But it would not affect Mr. Nacchio's growth shares,
11 would it?"

12 Answer: "That's correct."

13 In other words, he gets -- I'm just going to use the
14 figure \$24 million, although I know you know it's not
15 completely accurate.

16 January 1, he gets \$24 million in stock, and if the
17 price of the stock is a dollar, he gets 24 million shares. If
18 the price of the stock is \$10, he gets 2.4 million. The price
19 of the stock is immaterial to him. The testimony of Weinstein,
20 too, but I'm going to try to move along because I don't think
21 it can be seriously disputed what I said. That's just a fact
22 in this case.

23 Now, how did the Government start this case? They
24 told you folks that on December 21 Mr. Nacchio convened an
25 extraordinary press conference. Do you remember that? They

1 stood before you in opening, and they said that Mr. Nacchio
2 worried about the price of Qwest stock, which had just taken a
3 hit.

4 Why did Qwest stock take a hit? Because AT&T and
5 another company whose name for the moment I don't remember
6 issued some bad thing a few days before December 21. And they
7 told you that that drove the price of the whole industry down,
8 particularly Qwest stock. And they told you that Nacchio, on
9 his own, in an effort to buck up that price, because he was
10 going to sell his growth shares, convened an extraordinary
11 press conference.

12 I don't know if you remember that. But I'm going to
13 prove to you that they said it, because I have the little
14 charts they used -- you know, these things they use all the
15 time -- from their original opening to you.

16 But before I do that, I want to read to you the
17 testimony that Mr. Wise got from Mr. Wolfe. Remember, the
18 first witness they called.

19 "Mr. Wolfe, what happened on December 21, 2000?

20 "We issued a press release and held a conference call.

21 "And why did you issue a press release and hold a
22 conference call?

23 "Because the stock was getting hammered. It had gone
24 down 10 bucks in a five-day period and \$5 on the last day. On
25 the 20th, it went down \$5."

1 Question: "What happened in response to that," asked
2 Mr. Wise.

3 "We had a -- the issue was significant concern in the
4 investment community about the impact of the committee and
5 concern about pricing. And so the stocks, all the stocks in
6 the telecommunications industry were coming down. And because
7 other companies were reducing their earnings targets and our
8 conference call pointed out that Qwest was -- reaffirmed the
9 Qwest guidance and said we were not experiencing the same
10 problems the other companies were."

11 Question: "And whose decision was it to have this
12 conference call?"

13 Answer: "Mr. Nacchio."

14 Question: "And when was that conference call?"

15 "December 21."

16 Question: "And what happened to the stock price on
17 the day of the conference call?"

18 Answer: "It went up \$5."

19 Question: "And what did Mr. Nacchio tell investors
20 on this call about Qwest in that regard?"

21 Answer: "He reaffirmed the financial targets for both
22 2000, meaning the fourth quarter, the next few days, as well as
23 2001."

24 Now, that testimony was offered to you, members of the
25 jury, to suggest to you that Joe Nacchio had a personal motive

1 in terms of his own stock sales, in getting the stock up,
2 because he was about to sell his Qwest shares, and you know
3 that that can't be true.

4 Put aside the fact he was in Appalachia from the
5 15th to the 20th and could hardly have been following the
6 stock carefully. You know about that, because of Father Giles.

7 The fact of the matter is that he could not possibly
8 have had any personal pecuniary interest in what happened to
9 that stock, because, look, he made no sales after November 17,
10 2000. And I'm going to return to that and tell you why.

11 This is the chart for 2001.

12 Aside from the growth shares, which went, as you know,
13 the 1st and 2nd of January, the first sale he made was January
14 the 26th. So what interest, what personal, selfish, venal,
15 corrupt interest was it that drove Nacchio to hold a press
16 conference on December 21st to assure the investment
17 community that whatever else was happening to competitors in
18 the marketplace, Qwest was not getting hurt?

19 Perhaps Mr. Stricklin will tell us what it was. But
20 we know what he indicated in his opening -- not his, I think it
21 was Mr. Hearty.

22 Would you put on the screen, please, chart 5, page 8.

23 You know, they have this system -- which I really
24 envy, I wish I could do it. I can't manage these things for
25 myself.

1 But here it is. It's all laid out. This was the
2 chart that was used by the prosecution, Mr. Hearty, during his
3 opening. They label it all nicely, "Nacchio's Inside
4 Information" and all of that.

5 Now, what do we see? In the bottom, we see between
6 December 1 and 14th the Mohebbi memo. Then we've got another
7 one December 20. I haven't dealt with that yet, but I will in
8 a few minutes.

9 December 21, Nacchio reaffirms targets in an
10 unscheduled call. Very confident, right.

11 And now if we put on chart 5, page 11.

12 January 2 and 3, Nacchio sells, because you see, the
13 price went up. The prior chart shows how the price went up,
14 and then on January 2 and 3, Nacchio sells, because he has
15 inside information. That's what this chart says. He's
16 selling, inside information, and because of his inside
17 information, he needs to sell. And because he's worried about
18 the stock price having gotten hammered with AT&T, he schedules
19 an unscheduled conference call on the 21st to reassure
20 investors, which brings the stock price up, and -- or so they
21 were alleging, he gets more money.

22 Now, you know it isn't true. You know he didn't get
23 one penny more for holding that conference call. And that is
24 an irrefutable, immutable fact.

25 So why did he hold it? Isn't it plain?

1 What was going on in the telecom industry at least
2 that point in time was not affecting Qwest. You will remember
3 that in July they raised their guidance for the year 2000.
4 They were on December 21 within ten days of the close of the
5 year. And you will remember that they, in fact, made the
6 enhanced and increased publicly stated financial targets for
7 the year.

8 Now, folks, what do you want the CEO to do when his
9 competitors have made announcements that they're in trouble and
10 you're not, when their stock is getting hammered and your stock
11 is too, because of them? What does a responsible chief
12 executive officer do? Well, nothing, of course. You just let
13 your shareholders go down the drain, right?

14 You hold a press conference and you say -- and I'm
15 not -- I've been told by my colleagues I've got to be moving
16 right along. I'm going to be trying to do that. I've got
17 plenty of stuff here. These are the press conferences where he
18 says, look, we're not in trouble, and they weren't. They were
19 making the quarter. They were making the enhanced quarter.
20 And so he did what I suspect you would want him to do if you
21 were -- withdraw that.

22 Now, that's the first part of their argument.

23 The second part of their argument is that somehow he
24 did a dirty thing, namely, he played around, backdated
25 documents. I'm going to demonstrate to you he did no such

1 thing, that he had no reason to do any such thing. That is
2 absolutely absurd.

3 First point, from August 13 until January --
4 August 13, '99, until January 1 of 2001, everybody who dealt
5 with Mr. Nacchio, including Mr. Weinstein and Mr. Slater, two
6 men who they don't -- well, Mr. Slater spoke for one hour with
7 some of my colleagues, so I can't do that about him. But
8 certainly Mr. Weinstein has nothing to do with us. Every one
9 of them told you that from the beginning to the end, he was
10 going to sell those shares.

11 What motive in the world does he have to do anything
12 else but sell the shares that everybody knows he's going to
13 sell?

14 Now I want to show you something.

15 It's not heavy, but I'm not very agile, so --

16 You notice, folks, there are no sales after
17 November 17. And it isn't because he doesn't want to, because
18 you know on October 31 of 2000, you know, in response to a
19 question -- by the way, this wasn't a public statement that he
20 made, you know, in some queue or something. Some guy asked
21 him, what are your plans about selling, and then I read you
22 that whole board. He explained how he was going to be selling
23 a million shares a quarter because he's got to. You do recall
24 that, I take it.

25 That was on October 31.

1 Well, why isn't he selling after November 17?
2 Because, ladies and gentlemen -- and here is where I got to
3 make a very difficult presentation to you in terms of clarity.

4 Because of a trading window. You've heard testimony
5 about trading windows. Now, trading windows are policies of
6 the company. They are not requirements of law. I believe that
7 the judge will at the appropriate time instruct you in any way
8 that he cares to in this area. But I tell you that the
9 evidence has been, is, and the truth of the matter is that the
10 policy trading windows of the company are not requirements of
11 federal law, state law or any law.

12 They are simply comfort zones which the company
13 imposes upon executives as kind of safe periods where they
14 should not trade because it's too close to some event or
15 another, or earnings announcements and so forth.

16 The evidence in this case -- there is actually a
17 chart -- demonstrates -- it is Government's Exhibit 300A, that
18 the trading window was closed.

19 Now, that didn't mean that someone couldn't legally
20 sell. If Nacchio wanted to take his own stock or his trustee
21 of his children's stock, the company couldn't do anything about
22 it. But the company would not allow exercise of options during
23 that period of time.

24 You'll recall, Ms. Bonsness that talked about the
25 relationship, you know, that went back and forth.

1 The trading window was closed on November 17. He
2 couldn't do it.

3 It was open from October 30. This is very difficult
4 to see, I think. If you can help me -- help them.

5 Trading window was open from October 30 to
6 November 17. And you can see the trades between that period of
7 time. Not before, because it's closed; not after, because it's
8 closed.

9 And I emphasize again to you, this is not a
10 requirement of federal law or any law, but a matter of company
11 policy alone.

12 Now, what happened in this case is really very simple.
13 Weinstein, Rana and Nacchio for a long period of time were
14 working on this \$24 million. Weinstein -- I really do want to
15 move along. I won't read you a lot of testimony. I want to
16 summarize it as best as I remember in good faith.

17 Weinstein wanted to defer one-third so he wouldn't
18 have to pay taxes.

19 And by the way, Nacchio paid not only federal taxes,
20 he paid Colorado taxes, because the money is earned here, and
21 he paid New Jersey taxes, because that was his official
22 residence.

23 So as his financial advisor, \$8 million was going to
24 be segregated out. And you recall that 4 million was to go
25 into a deferred compensation, and 4 million was to use on an

1 EEP, executive life insurance thing, for the Nacchios.

2 And you will recall that on November 7, it is the
3 testimony of Mr. Weinstein, that Nacchio went for an
4 examination for the life insurance as a part of this \$8 million
5 deferral, and there is no dispute about it.

6 Now, here is the problem that they had: The trading
7 window would not be open when -- trading window would not be
8 open when the shares would be received to be sold. And they
9 were going to be automatically sold.

10 As you can see here in January, it is still closed.
11 First trade he can do is January 26.

12 And so Rana, who was the corporate counsel -- by the
13 way, you're going to find Rana's name on about every other
14 document in this case. Why? He signed many of the 8-Ks. He
15 was working with Drake Tempest in the counsel's office. He
16 signed many, many, many of the corporate minutes, audit
17 committee minutes and so forth and so on. He was working with
18 Nacchio.

19 And in order to clear the company policy, he
20 determined that if Nacchio made an irrevocable election to sell
21 the shares during an open window --

22 MR. STRICKLIN: I'm going to object now, arguing
23 outside the record, Your Honor. There is no evidence.

24 THE COURT: You may respond.

25 MR. STRICKLIN: Yes, sir.

1 THE COURT: Proceed, Mr. Stern.

2 MR. STERN: I'm a little embarrassed but I -- can
3 somebody help me?

4 I got it.

5 Please put -- it's up. Thank you.

6 Here is a memo from Weinstein. Can you make it
7 bigger? Thank you.

8 "On December 7, I spoke to Yash Rana at Qwest." We
9 know who he is. He's high up in the corporate counsel.

10 "I believe all the outstanding issues regarding the
11 growth shares have been resolved."

12 You know they've been working on it for months.
13 Weinstein told you for approximately two years he knew they
14 were going to be sold.

15 "100 percent of the shares will be sold immediately on
16 January 2. One-third will go into the deferral plan as cash."

17 Remember what I told you? 8 million.

18 "The amount that goes into the deferral plan will be
19 reduced by Medicare taxes. The remaining two-thirds will be
20 paid to Joe. In essence, there will be share withholding and
21 the net amount of shares will then be immediately sold. This
22 way, less shares are reported sold.

23 "I asked Yash if there was a problem from an insider
24 trading perspective, and Yash told me there was not. Joe
25 previously made an irrevocable election to sell the shares

1 during the last window period. And according to their legal
2 counsel" -- plainly referring to Qwest -- "this qualifies for
3 an exemption for the insider trading rules."

4 Now, I respectfully submit he wasn't talking really
5 about the insider trading rules. He was talking about the
6 window.

7 Now, we know what the window was. We know what Yash
8 Rana told to Weinstein.

9 Let us look at what Yash Rana filed with the
10 Securities and Exchange Commission, Exhibit 110.

11 That's the filing. Go, please -- I'm not going to
12 take you through all the Mickey Mouse. I'm going to go to the
13 statement on page 4, please, in the interest of time.

14 First we have Rana on December 7 telling Weinstein
15 that Nacchio had made an irrevocable election during the
16 window.

17 "Remarks, the securities to which this notice relates
18 were issued to Mr. Nacchio pursuant to Qwest's growth share
19 plan. On November 3, 2000, Mr. Nacchio provided irrevocable
20 instructions for the sale of such securities according to Rule
21 10b5."

22 Now, this is the attestation of Yash Rana, a lawyer.
23 The --

24 "Attention, the person who -- for whose account the
25 securities notice relates to be sold hereby represents that as

1 of -- as of November 3, the date on which he provided
2 irrevocable instructions for the sale of such securities in
3 accordance with 10b5-1 . . ."

4 Now, Yash Rana certified to the SEC that he had such
5 instructions on November the 3rd and that those
6 instructions -- and that it was given as of November 3.

7 Now, let us look at Government Exhibit 100. The first
8 point, this letter is not addressed simply to Smith Barney. If
9 you look at the heading, it is addressed to Qwest
10 Communications International.

11 This is a document obviously prepared by Mr. Rana to
12 document and -- which he kept in his file at Qwest, where it
13 was found, if you recall the testimony, to document the fact
14 that such instructions had, in fact, been given by Mr. Nacchio.

15 If you look at the second paragraph, could that be
16 made big?

17 "In accordance with the company's insider trading
18 policy" -- and that, ladies and gentlemen, is this window up
19 and down that I've been talking about. "In accordance with the
20 company's insider trading policy, the undersigned certifies
21 that as of the date hereof, he has no material non-public
22 information and is not otherwise prohibited from trading in
23 company securities."

24 At the bottom, it's November 3. And what that letter
25 is meant to do is to document the fact that on November 3,

1 during the period of time when Nacchio could sell under the
2 company's own policy, he had given instructions to Rana that he
3 wanted the shares to be sold.

4 There is no reason on earth to create any kind of
5 false document. It is not a false document. It is the written
6 confirmation of the fact that such instructions were given.

7 You know from the testimony of Slater and Weinstein
8 that the intention of Nacchio was to sell those shares. He
9 didn't want them. He wanted cash.

10 And the effort -- there is no question about the fact
11 that the document itself was typed later on. There is no doubt
12 about it. Rana didn't know how to do it. He had to call
13 Grossman. He had to call Grossman to find out how to do it.
14 And Grossman didn't know how to do it. You remember, he called
15 all over O'Melveny & Myers, they had over 1,000 lawyers,
16 because this whole program and idea had just come into
17 existence in October.

18 So in December -- it is true enough, in December, when
19 Rana was trying to document the transaction and to have written
20 evidence that such a thing was done, he called Grossman.

21 And when did he call Grossman? He called Grossman
22 according to the testimony and the records on December the
23 8th to create the document for his file. And that's where it
24 was found, in his file.

25 And what is the purpose of this document? To provide

1 the backup that Rana wanted for the fact that he had the
2 instructions on or as of November 3, so that he had the
3 validation of what he had filed with the SEC.

4 He calls on November -- December 8 to get a form,
5 because he doesn't know what form to use.

6 Members of the jury, the Weinstein document states
7 that a day before he had called Grossman, that is on
8 December 7, Yash Rana called Weinstein and told him that the
9 election had been made.

10 Now, it's easy to make a mess, very hard to straighten
11 it out.

12 The fact of the matter is that there is no motive, no
13 intent, no reason to have anything phony or wrong about the
14 transaction.

15 Joe Nacchio had no material non-public information in
16 the form of a memo from Mohebbi. He certainly was not selling
17 his growth shares because he received a memo from Mohebbi.

18 And the effort of the prosecution to make it look like
19 there is something wrong going on here is because they have
20 absolutely no evidence of any improper motive or reason to sell
21 those shares, which every witness in this case has told you
22 under oath were going to be sold from the time the period was
23 advanced, that is, from August 13, 1999.

24 What motive, what reason, except to document the fact
25 that the decision had been made during a period where under the

1 company's policy it was permissible to make it. Because if he
2 had material non-public information, he couldn't sell. Window
3 or no window.

4 We will hear in rebuttal what the material information
5 that he came into possession of. Certainly, the budget fights
6 were going on in October and November anyway, and under the
7 chart which I showed you, you know, those subheadings with the
8 Mohebbi memo.

9 Well, it is unfortunate that I've had to take that
10 much time on the subject, but I had to for the reason that the
11 first two counts of the Indictment are those growth share
12 sales. They don't appear on this chart. This chart was used
13 by Fischel. This is a blowup of it. You'll have it in your
14 jury room.

15 It doesn't appear on here because they are not options
16 that were exercised. They were the sale of the growth shares
17 that had been promised to him way back in '96, that he earned
18 at the time that Qwest went public in '97, that had to vest
19 over a period of time, and would not be fully vested until the
20 end of 2001, but which were made vested earlier pursuant to the
21 letter of August 13, 1999.

22 He sold those as he intended to do. The price did not
23 matter. The information did not matter. He had no
24 information. He certainly didn't conduct a press conference to
25 beef up the price with the intent to make more money on the

1 growth shares because he couldn't make more money on the growth
2 shares no matter what the price was.

3 I'm going to race along.

4 I'm going to skip the part where Mohebbi testifies
5 that he himself had no role to play in terms of writing memos
6 about budgets, because that wasn't his job.

7 I do want to get to the second memo that he wrote,
8 which is Government's 905.

9 Can you --

10 This, I take it, is another piece of evidence that the
11 Government has offered on the basis of it being material
12 non-public information. I can think of no other reason for it.

13 The purpose of the memorandum, obviously, was the
14 second paragraph. And so Mohebbi testified. He had to get
15 this to Nacchio because Nacchio on the 21st was going to have
16 a conference call with Europe. And so the second paragraph, I
17 think, you may not be able to see it on your screen, is all
18 italicized.

19 Paragraph 2 speaks about a likely scenario for the
20 fourth quarter. He's attached the most likely scenario for the
21 fourth quarter. He says it's not in the bag yet, but he's
22 feeling better than he did same time last year.

23 Remember his explanation? He always worried about
24 being able to make the numbers.

25 Now, according to him, this memo is written on

1 December 20, which is only 11 days before the end of the whole
2 year, certainly the end of the fourth quarter, and he's still
3 worried about it. This is the enhanced quarter. This is the
4 one where they've upped the guidance, and they make it.

5 Says he's sending on some EBITDA numbers.

6 And then on paragraph 3, the gentleman who has told us
7 that this was not part of his job, and really had no special
8 expertise in it, says, I am setting our best estimate for the
9 first quarter of 2001 revenues, which I think is the most
10 critical aspect. As you can see, we need to hit at least
11 5.1 -- that's 5.1 billion, actually. He says huge number.
12 It's doable, he says. But if we don't crank up recurring
13 growth by April, we got big problems.

14 And now if we turn to page 3, we can see his comment,
15 which is if -- can you blow that up.

16 "If economy slows down, recurring growth could be at
17 big risk."

18 I don't know whether the Government takes a position
19 that this is more non-public material information, but I
20 suggest to you that it is not. It is simply a debate and a
21 discussion entirely contingent upon what someone assesses the
22 future of the American economy to be over the next 12 months.

23 You know in response to the memo which he puts on the
24 chair December 1 to 14 which -- he says, Nacchio immediately
25 responds, not in writing, but orally. We know that he

1 authorizes him to put in place the procedures which Mohebbi has
2 asked to put in place in order to make the business plan.

3 We know that he sends out -- Mohebbi, does an e-mail
4 telling people that they have to attend some conferences.

5 I'm not going -- 912, maybe I will, if it doesn't take
6 long.

7 This is Mohebbi to all of the top people in the
8 company, except Joe. "Required attendance."

9 And so he begins with the authority of Nacchio to
10 implement what he said needed to be implemented in order to
11 make the business plan.

12 And you know what? He gets pushed back. So he
13 obviously goes back to Nacchio and says, look, I'm not going to
14 be able to get this done.

15 And in an effort to support Mohebbi's requests,
16 Nacchio sends out a general memo to everybody, Exhibit 983.

17 This is February 28. It is entitled -- it is
18 addressed to Qwest senior management. It is entitled "Change
19 in Governance."

20 Second sentence, "With our current progress and future
21 continued growth in mind, I want to inform you about a change
22 we are making regarding our corporate governance. The goal
23 here is to speed decision-making. Therefore, effective
24 immediately, we are creating two decision-making teams, the
25 operations council chaired by Mohebbi and the revenue

1 generation council chaired by Jacobsen. The charter of the
2 revenue generation council is to ensure top line revenue growth
3 performance and metrics are being met or exceeded by each
4 company unit, and that new products, services and related
5 sources of revenue are in place and to take corrective actions
6 necessary to ensure we deliver on our revenue commitments."

7 And what revenue commitments is he talking about?
8 He's talking about the business plan inside the company and
9 telling these people that they've got to get with it. And he's
10 following Mohebbi's recommendations of how to get the budget
11 done.

12 And the budget by this time has been slightly reduced.
13 It's no longer 2 billion 991, it's 2 billion 8 something --
14 21 -- I left off a few billion, but I think you know.

15 If you turn the page, he actually sets up the two
16 committees.

17 Is it not a fact that these are the two committees
18 that were recommended in the Mohebbi memo? He's implementing
19 the plan. And he lines them up.

20 And then he says, "I will attend these two council
21 meetings only infrequently." He's backing off, just like
22 Mohebbi told him to do. "Therefore, I wish to make it
23 extremely clear" -- and I don't know if you can see it, I guess
24 you can, the rest is italicized -- "that Afshin and Steve will
25 have full decision-making authority and accountability."

1 Members of the jury, can there be any doubt about the
2 fact that when Mohebbi wrote it, in whatever time period he
3 says it was, left it on his chair, Nacchio, in fact, got the
4 message, and the message was, let's get with it. This is what
5 has to be done to meet the business plan. And that Nacchio
6 responded, and he did it.

7 This is not a man dumping stock because Mohebbi wrote
8 him that memo.

9 "Isn't it a fact, Mr. Mohebbi, the reason why
10 Mr. Nacchio had to write this is because there was pushback
11 from some of the people who were going to be serving on your
12 committee and Jacobsen's committee in proceeding with the
13 recommendations you had made?"

14 Answer: "There was a lot of pushback, specifically
15 on the revenue committee, which was Jacobsen. On the cost
16 committee, there was very little pushback.

17 "Would you agree with me that the reason for the memo
18 was to settle any question about your authority and Jacobsen's
19 authority to implement your suggestions?"

20 "That was part of it, yes.

21 "And that was the purpose" -- withdrawn.

22 "And to take corrective actions as necessary to ensure
23 that we continue to deliver on our operating and financial
24 commitments" -- I was quoting the memo to him -- "have I got
25 that right?"

1 Answer: "Yes.

2 "And that was the purpose and the intent of the
3 recommendations which you had made to him in December?"

4 Answer: "Part of those recommendations.

5 "I think just to pick up the thread of where we were
6 yesterday, you had testified to the fact that these were
7 stretch budgets that were being discussed; am I correct?"

8 Answer: "Yes.

9 "And what we're really talking about here is the
10 internal formation of a business plan, true?"

11 Answer: "We talked about that yesterday, yes.

12 "And I think it's clear, but I would like to confirm
13 with you that what is going on is that the people on the very
14 top of the company, Nacchio and perhaps Woodruff, were
15 attempting to set internal goals for public -- for a budget
16 plan that was higher than what some of their subordinates
17 wished to; is that correct?"

18 Answer: "That was part of what was going on in 2000,
19 yes.

20 "Now, having stretch business plans are a good idea,
21 right?"

22 Answer: "Having stretch in business plans is a good
23 idea."

24 I'm trying to skip around.

25 "Now, this note, or memo, or whatever you want to term

1 it, that you left on Mr. Nacchio's chair and discussed with him
2 later, I think you told us about that yesterday; am I correct?"

3 Answer: "Yes.

4 "This was, am I correct, an effort by you to help
5 Nacchio make the business plan?"

6 Answer: "I was giving him some ideas about how an
7 efficiently run Qwest could make an attempt to make the
8 business plan, to make the numbers.

9 "And you had a lot of suggestions in terms of how to
10 effectuate and bring about that; am I correct?"

11 Answer: "Yes.

12 "Now, at the time you wrote this, is it fair to say
13 that in your opinion one of the difficulties that the company
14 might face in successfully making the plan was that Mr. Nacchio
15 had too much central control within him, too many direct
16 reports, and had to do too much of the detail work; am I
17 right?"

18 Answer: "That was a key thing.

19 "I'm sorry, Mr. Mohebbi" -- I didn't hear him.

20 "That was a key concern," is his answer.

21 "And because of that concern and your desire to see
22 the plan be successful, you made various suggestions about how
23 to in a sense reorganize things; am I right?"

24 Answer: "Yes.

25 "And once again, just to move things along, basically,

1 that was to make closer supervision over the performance of the
2 business plan; am I right?"

3 Answer: "And to -- it was really to monitor closely
4 the performance of the business units as they were working
5 towards achieving their plans."

6 Members of the jury, I have no desire to waste your
7 time or to bore you. It was entirely necessary, in my
8 judgment, for me to go through this painful exercise because
9 Joe Nacchio is charged with using material inside information
10 as a reason to trade.

11 I am satisfied that you will be able to conclude that
12 under this Indictment the Government has alleged that that
13 Mohebbi memo was the inside information which served as a
14 reason for him to trade. And I had to do this to demonstrate
15 to you, not the implausibility but the impossibility of such an
16 allegation.

17 The Mohebbi memo was nothing but an effort by Mohebbi
18 to, under his own increased authority, to implement the budget
19 which had been in effect, which was under debate, and which was
20 substantially higher than the publicly stated financial targets
21 of Qwest, and did not address those publicly stated financial
22 targets.

23 I would like to address --

24 Can we put this on the -- I don't know if you folks
25 can see this very well, and I can't talk to you, so we're going

1 to have this put on your screen as well. It's Exhibit A-1982.

2 In essence, these are all the trades of Mr. Nacchio in
3 the year 2001. Except for the first two counts of the
4 Indictment, which deal with the growth shares and are not
5 exercise of options, all the counts are here. 2001.

6 These all reflect exercises of options by him during
7 the year 2001.

8 During that year, as you know, indeed, during the year
9 before, he sold no personal shares, sold none of his children's
10 shares, sold no shares of his family plan, executed on no
11 \$28.50 shares, as he promised the public that he wouldn't.

12 And that aside from the growth shares -- and I've done
13 all I can about that, he was planning to sell them for two
14 years. Aside from those growth shares, these all reflect the
15 exercise and sale of options which he told the public he was
16 going to do way back on October 31 of 2000.

17 Now, look at what he did. There is a break here,
18 there is a break here, then there is a break here.

19 At this point, on February 20, he enters a trading
20 program. Under that program, he's going to sell 11,500 shares
21 every day until June of 2003, because that's the number of
22 shares he has to sell everyday to get rid of not only the
23 4,412,000, \$5-1/2 options he has at the beginning of the year,
24 because, folks, he has -- at the end of 2000, he had 2 million
25 12. Then on the 31st, another 2.4 million vest. So he

1 starts out the year with 4,412,000 vested shares.

2 And what else does he know? He's going to get on
3 December 31 of 2001, he's going to get another 2400 --
4 2,400,000 vested options. So he knows that by the end of 2001,
5 he's going to have 2.4 million more for a total of 6,812,000
6 some odd vested \$5-1/2 options which are going to expire in
7 June of '03.

8 So as he said he would in October of 2000, he's
9 selling. And then he enters a trading program.

10 Now, this man, who they say had inside material
11 information that the company was going to do terribly, enters a
12 trading program which is going to obligate him to sell 11,500
13 shares a day for the next couple of years. Does that make any
14 sense?

15 What is the last thing that you would do if you
16 thought the company was going to be going down? You wouldn't
17 enter a program which obligates you to sell 11,500 shares a day
18 for the next couple of years.

19 And what about his 2,250,000, \$28 options? They had
20 vested here, in August of 2000. Price of stock at that time in
21 November, we know he could have had \$46, even at the end of
22 November, \$42. Nothing prevented him from selling those.

23 Now, we heard about nickels versus dimes and all of
24 that, and I don't remember what the analogy was, but where I
25 come from, that's maybe 15 or so dollars a share profit on

1 \$2.25 million. That's get on towards \$30 million of sheer
2 profit. But he doesn't do it.

3 Now he gets the Mohebbi memo, if that's supposed to be
4 what's supposed to drive this whole case.

5 In January, the stock is \$43. That's \$15 above the
6 strike price of the \$28.50 that he got there. That's over
7 \$30 million. All he's got to do is sell them. Window is open.
8 If you think the stock's going down, ladies and gentlemen, what
9 do you do? You just sell the \$5-1/2 shares? If that stock is
10 going down, what is going to happen that \$28.50 strike price?
11 It's going to go under water.

12 From first to last, he never sells a single one of
13 them, just as he promised the public that he wouldn't.

14 From first to last, he's attempting to sell the shares
15 that he asked the board to extend the life on, and he just
16 couldn't do it.

17 And then he enters a trading program which would have
18 obligated him to sell a set amount of shares every day for the
19 next couple of years. This, mind you, if he's under the notion
20 that the company's going down. And then why does he pull out
21 of the trading program?

22 You've heard the testimony, you heard it from Slater,
23 and you heard it from others. And, indeed, there was a public
24 announcement. He didn't want to sell under \$38 a share. And
25 you see what happened? The stock went under. And he was being

1 forced to sell at a price that he didn't want to sell.

2 And when he pulled out of the plan, he publicly stated
3 that that was the reason.

4 Now, I don't know what they're going to say. They're
5 going to say that the man was cooking up some kind of crazy
6 scheme, while, mind you, keeping his children's shares that he
7 paid \$2 million on in gift tax, not selling them, not touching
8 his 28.50, and what about the 560,000 shares he owned outright?

9 So he pulled out, and he started catching up here.
10 And then at the end, he went back into a plan to sell roughly
11 10,000 shares a day. But at a floor -- he put a floor in of
12 \$38.

13 And so that is why there is no sale while in that plan
14 under \$38 a share.

15 I don't even know what I'm doing. I mean, there is no
16 information here in terms of that the public needs to know.
17 There is certainly no information that is driving Nacchio to
18 sell, because he doesn't agree with anybody who is telling him
19 that the budgets are too high. There is nobody -- and I'm
20 going to show you that in a few moments -- that is telling him
21 that the publicly stated financial targets are too high, and
22 there is nobody during this entire period of time that is
23 telling him, advising him or asking him to take down the
24 publicly stated financial targets. Yes, I know, he does that.
25 But he does that in September. And I'm going to cover that in

1 a few minutes. He is executing the plan that he told the
2 public about.

3 The first plan is Exhibit 579. Second paragraph,
4 please.

5 "Nacchio intends to sell stock that will be issued
6 upon the exercise of 6.1 million options that he was granted in
7 June 1997. These options must be exercised by June 30, 2003.
8 He intends to sell 11,500 shares daily beginning February 20
9 until June 30, 2003, or 6.1 million shares total. The daily
10 share price will not affect the number of shares sold that
11 day." In other words, there is no floor. There is no ceiling.
12 There is no floor. He's at the mercy of the market.

13 And then he pulls out. Why? Because he's bullish on
14 the stock. And when he's able to get back in, he enters
15 another sales plan. Government's 1612A.

16 This is the actual plan, page 2, please.

17 Can you make big the top paragraph, or just the last
18 two sentences, "For purposes of this agreement."

19 "For purposes of this agreement, the daily share
20 amount is 10,000 shares a day. No sale of stock shall be made
21 under this sales price at a price of less than \$38 per share."

22 What's the net result of that? He never, ever sells
23 another \$5.50 option, ever, because he remains in the view that
24 the stock should not be sold under \$38 a share.

25 And when the year 2001 ends, he has more \$5.50 options

1 than he had at the beginning of the year.

2 He began the year with 4,412,000. At the end of the
3 year, when you include the last tranche he got in December, he
4 had 4,640,902. He had 228,000 \$5.50 options more at the end of
5 the trading period, the end of the year, than he had at the
6 beginning.

7 This is the man they said was busy dumping stock
8 because of his inside information and cheating the public.

9 Of his \$28.50 options, he sold none. None. Not a
10 single one.

11 Now, in fairness, the second tranche was probably
12 under water when he got it. If my memory serves me, couldn't
13 have sold. But he sure could have sold these. He sure could
14 have taken home \$15 on every one of those shares if he wanted
15 them. He ate them, every bit of it.

16 If you look at the percentages, it's all there. But,
17 folks, that's just statistics. You can make numbers dance.
18 There is one number you can't make dance, and that is 4,640,000
19 \$5.50 options that that man never did a thing with, this man
20 who they said is busy unloading stock.

21 There is a couple of other numbers you can't change,
22 in the words of the Rubaiyat, "Not all their tears nor piety
23 wipe out half a line."

24 This is what his family owned on December 1, 2000.
25 This is what his family owns when he left.

1 There was one bequest which accounts for the -- you
2 know, gift, charitable gift. Total of his personal and family
3 shares sold, none. That's a lot of money. That stock was at
4 40 and more through much of the period we're talking about.
5 That's a lot of money. It's a lot of money not to realize, and
6 it's a lot of money to walk away from because you believe in
7 your own company.

8 Now, I've got to go through -- I'm sorry, but there is
9 a great deal at stake. I'm sure you're growing tired of me,
10 and I'm growing tired of myself, and I'm tired anyway. I'd
11 like to sit down and shut up, but I have an obligation, and I
12 can't do it.

13 So I have to go through what happened in April, into
14 May while all of this was going on. I have to go into what
15 happened when they took down the numbers and why they took down
16 the numbers.

17 And all I can do is ask for your patience and your
18 indulgence.

19 Now, we've heard from the prosecution that April was
20 going to be an important month. We've seen that in the Mohebbi
21 memo. We've heard that from Ms. Conry. Everything --
22 something has to happen in April.

23 Well, something did happen in April. In April, the
24 company got a \$1.5 billion contract with Microsoft that you
25 might remember. And a very important meeting took place on

1 April the 9th.

2 I'm going to use Mr. Mohebbi's own document on this
3 one, the one with his handwriting on it, which is 929A, please.

4 On September 9, there was a meeting. Who attended?
5 Ms. Szeliga, Mr. Mohebbi, Mr. Nacchio. What was the purpose of
6 the meeting? Well, I'll let Ms. Conry do it, I think she did
7 the direct.

8 "And did you prepare any forecasts or updates for
9 Mr. Nacchio once you had data for April -- I'm sorry, for
10 March?"

11 Answer: "Yes, I did.

12 "Could you take a look at Government's Exhibit 929."

13 Members of the jury, 929 is just another version of
14 929A, except 929A has Mohebbi's handwriting on it.

15 "Could you take a look at Government's Exhibit 929.
16 Have you seen that document?

17 "Yes, I've seen it.

18 "When did you first see it?

19 "Right around the date, April 9.

20 "Again, just remind the jury how much data or actual
21 financial information did you have when you prepared this
22 exhibit?

23 "Well, we had the first three months of the year
24 revenue.

25 "Is the first three months known as the quarter?"

1 Answer: "It's known as the first quarter.

2 "Why did you have this document prepared, Ms. Szeliga?

3 "Well, as I said earlier, we built the budget at the
4 product level, so this document was to show Joe Nacchio, Afshin
5 Mohebbi where we were, the product level where we compared our
6 budget to our actuals in the first quarter."

7 Question: "But you have a recollection, Mr. Nacchio
8 was there?"

9 Answer: "Yes, Mr. Nacchio, Mr. Mohebbi."

10 Now, if we could turn to the first page.

11 That's Mr. Mohebbi's handwriting.

12 First bullet point, "21.5 billion current estimate
13 versus BOD plan of 21.8."

14 Mr. Mohebbi wrote in the word "street."

15 Now, in fact, as you know, I'm sure this must be
16 engraven on your souls, the street estimate was 21.3 to 21.7,
17 so what Mohebbi wrote in there was, you know, smack in the
18 middle, 21.5. You've seen that time and time again.

19 Now, in the second page, that's the one that you get
20 referred to -- the first column, 2000, were actual numbers.
21 We've learned that in 2000, the company actually did 18 billion
22 953. I've always rounded it down to 18 billion 950. And as
23 we've heard, probably ad infinitum, that was over 450 million
24 more than the DLJ estimate.

25 The current estimate, according to Ms. Szeliga and

1 Mr. Mohebbi on April 9, was that the company would do on
2 December 31, 2001, \$21,560,000,000.

3 I hope you appreciate, members of the jury, the
4 significance of the fact that as they met there, the three of
5 them, on April the 9th, Mr. Mohebbi, Ms. Szeliga and
6 Mr. Nacchio, Mr. Nacchio was being told -- and this document
7 tells you -- that at that time, those people estimated that on
8 December 31, 2001, the company would do \$21,560,000,000. And
9 that's not just me saying it. I put it right to Ms. Szeliga.

10 "Now, Ms. Szeliga, the street guidance that we're
11 talking about is another way of saying publicly stated
12 financial targets; is that right?"

13 Answer: "Yes, I believe that's correct.

14 "And as of that time, that is, April 9, 2001, the
15 publicly stated financial targets for Qwest for the year 2001,
16 at the end of the year 2001, was a range of between
17 21.3 billion and 21.7 billion; is that correct?"

18 Answer: "Yes.

19 "Now, even as of April 9, with all the debates you've
20 told us about, the internal current view of Qwest was that they
21 would reach 21 billion -- 21.5 billion by December 31, 2001.
22 That's correct, isn't it?"

23 Answer: "I think so, yes.

24 "Now, these were the publicly stated financial targets
25 which had been issued on September 7, 2001, correct?"

1 "Give me the date again, please.

2 "September 7, 2000.

3 "Yes."

4 That's Ms. Szeliga, one of the two main government
5 witness who told you under oath that as of April 9 the internal
6 projection to Nacchio, and as you will shortly see, to the
7 board, is that they would meet the publicly stated financial
8 targets.

9 "Mr. Mohebbi, do I have it right that on April 9,
10 2001, there was a meeting that Mr. Nacchio attended with you
11 and other senior executives of Qwest?"

12 Answer: "Yes.

13 "Am I right that the purpose of that meeting was to
14 take a snapshot of what was going on and get a feel about how
15 things were progressing in terms of the business plan that you
16 had since December?

17 "Among other things, yes.

18 "And that was a process, I would gather, that the
19 corporation monitored, you know, as it went along, right?"

20 Answer: "The process of monitoring the progress
21 being made?"

22 Question: "Sure."

23 Answer: "Yes.

24 "Would you kindly turn to page 3 of the same document.

25 "Yes, of the document."

1 Question: "That's the document that Mr. Stricklin
2 just questioned you about maybe 10, 15 minutes ago; is that
3 right?"

4 Answer: "Yes.

5 "And that's the one that shows recurring and
6 non-recurring?"

7 Answer: "Yes.

8 "Now, do I read this correctly, that the 2000 numbers
9 are not estimates, they're actual numbers, because all of that
10 information was in, correct?"

11 Answer: "Yes.

12 "And therefore, we know that in the year 2000 the
13 company actually had revenue of 18,953,000,000, right?"

14 Answer: "Yes.

15 "Now, the next column, what the estimate was of what
16 the company was going to do at the end of 2001, do I have that
17 right?"

18 Answer: "The top portion?"

19 Question: "Yes. That's the estimate; is that
20 right?"

21 Answer: "Current estimate.

22 "And the number underneath there, 2001 plan, was the
23 budget, right, the plan?"

24 "I believe so.

25 "So what this document shows, does it not, is that on

1 April 9 of 2001 the senior executives assembled in
2 Mr. Nacchio's conference room believed that they were going to
3 miss the \$21.8 billion budget, right?"

4 Answer: "The current estimate was short of plan,
5 yes.

6 "But it was in excess of the 21.3 billion of the
7 publicly stated financial targets. That's a fact, isn't it?"

8 Answer: "Yes.

9 Is that right?

10 "And then sitting there on April 9, 2001, the then
11 current estimate for performance at the end of 2001 for the
12 corporation was 21,560,000,000, correct?"

13 Answer: "That's what this report says, yes."

14 Question: "And you were there, right?"

15 Answer: "I was in the meeting, yes.

16 "And you made the notes on it, right?"

17 "Yes.

18 "That was well within the publicly stated financial
19 targets that had been issued on September 7, 2000. That's
20 true, isn't it?"

21 Answer: "It was in the range.

22 "As a matter of fact, it was \$260 million higher than
23 the low end of the range, right?"

24 Answer: "Yes.

25 "And only 140 million less than the high end of the

1 range, right?"

2 Answer: "Yes."

3 I know this is laborious, but what can I do? There
4 has been so much testimony, so many exhibits, there has been so
5 much confusion between budgets and targets.

6 And when you're in that jury room, you're going to
7 have to consider what actually went on here. And I would
8 suggest to any one of you that if somebody says to you in that
9 room, oh, what about the recurring and the non-recurring, and
10 what about, you know, the mix and the this and the that? The
11 fact of the matter is, the only thing charged in this
12 Indictment is whether or not the publicly stated financial
13 targets of Qwest were known to be unattainable by Nacchio and
14 that that was the reason why he sold his stock, and none of
15 that is true.

16 And I'm going through this to demonstrate that as late
17 as April the 9th, sitting in a room, Mohebbi, Szeliga and
18 Nacchio projected that they were above the low end of the
19 range.

20 And lest there be any doubt about what was shown to
21 the Board of Directors on May 2, there was a budget overview of
22 the audit committee of the board, Government Exhibit 935,
23 please.

24 If you would kindly turn to page 2.

25 As of April 19, as reported to the board, the audit

1 committee of the board, they were coming in lower than their
2 budget of 21.8. That's the reduced budget. But that the
3 estimate given to the Board of Directors for year end of 2001
4 was 21,532,000,000, which is obviously smack dab in the middle
5 of the low and the high range of the publicly stated financial
6 targets of Qwest during that period of time.

7 Members of the jury -- thank you for that.

8 There can be no doubt that Nacchio wasn't hearing
9 anything different than the public was hearing. There is two
10 elements to this, you know. There not only has to be material
11 non-public information, but the person accused of trading has
12 to be trading on it. Putting aside the fact that Joe Nacchio
13 was a believer in his company, and certainly wasn't trading on
14 Afshin Mohebbi's view of what the company was going to do, the
15 fact of the matter is, what that company was saying internally,
16 in its own estimates of its own budget, into May, was that they
17 were going to be flat dab in the middle of the range of the
18 publicly stated financial targets.

19 There is no easy way for me to do this. I mean, this
20 is painful. But we didn't bring these charges. And while I
21 have no burden of proof, I can't take a chance under the
22 circumstances of leaving anything to be unclear here.

23 Nacchio was told in May what the public was told in
24 May. Oh, sure, this guy says, if this happens, then we won't
25 do that. And another guy says, if that happens, then that

1 won't happen. And you can hear that around any water cooler in
2 any company in the United States, but that's not material
3 non-public information.

4 What he was being told was, they were making the deal.

5 Just give me one minute. I'll take a swig and go on.

6 Now, don't think for a moment that the prosecution
7 doesn't know that they'd like to have some evidence that Joe
8 Nacchio was told by somebody, whether Mohebbi or Szeliga, that
9 he ought to take down the public numbers. Ms. Conry here, she
10 tried to get that out of Szeliga. But Szeliga wouldn't give it
11 to her, because it wasn't true.

12 Oh, it became true in August and September, but
13 Ms. Conry wanted to hear about that in April and in May. But
14 it wasn't true. And Szeliga wouldn't say it.

15 "Now, Ms. Szeliga, at any time during the spring of
16 2001, did you have any conversations at all with Mr. Nacchio
17 about taking down the numbers or taking down the targets at
18 Qwest?"

19 Answer: "I don't recall having conversations in the
20 spring about Mr. Nacchio taking down the internal target."

21 Ms. Conry says, "Okay. What about the external
22 target?"

23 Nope, no dice, wouldn't say it.

24 "Okay," says Ms. Conry, "the best you can recall, it
25 was sometime in April or May; is that right?"

1 "That's the best recollection I have.

2 "Do you remember if anyone else was involved in the
3 conversation?"

4 Answer: "I believe Mr. Mohebbi participated in the
5 conversation with Mr. Nacchio and I and possibly, I believe,
6 Mr. Tempest was there as well.

7 "Okay. Do you recall where the conversation takes
8 place?"

9 Answer: "My vague recollection of the conversation
10 was on the 52nd floor, but, again, it's vague and in general
11 time frame. We were using the information we had on the first
12 quarter results and current estimate part of the conversation.

13 "Okay. I'm just asking for your best recollection. I
14 appreciate your trying. Do you recall when you or others --
15 what you and others said to Mr. Nacchio?"

16 Answer: "There were comparisons made to the external
17 range that was shared to where our current estimate was, but I
18 can't give you anything more specific than that.

19 "Do you recall what his response was?"

20 I objected. It was overruled.

21 "Go ahead and answer.

22 "Okay. I'm sorry. I didn't hear that.

23 "My recollection is, Mr. Nacchio participated in the
24 discussion, but that there was no conversation from me to him
25 or back insisting that the numbers be brought down at that

1 time. It was just a conversation assessing where we were."

2 Sure, they'd like to have somebody tell Nacchio, take
3 down the public numbers. But they don't. Nobody did, because
4 the estimates at the time were that they were going to make
5 them. Not the top of them, but right between 21.3 and
6 \$21.7 billion.

7 Now, I asked her on cross-examination, "Do you recall
8 that there were economic studies prepared for the responsible
9 management of Qwest so that they could monitor what the
10 economic conditions were within the Qwest region as compared to
11 what they were in other parts of the country?"

12 Answer: "Yes, sir, I recall that.

13 "Do you recall that during the period of May, June and
14 July receiving reports that indicated that while other parts of
15 the country were having substantial economic slowdowns, the
16 Qwest region was doing better?"

17 Answer: "I recall the discussions, but not receiving
18 documents."

19 *THE COURT:* Is this a good time for lunch?

20 *MR. STERN:* Oh, it would be a great time. Thank you.

21 *THE COURT:* Members of the jury, we'll take the lunch
22 recess.

23 Please be back by quarter after 1:00, and we'll get
24 going again.

25 You're excused.

1 (Jury out at 12:05 p.m.)

2 All right. Anything we need to do at this time?

3 *MR. STERN:* No.

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

5 *THE COURT:* All right. Court will be in recess.

6 (Recess at 12:06 p.m.)

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11 REPORTER'S CERTIFICATE

12

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

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

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Therese Lindblom, CSR, RMR, CRR

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