

## EXHIBIT 2

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. NACCIO,

8 Defendant.

9 REPORTER'S TRANSCRIPT  
10 TRIAL TO JURY  
11 VOLUME ONE

12 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,  
13 Judge, United States District Court for the District of  
14 Colorado, commencing at 12:04 p.m., on the 20th day of March,  
15 2007, in Courtroom A1001, United States Courthouse, Denver,  
16 Colorado.

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

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25 PROCEEDINGS  
26 THE COURT: Good afternoon, members of the jury.  
27 We're ready to hear the opening statements of the lawyers.  
28 Mr. Hearty.

29 OPENING STATEMENT  
30 MR. HEARTY: May it please the Court. Counsel.  
31 Ladies and gentlemen of the jury, good afternoon.  
32 This is a case about cheating. Joe Nacchio, who is  
33 the chief executive officer at Qwest Communications, he sold  
34 100 million worth of Qwest stock, and when he knew about  
35 problems at Qwest, problems that people outside Qwest did not

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1 know.  
2 And after learning about those problems, in  
3 December 2000, Mr. Nacchio sold his stock faster than he ever  
4 sold it before.  
5 Joe Nacchio is charged with 42 counts of insider  
6 trading for selling \$100 million worth of Qwest stock in the  
7 first five months of 2001.  
8 Now, the judge will instruct you on what the law is.  
9 And just in its most basic terms, it is illegal for a corporate  
10 insider to sell stock in his company on the basis of important  
11 inside information; that is, information people outside the  
12 company don't have. And that's based on a very simple  
13 principle, fairness.  
14 Corporate insiders are in a position where they can  
15 take advantage of the information that they have that people  
16 outside the company don't have.  
17 Now, at its core, this case is fairly simple.  
18 Joe Nacchio was the chief executive officer of a very  
19 large company, Qwest Communications. And because of that  
20 position, he had -- he knew a lot of information that people  
21 outside the company did not know. And in December 2000,  
22 Mr. Nacchio learned of problems that Qwest would be facing in  
23 2001. And those problems were kept inside Qwest. People  
24 outside the company did not know about them.  
25 In fact, Mr. Nacchio frequently talked to investors

1 during this time frame, and he told investors that everything  
2 at Qwest was great, that Qwest was better than his competitors.

3 Now, Mr. Nacchio, the evidence will show, knew that  
4 the problems that he was told about were not known outside the  
5 company. And he knew that the information was information that  
6 would be important to investors, and that he sold \$100 million  
7 of Qwest stock.

8 The people outside Qwest, including the people who  
9 bought the stock that he sold, did not have the benefit of  
10 knowing about those problems, so when they made the decision to  
11 buy Qwest stock, they didn't have the advantage that he had of  
12 knowing about those problems when they made the decision how  
13 much they were willing to pay for Qwest stock.

14 When Joe Nacchio sold \$100 million worth of Qwest  
15 stock in 2001, we will prove that the playing field was not  
16 level.

17 Ladies and gentlemen, my name is Jim Hearty, and  
18 together with my colleagues, we represent the United States of  
19 America. And I know you were introduced to most of my  
20 colleagues yesterday, but many of you were sitting in different  
21 seats in different courtrooms. I'm going to take a moment now  
22 to introduce you to everybody.

23 This is Cliff Stricklin, he's another one of the  
24 attorneys on the case; Colleen Conry; over here is Leo Wise,  
25 who I don't think you have been introduced to yet; and Kevin

1 failed to meet the growth objectives that they set for  
2 investors, the company's stock price was punished. It would  
3 typically drop.

4 Now, Mr. Nacchio told you -- chose to talk to  
5 investors frequently. And you'll hear that he was a persuasive  
6 promoter of Qwest. And he knew that what he said about Qwest,  
7 particularly what he said about Qwest's future growth  
8 projections, had a significant impact on Qwest stock prices.

9 And in late 2000 and early 2001, Mr. Nacchio talked to  
10 investors frequently. And he repeatedly told them that Qwest  
11 was different than his competitors who were struggling.

12 In fact, he told investors to expect high growth from  
13 Qwest. And in his words, Qwest's growth was two to three times  
14 that -- that is, Qwest's growth that he was projecting for  
15 investors was two to three times that of its competitors. And  
16 unlike other companies, Mr. Nacchio told investors that he was  
17 very confident that Qwest would achieve those high growth  
18 targets that he told investors to expect.

19 However, at the same time, Mr. Nacchio is being told  
20 very different information from his executive team inside  
21 Qwest. He was being told that the targets that he set for 2001  
22 were unrealistic. He was being told that in order for Qwest to  
23 achieve those growth targets, Qwest would have to grow in a way  
24 that it never grew before.

25 In fact, he was told that Qwest would have to grow its

1 Traskos; and also assisting the United States in this case is  
2 Special Agent Susan Montoya, sitting here next to Mr. Traskos,  
3 with the FBI; and Postal inspector Joe Jan Henderson; and  
4 finally Mr. Mike Denno, who is going to be helping us with our  
5 courtroom presentation so you'll be able to see exhibits and so  
6 forth, hopefully, on the screens in front of you here shortly.

7 This is a straightforward case. It isn't a case about  
8 accounting; it's a case about fairness. There would have been  
9 nothing wrong with Mr. Nacchio selling his stock, so long as he  
10 told investors outside of Qwest, including the investors who  
11 bought the stock that he sold, about the problems that he knew  
12 about inside Qwest, problems that he knew about because of his  
13 position as an insider at Qwest Communications.

14 Now, in late 2000, you're going to hear that many of  
15 Qwest's competitors were beginning to have problems. And in  
16 November and December of 2000, big companies like AT&T, SBC and  
17 WorldCom were telling their investors they weren't performing  
18 as well as they had expected to. They were telling investors  
19 they weren't going to grow as much as they had previously told  
20 them to expect.

21 You're going to hear that growth, particularly in this  
22 time frame and in this industry, telecommunications, was very  
23 important to investors and so, therefore, had a significant  
24 impact on company stock price.

25 And you're also going to hear that when the company

1 core recurring business at twice the rate that it had grown in  
2 2000; that is, it would have to double its rate of growth when  
3 economic conditions at that time were driving the prices down  
4 for many of Qwest's products.

5 Now, inside Qwest, Mr. Nacchio knew about those risks.  
6 However, outside Qwest, investors didn't.

7 Now, by April of 2001, Mr. Nacchio knew that the risk  
8 that Qwest would not be able to achieve the growth targets that  
9 he told investors to expect was even greater, because by  
10 April 2001, Mr. Nacchio had the results of how Qwest had  
11 actually performed in the first three months of the year. And  
12 what he knew is that Qwest was not growing at a rate that was  
13 sufficient to hit the yearly targets that he had told investors  
14 to expect.

15 He was also told during that time period that the way  
16 that Qwest had made its numbers in the past, that is, the way  
17 that Qwest had achieved the growth targets that they told  
18 investors to expect, were large, one-time transactions, and he  
19 was told that in the second half of 2001, not to count on  
20 large, one-time transactions to make the numbers.

21 Now, inside Qwest, Mr. Nacchio knew of those risks.  
22 But outside Qwest, investors didn't.

23 Now, with the benefit of knowing these risks, risks  
24 that the public did not know, Mr. Nacchio sold \$100 million  
25 worth of Qwest stock. And you will hear that keeping the

1 these mutual fund companies, companies like Janus, American  
 2 Funds, Fidelity, they have analysts that work for them that  
 3 would follow Qwest stock and make recommendations as to whether  
 4 or not the fund managers should own Qwest stock or not.  
 5 Qwest stock was also owned by pension funds.  
 6 Basically, worked the same way. People's retirement savings  
 7 being managed by a fund manager, who is making decisions about  
 8 how those funds are invested.  
 9 And Qwest stock, of course, was also owned directly by  
 10 individual investors, who also at times would listen to the  
 11 recommendations of the analysts.  
 12 Now, Mr. Nacchio knew the importance of impressing  
 13 Wall Street, and so he chose to talk to Wall Street frequently.  
 14 It's worth having some basic understanding of how  
 15 investors and analysts value Qwest stock during this time  
 16 period. And so I'm going to talk a little bit about how that  
 17 was done. There is going to be on your screen in front of you  
 18 some slides that I think they're -- you all share one of the  
 19 screens, so hopefully you'll be able to see this on the  
 20 projector.  
 21 Can you all see that on your screen?  
 22 Sorry about the delay.  
 23 So investors -- how investors make decisions about  
 24 Qwest stock. And one of the most important things I -- I  
 25 mentioned this a couple of minutes ago to investors, is what

1 they could about how the company was growing and what their  
 2 plan to grow in the future was.  
 3 And then finally, the last point on this slide is  
 4 investors wanted to know, did Qwest achieve their growth  
 5 targets? This relates to the credibility of what the growth  
 6 targets are. Investors are interested to look back at Qwest  
 7 management and say, have you achieved your growth targets that  
 8 you told us you were going to achieve in the past?  
 9 And you'll hear that Mr. Nacchio understood the  
 10 importance of achieving those growth targets. And in fact, he  
 11 told employees that even a small miss, that is, even a slight  
 12 miss, in achieving those growth targets that he sets for  
 13 investors would result in a serious impact to Qwest stock  
 14 price. And in Mr. Nacchio's words, Qwest stock will get  
 15 whacked if they miss by even a small amount.  
 16 The next thing I want to talk to you about is the  
 17 slide I had in front of you a minute ago, and we'll get there.  
 18 That is, what is guidance. You're going to hear in  
 19 this trial the term "guidance." And these are the growth  
 20 projections that Qwest management -- and at Qwest, it was Joe  
 21 Nacchio that set Qwest guidance, but it is what Mr. Nacchio  
 22 told investors to expect that the company could achieve.  
 23 And the future growth of the company.  
 24 You're going to hear from investors -- you're going to  
 25 hear that investors relied on guidance, because executives

1 was Qwest's future growth rate? So investors are more  
 2 concerned, of course, when they're making decisions about how  
 3 Qwest is going to do in the future, not necessarily what they  
 4 did in the past. They'll use the past information to try to  
 5 help determine what they're going to do in the future. What  
 6 they're interested in is how the company is going to do in the  
 7 future.  
 8 Particularly, they're interested in the future growth  
 9 rate of the company. And the idea there is, is that investors  
 10 are willing to pay more for stock today if that stock is  
 11 predicted -- that company, I should say, is predicted to grow  
 12 in the future.  
 13 And the more the company's predicted to grow in the  
 14 future, the higher price investors are generally willing to pay  
 15 today for that stock.  
 16 And so one of the other pieces of information that  
 17 investors -- I apologize.  
 18 Hopefully that makes more sense and tracks what I'm  
 19 telling you.  
 20 One of the other things that investors wanted to know  
 21 from Qwest, and from other companies, is, how are they growing?  
 22 That goes to investors are trying to evaluate whether  
 23 or not the growth projections being given to them by the  
 24 company are realistic, can they count on them?  
 25 And so investors want to know as much information as

1 inside the company like Mr. Nacchio know much more about the  
 2 company than people outside the company, so they relied on that  
 3 information in making their investment decisions. And guidance  
 4 is also referred to as targets. So you're going to hear these  
 5 growth projections that Mr. Nacchio makes referred to both ways  
 6 as guidance and targets. In fact, this afternoon, I'll  
 7 probably refer to them more as targets. That's just a term  
 8 that is more comfortable for my use. It's basically the same  
 9 thing. Guidance and targets.  
 10 Now, you'll hear that Mr. Nacchio knew the importance  
 11 that investors placed on guidance, and particularly on future  
 12 growth.  
 13 And so Mr. Nacchio's guidance to investors was that  
 14 Qwest would grow a lot in the future. And you'll hear that  
 15 that helped drive Qwest stock price up, or at least keep it up.  
 16 We will prove, however, that investors outside Qwest  
 17 did not know what Mr. Nacchio knew about the risks of Qwest's  
 18 ability to achieve that guidance that he told investors to  
 19 expect in 2001.  
 20 Now, many of you have probably seen the large sign on  
 21 the building just more than a block away from this courthouse,  
 22 the large Qwest sign on the Qwest tower. During this trial --  
 23 in fact, that's the sign -- by the way at night, for those of  
 24 you in the Denver area, blue neon light that comes out of that  
 25 sign, during this trial will take you to the 52nd floor of

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9 REPORTER'S TRANSCRIPT  
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10 VOLUME TWO

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11 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,  
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1 questions about that.

2 Remind me what your answer to that question was.

3 A. Mr. Nacchio directed the investor relations portion, which

4 was about 90 percent of the direction I got from Qwest.

5 Q. Who in the company took the biggest role in determining

6 what was said to the investing public?

7 A. Mr. Nacchio did.

8 Q. How did Qwest in 2000 and 2001 communicate with investors?

9 A. We communicated through a number of means, issuing press

10 releases, holding conference calls, a number of direct

11 face-to-face meetings were the primary vehicles we used.

12 Q. Mr. Wolfe, you first mentioned press releases. How did

13 Qwest use press releases to communicate with investors?

14 A. We announced the quarterly earnings results, as well as

15 other announcements of product releases or information that we

16 felt we needed to communicate to the investor public.

17 Q. And just so we're clear, when you say the "quarterly

18 results," what are you referring to?

19 A. Four times a year, at the end of March, June, September,

20 December, Qwest, as public companies do, issued the results --

21 financial results for the quarter.

22 Q. What format were they issued in?

23 A. The press release would give an overview of the financial

24 results, operational results, and then there would be the

25 financial statements attached to the press release.

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6 PROCEEDINGS

7 THE COURT: Good morning.  
Mr. Wise, you may proceed.

8 MR. WISE: Thank you, Your Honor.  
Good morning, Mr. Wolfe?

9 THE WITNESS: Good morning.  
(LEE WOLFE, GOVERNMENT'S WITNESS, PREVIOUSLY SWORN)

10 DIRECT EXAMINATION CONTINUED

11 BY MR. WISE:

12 Q. Mr. Wolfe, yesterday I asked you who your boss was in the  
investor relations department, and I want to ask you some more

1 Q. How -- the press releases, how were they prepared?

2 A. I typically started with a -- I prepared a list of issues

3 and concerns that existed in the investment community, gave it

4 to Mr. Nacchio and the CFO. They got feedback primarily from

5 Mr. Nacchio in terms of how he wanted to position issues in the

6 quart --

7 Q. Mr. Wolfe, if I could interrupt you for a second, when you

8 use the word "position," what do you mean?

9 A. How we wanted to talk about them, express them in the press

10 release to the -- to the investor audience.

11 Q. You said you would prepare a list of issues, give them to

12 Mr. Nacchio, then he would talk with you about how to position

13 them was the word you used?

14 A. Yes.

15 Q. And he would give you feedback. What happened next?

16 A. Then investor relations in conjunction would do an initial

17 draft of the press release, and we would have a bit of the

18 review process with some of the senior executives, go to

19 Mr. Nacchio for his review.

20 Q. When you say "review," describe what you mean.

21 A. He would read the press release and make changes that he

22 felt were appropriate, and he usually made quite a few changes.

23 Q. What did you do with the changes Mr. Nacchio made?

24 A. We incorporated them in the press release, usually

25 verbatim, and the -- gave it back to him for a final review,

1 about a Wall Street Journal equal that questioned the viability  
 2 of the telecom sector, so it's bad news, and he responds  
 3 directly --  
 4 THE COURT: Will your -- and your proof will include  
 5 the fact that he participated in this decision, I assume?  
 6 MR. WISE: Yes.  
 7 THE COURT: Mr. Richilano.  
 8 MR. RICHILANO: This concern raised by the Wall Street  
 9 Journal has nothing to do with the allegations in the  
 10 Indictment, nothing to do with these one-time transactions, as  
 11 the Court was seeking in its question back. It has to do with  
 12 other issues that are unrelated to this case. And to inject  
 13 this into the case is a 403 problem.  
 14 THE COURT: What is it --  
 15 MR. WISE: The issue is --  
 16 THE COURT: Do you have the Wall Street Journal  
 17 article?  
 18 MS. CONRY: I've got it.  
 19 MR. WISE: The issue is, they're withholding  
 20 information on how a company is growing. The Wall Street  
 21 Journal publishes an article that says the whole sector is not  
 22 going to be able to grow. He goes out and tries to say, oh,  
 23 no, that's not us, we're different. He affirmatively goes out,  
 24 this was an unscheduled call, and he made the decision, and he  
 25 tries to dissuade the public from believing that there are

1 Really what you want is Mr. Nacchio's reaction to this  
 2 article?  
 3 MR. WISE: Yes.  
 4 And Mr. Wolfe has testified that investors didn't know  
 5 these one-time deals were being done. And this article says  
 6 that the market for these things -- calls in question the  
 7 market for these things, so he goes out and says, we're  
 8 different, don't worry.  
 9 THE COURT: The objection is overruled.  
 10 Now, I'm not making a ruling on everything after  
 11 May 29 can come in. I think we still will try to limit it.  
 12 But it appears to me he was still trying to sustain the stock,  
 13 and it goes to his state of mind. And there is the question of  
 14 materiality.  
 15 MR. STERN: Can I make a statement about the case as a  
 16 whole?  
 17 THE COURT: I don't think so.  
 18 MR. STERN: In 10 seconds, please.  
 19 THE COURT: All right. He wants to make a statement  
 20 about the case as a whole.  
 21 MR. STERN: I move to --  
 22 THE COURT: If it has anything to do with venue --  
 23 MR. STERN: No, I'm hooked at this point.  
 24 THE COURT: Go ahead.  
 25 MR. STERN: The Government's position is that the

1 growth problems in the sector.  
 2 THE COURT: I guess I have to look at the article.  
 3 And then your proffer is something happened in response to the  
 4 article, right?  
 5 MR. WISE: They -- right, the call, they did the call  
 6 in response to the article.  
 7 MR. STERN: Judge --  
 8 THE COURT: You're invited, but as a spectator.  
 9 MR. STERN: They talked about opening, which I  
 10 think --  
 11 THE COURT: You're invited because I didn't want to  
 12 exclude you. I really mean it when I say there is going to be  
 13 one lawyer for each side.  
 14 You did the same thing.  
 15 MR. STERN: No, I would never. It was welcome.  
 16 MR. RICHILANO: Could the Court tell us the exhibit  
 17 number.  
 18 THE COURT: I'm looking at 731, which purports to be  
 19 the article.  
 20 Can you direct me to it. It's five pages.  
 21 MR. WISE: Let me -- the whole article talks about a  
 22 glut in the sector, and --  
 23 Your Honor, we've got a highlighted copy that could  
 24 maybe point to it.  
 25 THE COURT: Okay.

1 company did not have to change the numbers. That is their  
 2 position pretrial and during trial. I move to dismiss the  
 3 Indictment.  
 4 THE COURT: Denied.  
 5 MR. WISE: The very next day, they did another  
 6 conference call, Morgan Stanley issued a report suggesting  
 7 accounting irregularities.  
 8 THE COURT: Of Qwest?  
 9 MR. WISE: They question Qwest's accounting  
 10 specifically in the context of whether they can sustain growth  
 11 based on some accounting issues.  
 12 THE COURT: Those are different accounting -- are  
 13 those different accounting issues?  
 14 MR. WISE: They're growth related. Here the issue is  
 15 the sector is -- here the issue is the sector is having  
 16 problems. The very next day, Morgan Stanley said, we think  
 17 Qwest is going to have problems growing. The information  
 18 withheld goes to growth. And he gets on the phone again and  
 19 does another call and says, these aren't right, we're going to  
 20 be fine, and tries to dissuade investors from having --  
 21 THE COURT: What does it have to do with the one  
 22 material omission that we've heard about so far, which in the  
 23 Court's mind is the omission to state the significance of these  
 24 one-timers in terms of Qwest's --  
 25 MR. WISE: Morgan Stanley -- what Mr. Wolfe said in

1 interviews is Morgan Stanley figured out the company -- there  
 2 was something going on that was not perceptible, and they  
 3 thought they had diagnosed it when they found the accounting  
 4 issues. What they had diagnosed is there were problems with  
 5 growth --

6 THE COURT: That one I think you should keep out of,  
 7 because the one thing is your simple case, folks, just as a  
 8 matter -- but that's not my objection. As a matter of  
 9 relevance, it injects different issues into the case, and it  
 10 injects accounting issues, correctness of those accounting  
 11 issues, whether he was right on the accounting issues.

12 MR. WISE: We don't intend to put in whether the  
 13 accounting issues were right.

14 I think the other thing it goes to, I think this is  
 15 important, the jury will be able to infer from some of the  
 16 post-trading evidence they raised on their opening, why he  
 17 stopped trading when he did, this was bad news coming very  
 18 shortly after he stopped trading but before the window --

19 THE COURT: I'm ready to rule on both of those  
 20 conversations. The conversation that he was -- in regard to  
 21 the Wall Street Journal can come in. The other one is  
 22 irrelevant and will be excluded.

23 Gentlemen, I have a judge's meeting today, so I'll go  
 24 until about 10 minutes after and then go to 1:30 -- sorry. I  
 25 didn't mean --

1 Q. And I want to ask you some follow-ups. But, first, was  
 2 this an article -- did you discuss this article with

3 Mr. Nacchio?

4 A. Yes.

5 Q. And what was the -- what was the issue the article raised  
 6 about this glut?

7 A. The issue called to question the ability for the -- for  
 8 growth in the telecommunications industry, revenue growth.

9 Q. And what specifically -- how specifically did the issue of  
 10 this glut and growth relate to Qwest's business, in terms of  
 11 what you discussed with Mr. Nacchio?

12 A. Then it called into question whether Qwest was going to be  
 13 able --

14 MR. RICHILANO: I'm sorry, I think Mr. Wise swallowed  
 15 the last part of his question. I think that's important. I  
 16 don't think the witness heard the last part of his question.

17 THE COURT: How do you know whether the witness heard?  
 18 Do you have any foundation for it?

19 MR. RICHILANO: In terms of -- if the last part of the  
 20 question can be read back, I'm fine with it.

21 THE COURT: Why don't you start the question over.  
 22 That's a -- that's a sui generis objection, Mr. Richilano. I  
 23 don't see it anywhere in the Rules of Evidence.

24 BY MR. WISE:

25 Q. Now I'm having trouble remembering.

1 MS. CONRY: That's okay.  
 2 (Hearing continued in open court.)

3 THE COURT: All right. That took longer than I had  
 4 hoped. But I think we're ready to go.

5 You may proceed, Mr. Wise. The objection is  
 6 overruled, at least the one made in open court is overruled.

7 BY MR. WISE:

8 Q. Mr. Wolfe, what happened -- I think I had asked you what  
 9 happened on June 19, and you referenced something that happened  
 10 on June 18. Let me ask a better question. What happened on  
 11 June 18, 2001?

12 A. On June 18, the Wall Street Journal had issued an article,  
 13 I think it was a front page article, that focused on the  
 14 capacity glut, which we've been talking about here for a while,  
 15 and the impact on pricing in the telecommunications industry,  
 16 the fiber optic capacity glut.

17 Q. I want to just -- if I can interrupt and I want to ask you  
 18 a couple of terms. I don't recall if I've asked you to define  
 19 them before. When you talk about "capacity," what are you  
 20 referring to?

21 A. I'm talking about the amount of fiber optic cable and then  
 22 the electronics or optronics are put onto the fiber optic cable  
 23 to actually activate it, that there was a -- too much glut,  
 24 more than needed of that capacity capability nationwide in the  
 25 United States.

1 What did you -- I'll put the end first. What did you  
 2 discuss with Mr. Nacchio about how this issue they raised, the  
 3 glut in the industry, would affect Qwest's business?

4 A. Well, I -- in terms of precisely what we discussed, I mean,  
 5 we -- the bottom line was that we both knew, and there was  
 6 enough communications that we both knew that -- you know, we  
 7 were on the same wavelength, that the question --

8 MR. RICHILANO: We're talking about wavelengths now.  
 9 The context is a discussion. If these events did not arise in  
 10 a discussion, I object.

11 THE WITNESS: We did have a discussion.

12 THE COURT: I think -- tell us as nearly as you can  
 13 recall.

14 THE WITNESS: The discussion was that the article was  
 15 negative. It suggested strongly that there was going to be  
 16 decreased pricing in the industry, decreased growth in the  
 17 telecommunications industry. And since Qwest was highlighted  
 18 in this article, that there was going to be decreased revenues  
 19 for Qwest.

20 THE COURT: Are you going to try to introduce the  
 21 article or not? I'm just asking, I'm not --

22 MR. WISE: I had not intended to, but we certainly  
 23 can.

24 THE COURT: I'm just asking.

25 BY MR. WISE:

0261  
 1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF COLORADO  
 3  
 4 Criminal Action No. 05-cr-00545-EWN  
 5  
 6 UNITED STATES OF AMERICA,  
 7  
 8 Plaintiff,  
 9  
 10 vs.  
 11  
 12 JOSEPH P. NACCHIO,  
 13  
 14 Defendant.  
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1 guess just to orient ourselves, before the break, you talked  
 2 about a call on June 20, 2001. When was the second quarter  
 3 2001 earnings call?  
 4 A. The second quarter call was in July 24, 2001.  
 5 Q. And similarly, I think to what I asked you about the first  
 6 call, what did you discuss with Mr. Nacchio about the comments  
 7 he would make on that second quarter 2001 call, before the call  
 8 actually occurred?  
 9 A. I suggested we not be too bullish in the statements given  
 10 the overall situation. The decision was made to reiterate the  
 11 guidance. So that was a given. But I recommended that there  
 12 not be a lot of other bullishness or hype around that.  
 13 Secondly, since the decision had been made to disclose  
 14 the one-time transactions shortly after this conference call, I  
 15 recommended that he make comments that provided a bridge to the  
 16 actual disclosure, that he not say anything that was  
 17 inconsistent with that disclosure.  
 18 Q. Mr. Wolfe, when you say the decision had been made to  
 19 disclose, what are you referring to?  
 20 A. The decision had been made at Qwest that -- I wasn't  
 21 directly involved in that decision, so I'm not sure precisely  
 22 who made it. But the decision was made to announce the use of  
 23 the one-time transaction to disclose the use of the -- of the  
 24 one-time transactions in the -- both the filing of the SEC,  
 25 which we -- 10Q, which was to be made the middle of August, and

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1 THE COURT: I don't think you have to, unless there is  
2 another basis for getting the attachment in.  
3 MR. WISE: I think there is, Your Honor, that is,  
4 Mr. Wolfe has testified that he showed the attachment to  
5 Mr. Nacchio.  
6 THE COURT: The fact that he showed it to Mr. Nacchio  
7 is neither here nor there. Whether it's admissible depends on  
8 the purpose for which it's offered.  
9 MR. WISE: I can offer the attachment for the  
10 non-hearsay purpose of going -- something that goes to the  
11 state of mind of the defendant, apart from the cover note.  
12 THE COURT: Are you saying that it goes to his intent?  
13 MR. WISE: It goes to his state of mind. I'll offer  
14 it for "non- -- not for the truth of the matter asserted but  
15 for the fact he received this information and, therefore, went  
16 to his state of mind.  
17 THE COURT: And how is his state of mind as of  
18 July 28, 2001, relevant?  
19 MR. WISE: Because he is continuing to make statements  
20 to the investing public in an attempt to cover up the bad  
21 news --  
22 MR. RICHILANO: Your Honor, I object to this.  
23 THE COURT: All right. I understand what he's saying,  
24 and I'm going to admit it for that purpose.  
25 MR. RICHILANO: I have another basis to object, Your

1 THE COURT: 2 is --  
2 MR. WISE: Yeah.  
3 THE COURT: -- something that you can inquire about.  
4 MR. WISE: There is going to be accounting issues  
5 in -- raised in lots of business documents all throughout the  
6 case. We're not going to be redacting those out.  
7 THE COURT: Well, paragraph 3H is relevant.  
8 MR. RICHILANO: But not the stuff in between it.  
9 MR. WISE: We can redact some of it, Your Honor.  
10 THE COURT: That's what I think you should do. I  
11 think you should redact everything except paragraphs 1, 2 and  
12 3.  
13 MR. WISE: Can I have the document person scroll up  
14 and stay away from these?  
15 THE COURT: I think that's fair. In other words, what  
16 comes -- what comes in in front of the jury will be what I've  
17 admitted, and then the Government should, I think, tender 739A,  
18 and that will be the version that goes to the jury. So 739  
19 will not be received ultimately, although you -- I know this is  
20 a weird procedural device, but I think you can play it -- those  
21 portions to the jury, and those portions will become 739A. So  
22 the record is clear.  
23 MR. WISE: That's fine.  
24 THE COURT: Okay.  
25 And you know, I guess before you blurted out the word

1 Honor, as to which I'd like to approach the bench.  
2 THE COURT: All right.  
3 (Hearing at the bench.)  
4 MR. RICHILANO: Your Honor, admission of this exhibit  
5 would inject all matter of collateral issues and issues of  
6 alleged or suspicion, wrongdoing on the part of Qwest that have  
7 nothing to do with the issues in this Qwest. It's all of these  
8 accounting issues --  
9 MR. WISE: I'm not going to ask about any of it. The  
10 first paragraph --  
11 MR. RICHILANO: Excuse me, I'm not done.  
12 MR. WISE: I'm sorry.  
13 MR. RICHILANO: I object to the exhibit. He can ask  
14 about relevant questions, but I object to the exhibit coming in  
15 as it is.  
16 MR. WISE: The first paragraph deals with credibility.  
17 That's the one I'm going to ask about. They're going to move  
18 in documents that are 100 pages long and ask about one page.  
19 There is a narrow issue I'm going to ask about. I'm not going  
20 to ask about accounting issues. I simply want to ask about the  
21 credibility issue.  
22 THE COURT: What about redacting the rest of it, then?  
23 It sounds like you're talking about paragraphs 1 and 2, right?  
24 MR. WISE: I'm definitely talking about 1. And I  
25 think --

1 coverup, I should have let you come up here. I think I'll  
2 instruct the jury to disregard it right now. I mean, I think  
3 it's legitimate argument, but it's not legitimate --  
4 MR. STERN: Would Your Honor be kind enough to  
5 instruct the jury that is not the basis of the admission,  
6 because he said in front of the jury, that was the basis. If  
7 they heard that sustained, they will think that is the basis.  
8 THE COURT: I don't think so. No. I've said what I'm  
9 going to do.  
10 (Hearing continued in open court.)  
11 THE COURT: Members of the jury, I admitted part of  
12 the evidence, and the relevant part of the evidence, Exhibit  
13 739, will be placed on the screens in front of you. And then  
14 it will become Exhibit 739A.  
15 So, in other words, I've excluded portions of the  
16 document that you will not have. They're completely irrelevant  
17 to this case.  
18 On a separate topic, it was improper to use the word  
19 "coverup" in this context. It's argument. It's not evidence.  
20 And the jury is instructed to disregard and put out of your  
21 minds the prosecutor's use of the word "coverup."  
22 Proceed.  
23 (Exhibit 739A admitted.)  
24 BY MR. WISE:  
25 Q. Mr. Wolfe, if you could -- as soon as we get it up on your

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

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

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 vs.

6 JOSEPH P. NACCHIO,

7 Defendant.

---

8 REPORTER'S TRANSCRIPT  
9 TRIAL TO JURY  
10 VOLUME NINE

---

11 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM  
12 Judge, United States District Court for the District of  
13 Colorado, commencing at 1:15 p.m., on the 27th day of March,  
2007, in Courtroom A1001, United States Courthouse, Denver,  
14 Colorado.

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

1 THE COURT: Sure. I don't know whose flip chart it  
2 is.

3 MR. STERN: I think she wants to flip the flip chart.

4 MS. CONRY: I do want to flip the flip chart.

5 BY MS. CONRY:

6 Q. Can you see, Ms. Szeliga?

7 A. I can --

8 Q. Okay. And the first thing -- can we call up Government's  
9 Exhibit 803.

10 One thing Mr. Stern talked about was the difference  
11 between the internal targets and the external targets. Do you  
12 remember that?

13 A. Yes, I do.

14 Q. And I think you had mentioned that there was the -- the  
15 original budget of the Board of Directors was around  
16 22 billion, and there was a cushion between that and the  
17 internal targets. Do you remember that?

18 A. Yes, I do.

19 MS. CONRY: Can we publish this to the jury, Your  
20 Honor, which is Government's Exhibit 803?

21 THE COURT: Yes.

22 MS. CONRY: Thank you.

23 BY MS. CONRY:

24 Q. I just want to be clear on this.  
25 Can we highlight our -- or enlarge the bottom portion

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13 Denver, Colorado

14 PROCEEDINGS

15 THE COURT: All right, Ms. Conry.  
16 MS. CONRY: Thank you, Your Honor.  
17 (ROBIN SZELIGA, GOVERNMENT'S WITNESS, PREVIOUSLY SWORN  
18 REDIRECT EXAMINATION

19 BY MS. CONRY:

20 Q. Ms. Szeliga, I just want to follow up on with a few things  
21 Mr. Stern was talking about. Is that okay?  
22 A. Yes.  
23 MS. CONRY: The first thing, can I approach the flip  
24 chart?  
25

1 of this memo, which starts with "grand total business unit  
2 risk."

3 Again, just to orient the jury, this is a memo you  
4 received on or around September 5, 2000; is that right?

5 A. Yes.

6 Q. Okay. And you discussed this with Mr. Nacchio, I think you  
7 told us in your direct, sometime between December and -- of  
8 2000 and February of 2001?

9 A. I discussed the billion dollar risk with Mr. Nacchio at  
10 that time, not this -- not the specifics of this memo,  
11 necessarily.

12 Q. Right, okay. We talked about, you didn't have it with you?

13 A. I did not.

14 Q. Terrific. The total budget here -- I'd like to start out  
15 with, you referenced the difference between the \$22 billion  
16 target and the 21.6 street disclosure.

17 A. Yes.

18 Q. What I'd like to do, sorry, is walk through the 22 billion  
19 is the budget, right?

20 MR. STERN: Excuse me, Your Honor. There was no  
21 street disclosure. This is dated September 5. And I believe  
22 the witness testified that it did not refer to street  
23 disclosure. But I'm having the record checked, even though it  
24 says it there, because you know the street was September 7.  
25 THE COURT: This is confusing.

1 MR. STERN: Objection, speculative.  
 2 THE COURT: I don't understand this. Are you basing  
 3 this on what you know?  
 4 THE WITNESS: Yes, I am.  
 5 THE COURT: Overruled.  
 6 MR. STERN: The word "might" is in there, Your Honor.  
 7 THE COURT: Overruled.  
 8 THE WITNESS: There were certain initiative sheets  
 9 that were prepared that had classified government contracts  
 10 listed with the code name instead of the name of the actual  
 11 contract. And it was in the initiative sheets that were used  
 12 to report month-end results and review month-end results.  
 13 BY MS. CONRY:  
 14 Q. And you and I spoke about initiatives earlier in the  
 15 testimony. Do you recall that?  
 16 A. Yes.  
 17 Q. How did the initiative sheets that you're just talking  
 18 about relate to government contracts with the code names, how  
 19 did those relate to the initiatives you and I spoke about?  
 20 A. They're the same.  
 21 Q. Are they categorized A, B, C and D?  
 22 A. Yes.  
 23 Q. All right. Mr. Stern also -- I think maybe his first  
 24 question, do you recall him asking you about the consecutive  
 25 streak of quarters that Qwest had in terms of making its

1 But I agree with Mr. Stern, I think that -- if we get  
 2 into these accounting issues and how they were making the  
 3 numbers and that kind of issue, we are going to be here a long  
 4 time.  
 5 MR. STERN: And the Government said in the opening,  
 6 this is not about numbers, this is about special information.  
 7 MS. CONRY: I agree. The last thing I want to do is  
 8 extend the trial. We're at a terrific pace. I think the jury  
 9 is left with a misimpression. I think he opened the door for  
 10 two questions, and that is, were they restated, and were those  
 11 restated numbers less than the original guidance.  
 12 THE COURT: The problem is that they were restated  
 13 with a different accounting firm, with different management at  
 14 a far later time, I think. I can't remember when Mr. Nacchio  
 15 left right now. But --  
 16 MR. STERN: He left in '02.  
 17 THE COURT: In '02, so these were much later. I  
 18 understand what you want to do, and I think there is a way to  
 19 do it. I think you can talk about the IRUs and how they were  
 20 making these projections, but -- it was restated for a lot of  
 21 different reasons having nothing to do with this case, as I  
 22 understand.  
 23 MS. CONRY: Right. It's just --  
 24 THE COURT: All right.  
 25 (Hearing continued in open court.)

1 numbers?  
 2 A. Yes.  
 3 Q. Okay. Do you recall whether Qwest ever restated its  
 4 quarterly results?  
 5 MR. STERN: Objection. I'm -- if there is any issue  
 6 about it, I want to approach the bench.  
 7 THE COURT: All right. Come up to the bench.  
 8 (Hearing at the bench.)  
 9 THE COURT: Your objection.  
 10 MR. STERN: Months -- months -- apparently there was a  
 11 restatement by -- when the administration changed many months  
 12 later, and the new accounting firm came in, Peat Marwick came  
 13 in. Arthur Andersen stands firmly behind the original  
 14 statement, and Peat Marwick and Mitchell, which was the  
 15 original auditor accounted for IRUs in exactly the same way.  
 16 If we get into this area, I believe we will be in this trial  
 17 forever.  
 18 MS. CONRY: It's a simple question, were the numbers  
 19 restated and the restated numbers did not meet --  
 20 THE COURT: The problem is that the base for the  
 21 restatement of the numbers would be a legitimate subject of  
 22 recross. You know, I'm a little bit torn, because, frankly, I  
 23 think that to say that Qwest made the numbers is a little bit  
 24 misleading. One way you might want to say is they were making  
 25 numbers with the IRUs.

1 THE COURT: The objection is sustained.  
 2 BY MS. CONRY:  
 3 Q. Ms. Szeliga, I'd like to follow up with you on some  
 4 questions Mr. Stern asked you about the economy. Okay.  
 5 A. Yes.  
 6 Q. And I'd like to talk to you about the September 10, 2001,  
 7 press release, if I can find it. I think it's Government's  
 8 Exhibit 646. And it should be in the binder that I gave you.  
 9 And I believe it's in evidence. So I'd like to have that  
 10 published to the jury, if I could.  
 11 Do you have that, Ms. Szeliga?  
 12 A. Yes, I do.  
 13 Q. Okay. And in fact, on September 10, 2001, when Qwest took  
 14 down its guidance, can you read to the jury the reason that it  
 15 pointed to for taking its guidance down?  
 16 A. "Qwest Communications International, broadband  
 17 communications company, today updated its financial guidance  
 18 for the second half of 2001 and for 2000. The new guidance  
 19 reflects deteriorating economic conditions both nationally and  
 20 within the 14 western states in which Qwest provides local  
 21 communication services."  
 22 Q. And you'll agree with me, that's the only reason, the  
 23 economy, that is given in this press release; is that right?  
 24 A. That's the only reason given.  
 25 Q. Is that a full and fair explanation as to why Qwest took

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

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

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 vs.

6 JOSEPH P. NACCHIO,

7 Defendant.

---

8 REPORTER'S TRANSCRIPT  
9 TRIAL TO JURY  
10 VOLUME TWELVE

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11 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM  
12 Judge, United States District Court for the District of  
Colorado, commencing at 8:45 a.m., on the 29th day of March,  
13 2007, in Courtroom A1001, United States Courthouse, Denver,  
Colorado.

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25 Proceedings Reported by Mechanical Stenography  
Transcription Produced via Computer

1 As the Court understands it, the Government intends to  
2 elicit testimony on facts and circumstances surrounding  
3 Mr. Nacchio's transfer of \$90 million assets into accounts held  
4 individually by his wife. This transfer was alleged to have  
5 occurred in February of 2002.

6 The Government initially contended the transfer was  
7 evidence of consciousness of guilt. It now contends, as a  
8 result of the opening statement by defense counsel, that it is  
9 a response to defendant's good faith defense to insider  
10 trading.

11 In the Court's view, there are three Rules of Evidence  
12 that are implicated. The first is Rule 404(b). As the parties  
13 know, Rule 404(b) provides that evidence of other crimes,  
14 wrongs or acts is not admissible to prove the character of a  
15 person in order to show that he acted in conformity therewith.  
16 This subdivision does not exclude the evidence when offered for  
17 other purposes, such as proof of motive, opportunity,  
18 preparation, intent, plan, knowledge, identity or absence of  
19 mistake or accident.

20 Evidence of other acts is only admissible if the other  
21 acts share some similarity or connection with the charged  
22 crime. Under the case law in this circuit, similarity may be  
23 demonstrated through physical similarity of the acts or through  
24 the defendant's indulging himself in the same state of mind in  
25 the perpetration of both the extrinsic offense and the charged

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6 PROCEEDINGS

7 THE COURT: Good morning.  
8 We're short one juror at the moment, and she has to  
9 travel some distance. She's on her way. So we'll use the time  
10 for the Court to rule on the issue of whether the Government  
11 can call David Weinstein, the defendant's former financial  
12 consultant.

13 As the Court understands it, the matter is framed by  
14 the briefs that the parties have submitted, including the  
15 supplemental filing that was made very recently by the  
16 Government.

1 offense. Otherwise stated, there must be a clear and logical  
2 connection between the other acts evidence and the case being  
3 tried.

4 As the Court understands the Government's position, it  
5 is that because the transfers were motivated by the defendant's  
6 desire to take dramatic action to avoid suffering a loss, which  
7 is then bootstrapped into an argument that this bears strong  
8 similarity that the desire that motivated his insider trading  
9 sales several months before, the Government believes that this  
10 justifies admission of the evidence. And, of course, as I  
11 said, the Government also claims that this is consciousness of  
12 wrongdoing.

13 The Court disagrees.

14 First, the Court is not convinced of the similarity  
15 between the insider trading with which the defendant is charged  
16 and the later transfer of assets. The Tenth Circuit has  
17 propounded a number of non-exclusive factors to be considered  
18 in assessing similarity. The factors include temporal  
19 proximity, geographical proximity, physical similarity, and  
20 whether the alleged offense or alleged act is part of a common  
21 scheme with the underlying crime.

22 In this case, the Court is unconvinced that there is  
23 temporal proximity.

24 The acts in question allegedly occurred in February of  
25 2002. The last act, which the defendant is charged with here,

1 the options that he previously had from U S WEST?  
 2 MS. CONRY: Yes, sir, I think it indicates from the  
 3 schedule they're from U S WEST.  
 4 THE COURT: We can proceed to inquire, we'll go  
 5 question by question as to whether there is an objection.  
 6 Is there an objection to the exhibit itself?  
 7 MR. SPEISER: There is an objection to the exhibit  
 8 because I believe it's confusing as to what the status was in  
 9 2001, as this was done as of 2003. It's not clear what was  
 10 vested in 2001.  
 11 MS. CONRY: He can ask --  
 12 THE COURT: I'm not sure that's a legal objection,  
 13 that the exhibit is confusing. If that was a legal objection  
 14 to testimony, we could be at this trial --  
 15 MR. SPEISER: I have no objection that it's a business  
 16 record.  
 17 THE COURT: All right. Well -- if you don't object  
 18 it's a business record, and you don't object to relevancy, then  
 19 I'm going to allow it in.  
 20 So Exhibit 998 is received. If you're right that it's  
 21 confusing, it's confusing. And maybe -- you will proceed to  
 22 clear it up.  
 23 (Exhibit 998 admitted.)  
 24 MS. CONRY: I'll try. I want to make a comment, there  
 25 is some personal data on this in terms of Social Security

1 roughly?  
 2 A. Correct.  
 3 Q. Can you look to the exhibit that Mr. Speiser showed you  
 4 yesterday that discussed the stock price. I think that's going  
 5 to be Defense Exhibit 1880. Do you have that in front of you?  
 6 A. I have it in front of me.  
 7 Q. Okay. If you wouldn't mind, go ahead and look at the stock  
 8 price for the first six months of 2001 and tell me if your \$15  
 9 strike price options were in the money.  
 10 A. For how long, the first six months?  
 11 Q. Let's focus on that for now, yeah, please.  
 12 A. They were in the money.  
 13 Q. Okay. And in fact, were they in the money throughout the  
 14 period that's reflected in that chart?  
 15 A. Yes.  
 16 Q. Okay.  
 17 Your Honor, may I approach the witness?  
 18 THE COURT: You may.  
 19 MS. CONRY: Give you Government's Exhibit 413, Your  
 20 Honor.  
 21 BY MS. CONRY:  
 22 Q. Do you have Government's Exhibit 413?  
 23 I'm not sure I have an extra copy.  
 24 MR. SPEISER: Can you tell us what it is.  
 25 MS. CONRY: Sure, it's the stock price, goes a little

1 numbers, which I didn't have a chance to redact this morning.  
 2 I won't publish it to the jury for that reason. I'll have  
 3 Mr. Schumacher walk through it and submit a redacted version  
 4 this afternoon, if that's all right with the Court.  
 5 THE COURT: Oh. Proceed.  
 6 MS. CONRY: Thank you.  
 7 BY MS. CONRY:  
 8 Q. Mr. Schumacher, take a look at the schedule I've just  
 9 handed you. And I think if you look to your information, I  
 10 think begins on page -- has the Bates number ending in 617. Do  
 11 you see that, sir?  
 12 A. Yes.  
 13 Q. Do you see in your -- under your name, Mark Schumacher, any  
 14 options that were granted to you while you were at U S WEST?  
 15 A. I'm -- it's hard to tell when they were granted to me, at  
 16 least based on this, without seeing grant date, which I'm not  
 17 sure that's -- yes, the grant date is 1 -- fifth column over.  
 18 Q. Right.  
 19 A. So the grant date is 1995, 1998, 1999, those would have all  
 20 been pre-Qwest.  
 21 Q. What's the strike price on those that were granted to you  
 22 pre-Qwest?  
 23 A. \$15.10 for the one in 1995, 29.09 for the one in 1998, and  
 24 31.26 for the one in 1999.  
 25 Q. Okay. So 15.10, \$29, and \$31, roughly; is that right,

1 bit further in time than your Exhibit 1880.  
 2 MR. SPEISER: Your Honor, I'd object to the use of  
 3 this exhibit. We placed into evidence yesterday our list of  
 4 the stock price which ends approximately September 20, 2001.  
 5 This exhibit goes through the end of 2002, which is clearly not  
 6 relevant to the issues in this case.  
 7 MS. CONRY: So this is a completeness issue. I'd like  
 8 to get the stock price over time. And in particular, I'd like  
 9 to establish with the witness that certainly through the time  
 10 he held Qwest stock, his options stayed in the -- some options  
 11 stayed in the money just about until the time he left, and then  
 12 came out of the money after he left.  
 13 THE COURT: And your position is that the  
 14 post-September --  
 15 MR. SPEISER: Post-September is totally irrelevant to  
 16 the issues in this case. This document runs through the end  
 17 of -- through December 31, 2002, which is way beyond the period  
 18 in this case.  
 19 THE COURT: Right. The objection is sustained. I  
 20 won't allow in the exhibit that shows stock prices after  
 21 September 10, 2001.  
 22 You may inquire, refreshing his recollection, if  
 23 necessary, as to whether his options remained in the money.  
 24 MS. CONRY: Okay. Thank you, Your Honor.  
 25 BY MS. CONRY:

2221  
 1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF COLORADO  
 3  
 4 Criminal Action No. 05-cr-00545-EWN  
 5  
 6 UNITED STATES OF AMERICA,  
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 8 Plaintiff,  
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 12 JOSEPH P. NACCHIO,  
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1 BY MR. SPEISER:  
 2 Q. Good morning, Mr. Johnson.  
 3 A. Good morning.  
 4 Q. Have you spoken with anyone overnight about your testimony?  
 5 A. No, I have not.  
 6 Q. In your role as an analyst in the telecom industry, you  
 7 were familiar with IRUs, were you not?  
 8 A. Yes.  
 9 Q. When did you first learn about IRUs?  
 10 A. Some of the nationwide carriers began employing IRUs  
 11 somewhere in the 1998, 1999 time frame.  
 12 Q. Can you tell the members of the jury what your  
 13 understanding of an IRU is?  
 14 A. An IRU is known as an indefeasible right of use, and they  
 15 tend to be long-term capacity leases, so, for example, if a  
 16 carrier entered into a long-time IRU, they might go lease  
 17 access to a fiber optic network for, say, a 20- or 25-year  
 18 term.  
 19 I'll stop there in case you have more questions.  
 20 Q. And Qwest was one of the companies that sold IRUs, was it  
 21 not?  
 22 A. Yes, as well as Level 3 and other telecom firms.  
 23 Q. So you were well aware this was something that was fairly  
 24 common in this telecom industry?  
 25 A. Yes.

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1 Q. If a company has proprietary information, can it be harmful  
 2 to the company to disclose that type of information?  
 3 A. If they disclosed proprietary information of a competitive  
 4 nature, potentially it could affect them in a competitive  
 5 environment, but if it's a material nature, they're obligated  
 6 to disclose that to investors.  
 7 Q. Well, if -- do you know whether Qwest disclosed its  
 8 information about its sale of IRUs would have hurt it  
 9 competitively? Do you know that?  
 10 A. I believe at the time in question there were IRU sales  
 11 taking place. There are 10 or 15 carriers with lots of fiber  
 12 optic capacity, so there is swaps, IRUs taking place. Qwest  
 13 was in -- in many communication with a lot of these carriers,  
 14 so I don't believe at the time that would have hurt their  
 15 competitive situation.  
 16 Q. Well, if Qwest felt -- is Qwest entitled to differ from  
 17 you, if they felt it would have hurt the company to disclose  
 18 that information?  
 19 A. I believe when Qwest has a portion of their revenue that's  
 20 material, they're obligated to disclose that to investors.  
 21 Q. Yes, because you believe investors should be protected and  
 22 their investment should be protected, right?  
 23 A. That's correct.  
 24 Q. All right. And if disclosing proprietary information would  
 25 hurt Qwest and result in its losing business, wouldn't that

1 bubble in the telecom industry?  
 2 A. That's correct.  
 3 Q. And analysts such as yourself were playing up the stocks  
 4 and saying what great investments they were? For the telecom  
 5 industry as a whole?  
 6 A. I -- I would not respond to that characterization. I think  
 7 my answer to you is no.  
 8 Q. Okay. You testified yesterday about the drop in price of  
 9 Qwest stock over the period of time in the year 2001. Were you  
 10 aware that Sprint dropped its price on June 1, 2000, was  
 11 \$59.94; by May 29, 2001, it was \$19.61? Were you aware of  
 12 that?  
 13 A. Yes, I was.  
 14 Q. Were you aware that AT&T was 34.94 on June 1, 2000, and  
 15 dropped to \$20.68 by May 29, 2001?  
 16 A. Yes, I was aware of that.  
 17 Q. Were you aware that WorldCom was at \$38.75, by July 1,  
 18 dropped to 18.75 by May 29, 2001?  
 19 A. Yes, I was aware of that.  
 20 Q. Are you aware that Level 3, a direct competitor of Qwest,  
 21 correct?  
 22 A. That's correct.  
 23 Q. Level 3 was at \$79.50 on June 1, 2000, and it dropped to  
 24 \$12.34 by May 29, 2001, and dropped to \$3.29 by October 30,  
 25 2001, are you aware of that?

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1 hurt the shareholders as well?  
 2 A. It hurts shareholders much more to not disclose material  
 3 information than to actually disclose information that -- as  
 4 the company should have.  
 5 Q. That's your opinion, sir, correct?  
 6 A. That's correct.  
 7 Q. Do you know what Greg Casey's opinion is, who was in charge  
 8 of the wholesale unit at Qwest on this subject?  
 9 A. I'm not familiar with Mr. Casey's opinion on that.  
 10 Q. Okay. Would you agree that it's just as bad for a company  
 11 to give out guidance that is too low as well as to give out  
 12 guidance that is too high?  
 13 A. A company should provide guidance -- guidance being their  
 14 best efforts to present to investors how they believe they're  
 15 going to do over the next, you know, month, three months, year,  
 16 and long-term. So the markets are based on trust. And you, as  
 17 investors, need to rely on my trustworthiness, and as analysts,  
 18 until the trust is breached, we assume the company is  
 19 trustworthy.  
 20 Q. And I take that to -- that's a yes on my question?  
 21 A. Please reframe your question.  
 22 Q. I withdraw it.  
 23 A. Okay.  
 24 Q. Now, you're well familiar with the telecom industry. Was  
 25 there not a period of time in '98, '99, 2000, where there was a

1 A. Yes, I was.  
 2 Q. Okay. Global Crossing, another competitor of Qwest, are  
 3 you aware their stock was at \$25.69 on June 1, 2000, dropped to  
 4 \$13.16 on May 29, 2001, and then dropped to a dollar 15 on  
 5 October 30, 2001? Were you aware of that?  
 6 A. Yes, I was.  
 7 Q. Williams Communication, another direct competitor of Qwest,  
 8 correct? Is that a yes?  
 9 A. Yes, they were.  
 10 Q. Okay. On June 1, 2000, Williams Communication was at  
 11 \$38.44, by May 29 was at \$4.75, and by October 30, 2001, was a  
 12 dollar 31. Were you aware of that?  
 13 A. Yes, I was.  
 14 Q. What about 360 Networks, another competitor of Qwest,  
 15 correct?  
 16 A. Correct.  
 17 Q. On June 1, 2000, they were at \$14.44, had dropped to a  
 18 dollar 43 by May 29, 2001, and were bankrupt by October 30,  
 19 2001. Were you aware of that?  
 20 A. Yes, I was.  
 21 Q. So Qwest was part of this trend, the price of the stock  
 22 going down was part of this entire trend in the telecom  
 23 industry, was it not?  
 24 A. Qwest's stock did go down as did the other stocks, and I'll  
 25 just respond to that, as you indicated. I won't comment

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1 further.  
 2 Q. Okay. Did you expect Qwest to divulge to you or to other  
 3 analysts the debates that it was having amongst its executives  
 4 about how it should reach its budgets or what products to  
 5 emphasize or whether it was going to make this particular area  
 6 in the budget or it may have to shift to another area in the  
 7 budget? Did you expect those types of debates to be disclosed  
 8 to you?  
 9 A. The debates in terms of internal workings and strategy, I  
 10 don't expect that to be disclosed; but I do expect material  
 11 items to be disclosed.  
 12 Q. Now, you said that you were present at the April 24, 2001,  
 13 analyst conference. I'd like to play another section from that  
 14 conference to you.  
 15 (Tape played.)  
 16 Do you recognize Mr. Nacchio's voice?  
 17 A. Yes, I do.  
 18 Q. Do you remember hearing that?  
 19 A. Yes, I do.  
 20 Q. And was not Mr. Nacchio telling you things where they were  
 21 not being successful in the first quarter?  
 22 A. In that particular instance, yes.  
 23 Q. And this analyst telephone conference lasted for an hour or  
 24 so?  
 25 A. Approximately.

1 MR. SPEISER: Well, first, the document has been  
 2 certified as a business record by Qwest.  
 3 THE COURT: So what?  
 4 MR. SPEISER: Well, that would be its basis for  
 5 admission.  
 6 THE COURT: Well, are you going to ask this witness  
 7 about it?  
 8 MR. SPEISER: Yes.  
 9 THE COURT: Why?  
 10 MR. SPEISER: He has testified -- he's given extensive  
 11 testimony on what he thought the role of IRUs were at Qwest and  
 12 why it was deceptive not to disclose it. I would like to  
 13 question him whether that was a unanimous -- opinion of  
 14 everybody or that was just his personal opinion.  
 15 THE COURT: That's improper. Unless you're treating  
 16 him as an expert, then there might be more of a basis for it.  
 17 MR. SPEISER: No, I'm not treating him as an expert.  
 18 THE COURT: I don't see that that's proper. What rule  
 19 of evidence can you impeach this witness with another analyst's  
 20 statement?  
 21 MR. SPEISER: Based on statements he's given before  
 22 this jury about the prominence of IRUs, I'd like to show that's  
 23 solely his opinion and not the opinion of the entire industry.  
 24 THE COURT: The objection is sustained.  
 25 MR. SPEISER: I have no further questions of this

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1 Q. And lots of people asked questions during that?  
 2 A. Apparently. Tried to. Yes.  
 3 Q. Sorry. Was there something else you wanted to say?  
 4 A. No, I won't interject. I don't think the judge would  
 5 agree.  
 6 Q. Now, not every analyst agreed with you with regard to your  
 7 opinion about prominence of IRUs; is that correct?  
 8 A. I cannot speak for other analysts' opinions. I can speak  
 9 for my own.  
 10 Q. I'd like you to take a look at Exhibit A-1720.  
 11 MR. NATHAN: Volume II, Your Honor.  
 12 MR. WISE: I'm going to object, give you a chance to  
 13 look. This is another analyst report. First of all, it's  
 14 hearsay; second of all, Mr. Speiser objected to opinion  
 15 testimony right out of the gate and has now elicited a  
 16 truckload of it.  
 17 THE COURT: This is unbelievable. You're now  
 18 soliciting opinion testimony which I said the prosecution  
 19 couldn't get it because it disclosed expert testimony. And  
 20 they told you they weren't calling experts. And now you're  
 21 trying to get in the testimony of other analysts. This is  
 22 improper impeachment. You can't impeach this witness by what  
 23 another analyst said.  
 24 MR. SPEISER: May I be heard?  
 25 THE COURT: Yes.

1 witness.  
 2 THE COURT: Redirect.  
 3 MR. WISE: Thank you, Your Honor.  
 4 REDIRECT EXAMINATION  
 5 BY MR. WISE:  
 6 Q. Good morning, Mr. Johnstone.  
 7 A. Good morning.  
 8 Q. I want to ask you a couple of follow-up questions to  
 9 questions that the defense asked. And just to start, the  
 10 defense asked about -- well, a whole number of companies, Bell  
 11 South, CenturyTel, Citizens Communications, SBC, someone called  
 12 Cavista, ITC DeltaCom, Talk America. I may not have written  
 13 fast enough.  
 14 My question is -- and they asked you if any of these  
 15 companies disclosed the magnitude of their IRU sales. Do you  
 16 recall those questions?  
 17 A. I recall that line of questioning.  
 18 MR. SPEISER: Objection. I never used the word  
 19 "magnitude." I asked whether they disclosed them.  
 20 THE COURT: Overruled.  
 21 BY MR. WISE:  
 22 Q. Mr. Johnstone, for any of those companies, did you later  
 23 learn that 40 percent of their growth in the first quarter was  
 24 driven by one-time undisclosed capacity sales?  
 25 A. No.



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1 Q. You received this approximately on March 1, 2001?  
 2 A. Yes.  
 3 Q. Okay. And you received it from Dave Shell, the managing  
 4 director, Goldman Sachs Asset Management?  
 5 A. Yes.  
 6 Q. Who was Mr. Shell?  
 7 A. He -- he was on the Tampa investment team, he was a  
 8 portfolio manager and, as it says, a managing director. He had  
 9 covered telecom services prior to -- to me joining, and I  
 10 worked closely with him.  
 11 Q. Was he your superior?  
 12 A. Yes.  
 13 Q. And he sent you this e-mail for your information, FYI,  
 14 right?  
 15 A. Yes.  
 16 Q. And in it it says, "Do you think the IRU issue is coming  
 17 back to haunt them?"  
 18 A. That is actually the Morgan Stanley person who is saying  
 19 that, yes.  
 20 Q. Right, but Mr. Shell forwarded that to you?  
 21 A. Yeah.  
 22 Q. On at least by March the 1st, you were concerned about  
 23 the IRU issue, correct?  
 24 A. Yes.  
 25 Q. Okay. And you had these meetings in March with

1 Q. Now, with regard to -- you testified somewhat about the  
 2 wireless issue, correct?  
 3 A. Yes.  
 4 Q. Was it Mr. Mannetti who had the wireless for Qwest in early  
 5 2001? Does that name ring a bell?  
 6 A. I have met Mr. Mannetti, but he wasn't there at the March  
 7 meeting that I mentioned.  
 8 Q. Do you recall at the April 24 analyst conference that  
 9 Mr. Nacchio announced that Mr. Mannetti had been replaced, and  
 10 that new person was going to run wireless was -- by the name of  
 11 Annette Jacobs? Do you recall that?  
 12 A. I do not recall specifically.  
 13 Q. And that Mr. Nacchio is now optimistic, having replaced  
 14 Mr. Mannetti with someone, that he was hopeful that wireless  
 15 would now turn around. Do you recall any of that?  
 16 A. I do not specifically recall that.  
 17 Q. Isn't it a fact that one week after you submitted your late  
 18 July memo to be passed on to Mr. Nacchio, that Qwest held an  
 19 analyst conference with Piper Jaffray in Boston?  
 20 A. Yes.  
 21 Q. Were you there?  
 22 A. Sometime in August.  
 23 Q. Yeah, August 7?  
 24 A. Sometime early August. That may be right, August 7.  
 25 Q. Were you there?

2310

2312

1 Mr. Nacchio?  
 2 A. Yes.  
 3 Q. But you didn't raise the IRU issue with him, did you?  
 4 A. I don't recall specifically. We may have raised the issue  
 5 of one-time -- we may not have said, specifically -- used the  
 6 word IRU. We may have raised questions about non-recurring.  
 7 Q. Please don't tell us what you may have done. Tell us what  
 8 you recall doing.  
 9 A. I do not specifically recall. We --  
 10 Q. Thank you.  
 11 A. Okay.  
 12 Q. Do you know whether Qwest considered the amount of its IRU  
 13 sales to be proprietary?  
 14 A. I assume so, they didn't disclose.  
 15 Q. And did you ever consider that if they disclosed it it  
 16 might have hurt the business, it might advise competitors of  
 17 possible leads, and therefore, they did not wish to disclose it  
 18 because it may then have lost the shareholders if they lost the  
 19 business?  
 20 A. No.  
 21 Q. You never considered that, did you?  
 22 A. No, we didn't think that was the case.  
 23 Q. Did you know who at Qwest was responsible for disclosing  
 24 IRU information?  
 25 A. No.

1 A. I wasn't.  
 2 Q. Did Qwest disclose at that conference the percentage of IRU  
 3 revenue it had since 1997?  
 4 A. I think they first began to disclose at that point in time.  
 5 But the details kept coming later and later as well.  
 6 Q. I'm sorry?  
 7 A. The details kept coming from that point forward, but it was  
 8 first disclosed, I guess, to some extent on that date.  
 9 Q. And that its IRU revenue for the year 2000 had been  
 10 approximately 5 percent of its revenue?  
 11 A. I do not recall specifically the figures.  
 12 Q. And that it expected estimated that its IRU revenue for  
 13 2001 would be approximately 8 percent of its revenue?  
 14 A. That sounds about right, but I don't specifically recall.  
 15 Q. Now, the telecom industry was having a hard time in the  
 16 year 2001, correct?  
 17 A. Yes.  
 18 Q. And many companies' stocks plummeted during that year,  
 19 telecom stocks, correct?  
 20 A. Yes.  
 21 Q. Many companies that had nothing to do with IRUs, correct?  
 22 A. Yes.  
 23 MR. SPEISER: Thank you, sir. I have no further  
 24 questions.  
 25 THE WITNESS: Thank you.

2708  
 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 \_\_\_\_\_  
 10 REPORTER'S TRANSCRIPT  
 11 TRIAL TO JURY  
 12 VOLUME TWENTY-FOUR  
 13 \_\_\_\_\_  
 14 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,  
 15 Judge, United States District Court for the District of  
 16 Colorado, commencing at 1:04 p.m., on the 10th day of April,  
 17 2007, in Courtroom A1001, United States Courthouse, Denver,  
 18 Colorado.  
 19  
 20  
 21  
 22  
 23  
 24 THERESE LINDBLOM, Official Reporter  
 901 19th Street, Denver, Colorado 80294  
 25 Proceedings Reported by Mechanical Stenography  
 Transcription Produced via Computer  
 2709

1 some hearsay within hearsay, so I sustained an -- a Government  
 2 objection to the offer of that exhibit by the defendant.  
 3 Later on, the defendant raised additional arguments  
 4 and convinced me that the exhibit ought to come in, but I  
 5 allowed it to come in only under the condition that  
 6 Mr. Weinstein could come back here and testify fully about the  
 7 exhibit, because the original examination about the exhibit was  
 8 somewhat truncated.  
 9 So procedurally, what I've allowed the Government to  
 10 do is to reopen its case for a limited purpose at this time.  
 11 So you're really hearing a part of the Government's case at  
 12 this juncture. And I will start by receiving Exhibit A-1031,  
 13 as I said, if Mr. Weinstein appeared, that is now received as  
 14 an exhibit, and it's part of the record.  
 15 (Exhibit A-1031 admitted.)  
 16 MR. STRICKLIN: May it please the Court.  
 17 I think we need to have the witness sworn in.  
 18 THE COURT: All right.  
 19 (DAVID WEINSTEIN, GOVERNMENT'S WITNESS, SWORN)  
 20 COURTROOM DEPUTY: Please be seated.  
 21 Please restate your name for the record.  
 22 THE WITNESS: David A. Weinstein.  
 23 DIRECT EXAMINATION  
 24 BY MR. STRICKLIN:  
 25 Q. Good afternoon, sir.

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 15 PROCEEDINGS  
 16 THE COURT: Good afternoon, members of the jury.  
 17 I would like to explain to you what is going on. We  
 18 have an unusual procedure, and I would like to share with you  
 19 as much information as the law permits me to share.  
 20 You may recall that during the testimony of  
 21 Mr. Weinstein last week there was considerable controversy and  
 22 discussion about an exhibit numbered as Defendant's Exhibit  
 23 A -- Exhibit A-1031, and you may not remember what that exhibit  
 24 was, and I'm sure we'll find out in a few moments.  
 25 I thought that the rule -- that the exhibit contained  
 2710

1 A. Good afternoon.  
 2 Q. Thank you for being available and coming back here today.  
 3 Now, the other day when you testified, one of the --  
 4 we addressed a number of subjects. One of the subjects we  
 5 addressed was a series of phone calls you had between the  
 6 defendant, Mr. Nacchio, and yourself between November 3 and  
 7 December 13. Do you recall that, sir?  
 8 A. Yes.  
 9 Q. If you look in the binder before you, Government's Exhibit  
 10 210, do you see that before you?  
 11 A. 210?  
 12 Q. Yes, sir.  
 13 This has been admitted. We would ask to publish it to  
 14 the jury, Your Honor.  
 15 THE COURT: Proceed.  
 16 THE WITNESS: Yes.  
 17 BY MR. STRICKLIN:  
 18 Q. Tell the -- remind the jury exactly -- this is a phone call  
 19 between you and Mr. Nacchio. And what was the date that this  
 20 phone call occurred?  
 21 A. December 9, 2000.  
 22 Q. And there was some parts obviously that had been redacted  
 23 and removed. They weren't relevant to the case. On paragraph  
 24 3 there, about halfway down, it says -- it says, "Joe is  
 25 signing an irrevocable election to sell the shares now, and

1 away in the second half of 2001.  
 2 So the plan that he knew of, that he chose not to tell  
 3 investors about, was the fact that Qwest was planning on  
 4 ramping up its recurring revenue at two times the rate it had  
 5 ever done and hadn't done in the year before. Qwest had a bad  
 6 track record of ramping up recurring revenue.  
 7 He also knew, as the first quarter progressed, that  
 8 this shift from non-recurring to recurring wasn't happening.  
 9 The shift was not recurring. We've seen a couple of documents.  
 10 We're going to look at a couple more today. The shift was not  
 11 occurring, the gap was becoming larger and larger, and they  
 12 were using IRUs in the first quarter to fill that gap. And in  
 13 fact, it was -- 40 percent of the first quarter growth was made  
 14 up of IRUs, and it was Mr. Nacchio's decision not to tell  
 15 investors and not to tell analysts that.  
 16 And I think most importantly, it was his decision not  
 17 to tell investors and analysts that the only plan they had  
 18 internally, the April 9 document, which we're also going to  
 19 spend a little time on later today, the only plan they had to  
 20 hit the number for the rest of the year required them to sell a  
 21 billion dollars in IRUs.  
 22 And four days after he gets that document, the guy in  
 23 the company who knows more about IRUs than anybody, tells him,  
 24 we have drained that pond. Greg Casey goes in on April 13 and  
 25 says, it's over for the third and fourth quarter. I think I

1 You heard from Mr. Johnstone. This was the obvious question on  
 2 everyone's mind. How are they doing it? He chose not to tell  
 3 them.  
 4 He had the final say on press releases, according to  
 5 the head of investor relations, Mr. Lee Wolfe. He fielded most  
 6 of the analyst questions on the earnings conference calls.  
 7 This was his choice. And I hope you keep that in mind when you  
 8 deliberate.  
 9 He also made the choice to sell, and I want to be  
 10 clear on this too.  
 11 He talks about his options expiring. He had a couple  
 12 of choices on it. They didn't expire for two years. Why not  
 13 just wait and let the dust settle? See how we're going to do  
 14 on this shift. Give it six months. Just take your time, say,  
 15 now, I'm not really comfortable getting some mixed results in  
 16 here. I think I'll sit back. You know, I still have a year  
 17 and a half left. It's not a big deal.  
 18 But he doesn't. He puts his foot to the accelerator,  
 19 and he dumps stock like he's never done before, and that is  
 20 intent to deceive.  
 21 He also could have exercised and simply held the  
 22 shares. So exercise, pay the taxes. You heard earlier in the  
 23 case he had \$70 million of cash in February. That's plenty of  
 24 money to pay the tax. He could have exercised and held, shown  
 25 some confidence in the company. That was his choice. He chose

1 can hit the second quarter, but it's over. At that point, he  
 2 knows, of course. That's more information he had coming  
 3 through the budget process and seeing the huge stretch that  
 4 he -- it's a building mountain of information that he acquires,  
 5 and he makes a decision through those five or six months not to  
 6 tell the investing public exactly what he knows.  
 7 If that's all he did -- I want to be very clear about  
 8 this, if that's all he did is not tell investors, none of us  
 9 would be here, because, ladies and gentlemen, this is not a  
 10 disclosure case. If the defendant had simply chosen not to  
 11 tell investors, we would not be here. But the decision he  
 12 made -- if we could pull up 63, please.  
 13 The decision he made which landed him in this  
 14 courtroom today is not telling investors and then selling his  
 15 stock. And it's a very simple theme I'd like to impress upon  
 16 you; that is, if you don't tell, you can't sell. It's that  
 17 simple. He decided not to tell. He couldn't sell. He sold,  
 18 and he sold at a rate that was unprecedented for him. And  
 19 that's why he's here today and he's here today, because of his  
 20 own choices which were criminal choices. And you'll see that  
 21 as we go through the evidence related to these sales.  
 22 Now, I want to be very, very clear, the choice to tell  
 23 was his and his alone. 55 times during the period when he was  
 24 selling stock he met with analysts in the investment community.  
 25 He knew what they were asking for. You heard from Mr. Khemka.

1 not to do it. He chose to sell, and that's why we're here  
 2 today.  
 3 Now, why did he do it? What would drive a man who  
 4 doesn't have much problem in the past, what would drive him to  
 5 do something like this? Well, there are 100 million reasons  
 6 that drove him to do what he did. He knew he had to get out in  
 7 the first two quarters, because he knew that the house of cards  
 8 that he built by deciding not to tell investors was about to  
 9 come crashing down, and he -- get out he did. He got out to  
 10 the tune of \$100 million.  
 11 Now, I want to walk you through some evidence, but  
 12 before I do, I want to thank you for your time. The  
 13 prosecution and the defense, I know, want to thank you. You've  
 14 been here on time every day, been very attentive, taking notes.  
 15 I appreciate that.  
 16 If you bear with me as with go through some of these  
 17 documents one more time, I'll send you on your way.  
 18 I want to start by focusing on how Mr. Nacchio knew  
 19 how the scheme worked, and that is, you've got to promise  
 20 growth, you've got to deliver growth, and if you don't deliver  
 21 growth, you're going to get -- in his words, you're going to  
 22 get whacked. And you're going to get whacked even if you miss  
 23 by a little bit.  
 24 Let's review some of the evidence that goes with that.  
 25 We know that the DLJ projections -- if we can look at

1 Mr. Mohebbi says, a not friendly merger. They weren't sharing  
2 a lot of information. They didn't have great information to  
3 start with.

4 It's eight weeks after the merger. Now they're  
5 inside, meeting, kicking the tires. Ms. Szeliga told you they  
6 didn't have a plan for 2000 yet, as of September 2000, 2000,  
7 let alone a plan for 2001. She's the head of financial  
8 planning at this time. If she doesn't know how they're going  
9 to get there, who would know? She's the person who is in the  
10 detail. The defendant on his own went out and not only  
11 affirmed guidance, but raised it, without any basis.

12 There is -- they're in the middle of the budget  
13 process, shortly following the September 7, 2000, increase in  
14 guidance, and I want to spend a little bit of time talking  
15 about that with you. And there is -- we've heard a lot about  
16 this in terms of the difference between the external targets  
17 and the internal targets at Qwest, and I want to put that issue  
18 to rest, because I think it's a little bit of a distraction and  
19 nothing more.

20 Let me focus to go through that issue on an exhibit  
21 that we talked a lot about at trial, and that's Exhibit 803.

22 Now, this is a September 5, 2000, memo, and it may  
23 look familiar to you. We talked to you about this with  
24 Ms. Szeliga. And I want to focus your attention -- this is,  
25 again, Bickley and Pritchard are people in the financial

1 21.7. And we just reviewed a document that says there is  
2 1.2 billion in the risk to the street. So let's take a look at  
3 that.

4 So if you factor in or you adjust for that unlikely  
5 revenue that's in the guidance, that brings it back to  
6 20.4 billion. That's well below what Mr. Nacchio is  
7 continuously touting to Wall Street.

8 So that's one example of that. Let me run through --  
9 because the budget changes over time, so we may as well finish  
10 this out.

11 On February 5, the budget changing to 21.8 billion, I  
12 think Ms. Szeliga said there might have been some mathematical  
13 error or double counting, so they changed the budget. Again,  
14 the guidance remains the same. It's 21.3 to 21.7.

15 Ms. Szeliga's testimony was, even at the time of that  
16 budget, bringing it down to 21.8 billion. Now there is just a  
17 billion dollars of risk in there.

18 Okay. When you factor in for that billion of risk,  
19 unlike revenue in her words, again, you're well below, you're  
20 21.8 billion while you're out continuously touting to the  
21 street that you're going to hit 21.3 to 21.7.

22 And then finally, on April 9, the company performs  
23 what they call a current estimate. And that is, after having a  
24 quarter's worth of information on how we're doing, what do we  
25 think we're going to do for the rest of the year? So their

1 planning group, and they've gone out as part of this  
2 kicking-the-tires process and part of the initial budget  
3 process, decided to take a look at these targets, these  
4 internal targets and see how much risk is in them, and risk the  
5 way it was used at Qwest -- I guess I'd ask you to evaluate  
6 Ms. Szeliga's testimony on this. She explained it as simply  
7 being unlikely revenue. It was a billion dollars of risk. She  
8 viewed that, as the head of the planning unit, as unlikely  
9 revenue.

10 As of September 5, Bickley and Pritchard give Szeliga  
11 the memo that says the grand total of the business unit risk  
12 with the \$22 billion internal target would be 1.6 billion.  
13 Then they say there is a cushion to the street of about  
14 400 million, so they back that out, and they get the 1.2  
15 billion grand total risk in the street disclosures -- and this  
16 is really important -- there isn't a \$700 million cushion to  
17 the street. We're going to go through that in a minute. There  
18 is a billion 2 in risk in the street disclosure.

19 So let's look -- I prepared some charts that I'm  
20 hoping are going to help you understand this. Those are the 69  
21 series, Mr. Denno. Could we start with those.

22 All right. And just to orient you to this, on  
23 September 5, 2000, the internal budget was at 22 billion, okay.  
24 Two days later, on September 7, they set that guidance range,  
25 which you see in the yellow shading. That's the 21.3 to the

1 best estimate on April 9 is 21.5, which on its face is right  
2 within what you're telling Wall Street, but Ms. Szeliga  
3 explained, having gone through three months of operational  
4 reviews -- and again, we'll look at some of those documents in  
5 a few minutes, when you adjust for the risk that is still in  
6 that April 9 document, if we look at the next chart, you're  
7 down to 20.56 billion. Again, still well outside this guidance  
8 range of 21.3 to 21.7, which is being told to the public during  
9 this time period.

10 And then finally, we know the company took down its  
11 number on September 10 of 2001. You heard a little bit of  
12 testimony about that. Ms. Szeliga talked about that. They  
13 took it down by a billion dollars. Not coincidentally, the  
14 same billion dollars of risk she told him about in the fall,  
15 they finally realized and tell the public what he's known all  
16 along.

17 So when you adjust for that, from the guidance in  
18 place at the time, new guidance is 21.5 billion, that's in the  
19 press release on September 10, like a good card trick, the  
20 20.5, 20.4 billion has been there all along, because that's  
21 really what they had a shot at, and defendant knew that all  
22 along.

23 So when you hear these discussions about \$700 million  
24 gap between the street budget and the internal budget, it's a  
25 distraction, and I urge you not to fall for it for the reasons

1 identifying what their gaps are. And just to give you some  
 2 leeway here, Mr. Graham's testimony on this was that his target  
 3 for 2001 was 30 percent higher than his target for the prior  
 4 year, just to put it in perspective, a target he never thought  
 5 he could attain.  
 6 Even assuming all the initiatives he could divine, he  
 7 still comes up with \$714 million in IRUs, which is basically  
 8 what they used to plug -- national mass markets, as we'll  
 9 visit, they usually didn't fill their gap. They would list it  
 10 as a gap. Casey -- I think the testimony was, Casey and Graham  
 11 would plug it to IRU. Here you see \$714 million in IRU.  
 12 And again, the testimony is during this time period,  
 13 during these meetings, Mr. Casey was very clear with  
 14 Mr. Nacchio about the likelihood and unlikelihood of hitting  
 15 that number in the IRU market for 2001.  
 16 If we look at Government's Exhibit 986, which is the  
 17 December 7 submission from the same unit.  
 18 There is one piece of testimony you might remember,  
 19 and this is Mr. Graham -- if you go to the page where it shows  
 20 the 67 percent.  
 21 Great. Can you enlarge that, Mike?  
 22 So here we're talking about the productivity that is  
 23 assumed in the budget, and you can see in the bottom right-hand  
 24 corner, the 70 percent increase in productivity. And  
 25 Mr. Graham gave a very compelling piece of testimony when he

1 unit reviews. And I think Mr. Schumacher's testimony during  
 2 this time period was, they go back to this chart and  
 3 Mr. Nacchio folded it up and said, I don't want to talk to you  
 4 guys until you have a plan to hit your number, which is fine.  
 5 I want to be clear on this. The Government's contention is not  
 6 that it's criminal to be a hard-line executive. That's fine.  
 7 It's just a disclosure issue. If you know that your people  
 8 haven't a plan hit these targets and they're telling you  
 9 they're unrealistic, you can't keep that inside and continue to  
 10 sell your stock.  
 11 So at the end of the budget process -- the budget  
 12 process -- and there were a series of these meetings that went  
 13 on in the fall of 2000. And Mr. Mohebbs was an active member  
 14 in each of those proceedings. And he testified here to you  
 15 about those.  
 16 And toward the end of those proceedings, he issued a  
 17 couple of e-mails which he printed out and put on Mr. Nacchio's  
 18 chair, and you heard a lot of testimony about that.  
 19 In late December, the testimony was, from Mr. Mohebbs  
 20 and Ms. Szeliga, that each of them had spoken to Mr. Nacchio  
 21 about the huge stretch in the budget, based on these billion  
 22 dollar risks and based on the submissions and the complaints  
 23 from the business unit heads.  
 24 And Ms. Szeliga specifically urged Mr. Mohebbs to go  
 25 forward and to really push Mr. Nacchio, because she thought, I

1 explained that, at least in terms of what made sense to me.  
 2 It's like asking a door-to-door encyclopedia salesman to go  
 3 from selling 10 to 17 encyclopedias --  
 4 MR. STERN: Your honor, I hate to interrupt. I'm not  
 5 sure that counsel did this intentionally, but saying something  
 6 made sense to her is not correct. If she doesn't do that  
 7 again, that would be fine with me.  
 8 MS. CONRY: Doesn't happen that often, so I thought it  
 9 was noteworthy.  
 10 THE COURT: Try not to inject --  
 11 MS. CONRY: All right. I will.  
 12 So his testimony was that there was -- is 70 percent  
 13 assumed increase in productivity for that time period. Again,  
 14 more than he thought he could handle in his unit. And he told  
 15 Mr. Nacchio so.  
 16 Let's look at the October 9 submission for the  
 17 national mass markets. And, again, I think national mass  
 18 markets was roughly a third. This is Government's Exhibit 806.  
 19 And if we go to their waterfall chart, their gap was  
 20 444 million.  
 21 So when you add these up, these problems, you can see  
 22 how Bickley and Pritchard got to their billion dollars in risk.  
 23 It's not coincidence. They're all sort of evaluating the same  
 24 process. Again, this was a document that was presented to  
 25 Mr. Nacchio in the October time period during these business

1 think you'll remember, she said she thought Mr. Nacchio would  
 2 pay a little more attention to her because -- to him because  
 3 Mr. Mohebbs was an operations guy.  
 4 So Mr. Mohebbs had a discussion with Mr. Nacchio in  
 5 December of 2000 about these issues of the recurrent -- shift  
 6 to recurring revenue, the issues with IRUs and non-recurring  
 7 revenue and one-timers, and he summarizes those in a couple of  
 8 memos, and I'd like to look at those with you now.  
 9 Let's look at what Mr. Mohebbs's first warning is, and  
 10 I think that's Government's Exhibit 904.  
 11 If we could enlarge that.  
 12 And I think the date from the testimony on this was  
 13 late November or early December. And Mr. Mohebbs is telling  
 14 Mr. Nacchio in this memo, first he's describing some meetings  
 15 he's having internally at Qwest. Then he's saying, "As we  
 16 discussed this week" -- to Mr. Nacchio, referencing their  
 17 discussions they had had earlier -- "the revenue and EBITDA  
 18 numbers for next year are huge stretch and they require  
 19 day-to-day monitoring as well as close cooperation between the  
 20 units. We need our recurring revenue -- we need our recurring  
 21 business to literally take off by April/May time frame or the  
 22 amount of one-time businesses required to fill the gap will  
 23 just be too large to deal with. Our track record in this area  
 24 is not good, as you know."  
 25 And I want to focus for a moment on the comment that

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1 told the shift is not recurring, recurring revenue is down  
 2 20 percent, after he goes through the operational reviews,  
 3 where he does hear from Mr. Casey, we've drained the pond, it's  
 4 another time he's got a choice, and he's got a big one now.  
 5 What do I do? I'm about to go on the earnings conference call.  
 6 I'm going to tell the whole investment community what happened  
 7 at Qwest during the first quarter. Lots of interest. You  
 8 know, this is first quarter of the new full year they're going  
 9 to be together. He's got a big decision. When I say this is  
 10 about choices, this is exactly the moment I'm talking about.  
 11 He has a choice. Don't tell. You know what? Don't  
 12 tell. You've got this proprietary information. You want to  
 13 keep it to yourself. You think this is terrific. None of us  
 14 would be here, none of us would be here. Keep it to yourself.  
 15 But he makes a decision.  
 16 He makes a decision to go out and -- can we play that  
 17 clip from the April 24, 2001, earnings conference call. All  
 18 the analysts following Qwest is on the call. This is the  
 19 comment he leaves them with.  
 20 (Tape played.)  
 21 Nothing to dissuade us? Nothing to dissuade us. I  
 22 got a binder full of things that he should have told these  
 23 people about at the other end of that call. Or not tell them  
 24 and not sell. But if you don't tell, you can't sell. That's  
 25 the choice he had in front of him. And what does he do that

1 want you to look at the mounting evidence over time, and that's  
 2 one of the most important things you're going to do is  
 3 evaluate, is there enough material non-public information at  
 4 any one point for there to be a crime. I ask as you start that  
 5 period you really focus on the backdating of the growth shares,  
 6 because I think that's very indicative of someone who knows he  
 7 has material non-public information at the time he's trying to  
 8 sell the January and February.  
 9 So I draw your attention to the April sales at this  
 10 point because of the amount of information he has at this time,  
 11 because of the misleading impression that he's seen nothing to  
 12 dissuade us. And of course, you'll be the judge of that,  
 13 whether it is misleading or not, but the contrast between that  
 14 statement and the documents we've just reviewed.  
 15 Let's walk through the rest of his trades, then.  
 16 The rest of his trades -- let's take a look at this  
 17 chart. Again, I believe -- I'm not certain, but I believe  
 18 you're going to get some sort of summary of the sales that  
 19 might look something like this when you go back to the jury  
 20 room. So let me -- it won't have the descriptions on the side.  
 21 These are the count on the first column. When you go down --  
 22 first two are the growth shares, backdated documents.  
 23 The next -- if you look at the timing, you wonder why  
 24 it's timed this way. The first quarter trading window doesn't  
 25 open up until January 26, so you won't see any trades before

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1 lands him here in this courtroom with us today? He sells and  
 2 does he.  
 3 Let's look at his April sales. If we can look at the  
 4 stock sale chart, again, Mike, with the 42 counts.  
 5 I think it's 62.  
 6 Okay. So, again, this is the list of the 42 sales  
 7 which he's charged.  
 8 In we can go to the next slide.  
 9 Now, remember the window, the first day he can sell in  
 10 the open window after this quarter is April 26 of 2001. Let's  
 11 look at what he does in the first four days when he had a  
 12 chance to sell after he says there is nothing to dissuade us.  
 13 \$34 million worth of sales.  
 14 I mean, look at the dump he puts out there relative to  
 15 the rest of the sales on this chart. Nothing to dissuade us.  
 16 A third of the amount charged in this case takes place  
 17 in those four days. Again, he knows recurring revenue is not  
 18 taking off at this time. He knows the one-time market is going  
 19 away. He knows the house of cards is about to implode. Knows  
 20 he drained the pond. He tells them, we've seen nothing to  
 21 dissuade us, and he goes on a selling binge that is  
 22 unparalleled. That is -- the judge is going to talk to you  
 23 about what is criminal intent, what is intent to deceive. I  
 24 really ask that you pay a lot of attention to this time period.  
 25 Again, I don't want to focus on the April counts. I

1 then, because, under Qwest's policy, the window is closed.  
 2 Then you see the February trading plan. He enters  
 3 into a plan February 15 to sell 11,500 shares a day. All  
 4 right. And there is a big announcement about this, and you've  
 5 heard actually a lot of testimony about that plan as well, so  
 6 now would be a good time for me to focus on that.  
 7 He has a plan to sell 11,500 shares a day for the next  
 8 couple of years, because, as he says, his options are expiring.  
 9 If he sells a little bit every day, he can get rid of all his  
 10 shares before they expire. He can diversify. Everybody loves  
 11 this plan. Slater loved the plan. Weinstein, personal  
 12 advisor, loved the plan. Mr. Nacchio originally loves the  
 13 plan. But you can't tell somebody you're going to sell 11,500  
 14 shares a day and then start dumping a million shares within a  
 15 couple of days. So he cancels the plan and goes on the April  
 16 purge, which we see there.  
 17 You'll see following the large April sales are Counts  
 18 28 through 35, which are, again, just more selling --  
 19 exercising of options and selling of shares during the window  
 20 when he has material non-public information, and then he enters  
 21 another plan May 18, and he sells -- I think you have the plan  
 22 back with you in evidence, but I think the gist of it is he's  
 23 agreed to sell 10,000 shares a day, but there is some sort of  
 24 catchup routine if the stock goes below \$38. You're going to  
 25 be able to sell a lot more shares once the stock goes up. I

1 haven't read it recently, but take a look at it yourself to  
 2 make sure you understand it. He puts a \$38 floor in there.  
 3 There is a lot of discussion, I'm sure you'll hear,  
 4 about the \$38 floor. But if you think about it, the stock --  
 5 stock is at about a 52-week low at this time. I mean, look at  
 6 the stock evidence that's in, I think it's 1880, and think of  
 7 how it looks for a CEO to be selling shares as his market price  
 8 is plummeting, when he's already sold a million shares in the  
 9 last week or so. There comes a point when even the CEO just  
 10 can't sell anymore.

11 You heard Mr. Wolfe talk about how the analysts were  
 12 calling, asking. He gets several calls a day, why is he  
 13 selling.

14 So there does come a point where you really can only  
 15 cash in at a point. I'll let Mr. Stricklin talk to you about  
 16 that when he talks to you after the defense talks to you. But  
 17 there does come a point where the CEO can't unload because then  
 18 the whole market will implode.

19 Following the -- actually, let me look at a few more  
 20 charts on the stock sales. I apologize.

21 If we could take a look at 400, Government's Exhibit  
 22 400.

23 Again, I want to focus your attention on the magnitude  
 24 of his sales during this time period when he knows the IRU  
 25 market is going away. He's got this two-quarter window in

1 All right. Now let me move forward to the summer of  
 2 2001.

3 The evidence shows that the defendant's goal during  
 4 the summer of 2001 was to put as much distance between himself  
 5 and eventually having to take down that number, because he  
 6 knows it's coming, and that last sale. When you go back to the  
 7 jury room, I ask you to look at your notes or think through the  
 8 testimony, because he affirms guidance so vehemently through  
 9 this summer.

10 You'll remember June 18. There is some discussion on  
 11 this from Ms. Szeliga. There was a really bad article in the  
 12 Wall Street Journal, and it says, there is a glut in the fiber  
 13 optics industry, and Level 3's stock is falling. Mr. Wolfe  
 14 testified about this and so did Ms. Szeliga. And it was just  
 15 really bad for Qwest, because it compared them to some  
 16 companies who did a lot of IRUs, and Mr. Nacchio insists that  
 17 they have a conference call the following day, and they get all  
 18 the analysts on the call immediately, and he wants to make sure  
 19 that the stock price doesn't go out. He wants to go out and  
 20 affirm guidance.

21 Ms. Szeliga is in Pennsylvania on East Coast time.  
 22 They're talking. It's about 2:00 a.m. in the morning, I think  
 23 her testimony was. She is begging him, this is a quiet period.  
 24 We can't affirm for the year. We don't know if we made it for  
 25 the second quarter yet. It's June 18. We're sort of in an IRU

1 which he could get rid of this stuff, because the house of  
 2 cards is about to fall down.

3 In these two quarters, first two quarters of 2001, he  
 4 sells 250,000 more shares in those two quarters than he did in  
 5 those gray bars combined. I think that's 18 months.

6 So 250,000 more in five months than he sold in the 18  
 7 months before that. And that's the ramp-up of the sales that  
 8 we talked about, again, we think evidence of a man who knows  
 9 that the party is about to be over. He's dumping his shares.

10 Let's also look at the stock price chart, if we could.

11 All right. And I just want to draw your attention to  
 12 some of the fortuitous timing. He stops selling -- I don't  
 13 know if you can put a dot -- he stops selling just about the  
 14 end of May. So you can see he enjoyed good times, gotten out  
 15 while the getting is good.

16 And stock goes down, and throughout the summer of  
 17 2001, and I want to focus you now just for a minute on the  
 18 summer of 2001.

19 Actually, before I leave his rate of sales, I want to  
 20 be clear with you, that February plan that we talked about,  
 21 that would have solved all of his problems. It would have  
 22 enabled him to exercise and sell every single option that he  
 23 had before it expired. So that was a viable alternative for  
 24 him. And he chose not to do it because he couldn't sell fast  
 25 enough.

1 period. We don't know if we're going to close it or not.

2 She begs him. He says to her, you go to sleep, see  
 3 what I do in the morning. Wakes up, holds a conference call,  
 4 affirms guidance, very strongly touting that this company is  
 5 going to make its numbers for the year. Again, knowing all the  
 6 documents that he's seen, knowing the business unit reports  
 7 that he's seen, having talked to the business unit heads, he  
 8 goes out and affirms on June 18. Why? Because he has to. How  
 9 would it look if he takes the number down on June 18? He has  
 10 to. It's too close in time.

11 He doesn't have much of a choice there. Throughout  
 12 the summer, he continues in this pattern. There was a Piper  
 13 Jaffray conference on August 7, which Mr. Wolfe, head of IR  
 14 talked about. In that conference, he decides to talk about the  
 15 fact they do have IRUs.

16 I encourage you to review your notes or exhibits on  
 17 this, because this is another kicker that the guy does. He  
 18 goes out and sort of pretends everyone's known it all along.  
 19 After insisting that nobody disclose this and being wholly  
 20 unwilling to tell the people how they're making the number,  
 21 he's been caught. People know they're doing it now. Wall  
 22 Street has stopped believing him, I think the testimony was  
 23 from Mr. Wolfe. So he comes out and pretends you've known  
 24 we've done this all along. What's the big deal? He still  
 25 confirms guidance. We're terrific.

1 Now, this is August. We're well into the third  
 2 quarter. When Casey has told them we're not going to be there,  
 3 he's still affirming guidance strongly. Again, trying to put  
 4 some distance between himself and that last trade on May 29.  
 5 Finally, on August 15, the company finally does for  
 6 the first time -- and I think you heard this from  
 7 Mr. Johnstone, the company finally does describe the volume of  
 8 IRUs that they were doing in the first quarter and the second  
 9 quarter. And, you know, I think Mr. Johnstone's testimony was,  
 10 he immediately stripped it out of his model. I think his  
 11 testimony was -- when I say, stripped it out of his model, that  
 12 growth was that related to the IRUs, he just took it out. I  
 13 think his testimony was, he used to think that Qwest was  
 14 growing at 12 percent, and now he knows they're really only  
 15 growing at 7-1/2 percent because he knows these IRUs are also  
 16 going away, very difficult market, one-timers.  
 17 You know, very difficult to have sustainable growth in  
 18 that market, particularly during this time. So he strips them  
 19 out.  
 20 And then Qwest, I think the testimony was from  
 21 Mr. Johnstone as well, Qwest does the same later on, takes it  
 22 out of their growth estimates.  
 23 The first time that Qwest reveals and Mr. Nacchio  
 24 reveals that the IRUs actually went away and were going away  
 25 was in the third quarter. So he doesn't tell the investing

1 know, why do they need to know? And I would say, to make an  
 2 informed decision whether to buy or sell the stock. And  
 3 basically Mr. Nacchio responded, screw them. Go tell them to  
 4 buy."  
 5 Now, that is the clearest form of taking advantage of  
 6 investors. Unambiguous. And it was not attacked further on  
 7 cross.  
 8 Let's go to the next example of taking advantage of  
 9 other investors.  
 10 Now, this is Prashant Khemka who came to us from the  
 11 investment banking firm of Goldman Sachs. And he testified  
 12 about finding out about the IRUs and writing a memo to Wolfe  
 13 that eventually went to Nacchio, and we all remember this  
 14 because it said, "How many more cockroaches do you have in your  
 15 bag?" And we all -- unfortunately, my college days --  
 16 remember, you see one cockroach, we know you have a lot of  
 17 them. That was the reference Mr. Khemka was making.  
 18 He says in January of 2002, to set the scene, this is  
 19 the investment conference he's at, asking Mr. Nacchio how he's  
 20 going to recover from what they've been through, Mr. Khemka  
 21 says, "I recall specifically quoting Mr. Nacchio, smiling, and  
 22 he was saying, first of all, let me give you a piece of free  
 23 advice. Never believe a word of what management says at the  
 24 time of a merger. Do you think AOL/Time Warner management  
 25 believed what they said at the time of their merger?"

1 public what he knows in the fall of 2000 until almost a year  
 2 later.  
 3 And I think Mr. Casey testified that the IRUs  
 4 dissipated throughout the fourth quarter as well.  
 5 Let me just stop for a minute and go -- let's  
 6 review -- you're going to go back to the jury room, and the  
 7 judge is going to give you a lot of instructions on how to view  
 8 the counts. And I wouldn't be so cavalier as to speak on the  
 9 law, but I do know the judge is going to talk to you about a  
 10 couple of key words.  
 11 And one concept is, taking advantage of investors, or  
 12 is he taking advantage of the information.  
 13 And I'd like to show you a couple of pieces of  
 14 evidence that I would like you to focus on when you go back and  
 15 you review.  
 16 If we can show chart 64A.  
 17 Now, this is testimony that you heard from Lee Wolfe  
 18 when he was discussing with Mr. Nacchio the concerns that the  
 19 analysts were raising. This is Mr. Wise's question. "Now,  
 20 what did Mr. Nacchio tell you in response to your concerns that  
 21 were raised by the analysts about these one-time transactions?"  
 22 What was his response to you?  
 23 He says, "Well, as I testified earlier, there were  
 24 different responses in terms of what the impact on the stock  
 25 price would be. A couple of other times he would say, you

1 Management have to say things in order to get the merger done."  
 2 And then question, "When he says management had to say  
 3 things to get the merger done, what merger is he referring to?"  
 4 Answer: "The Qwest/U S WEST merger."  
 5 Question: "And when he said management had to say  
 6 things to get things done, who is management? Who is he  
 7 referring to?"  
 8 Answer: "Mr. Nacchio himself."  
 9 So those are two examples, and you look at your notes,  
 10 look through the record, certainly not suggesting it's limited  
 11 to that. I think those are two very good examples of  
 12 Mr. Nacchio's intent to take advantage of investors.  
 13 The another thing the judge is going to talk to you  
 14 about is, did the defendant really know what he was doing is  
 15 wrong? And there is a very specific instruction on that, but  
 16 did he have the intent to do something wrong or bad. And  
 17 listen to the judge's instruction on that, because that's what  
 18 governs, not what I say.  
 19 But what I do want to do is focus your attention on  
 20 why we think he did know what he was doing was wrong.  
 21 Let's look at Government's Exhibit 308.  
 22 And I want to be clear, he knew not only what he was  
 23 doing was wrong, he knew it was unlawful.  
 24 So this is Qwest's insider trading policy. And I  
 25 think Ms. Oneth talked to you about this. This is Government's



1 want to be clear on that. The chart might be off. CFO warned  
 2 1 billion of risk in 2001 budget, and national mass markets  
 3 warnings of a gap as high as 444 million, and it has no plan to  
 4 fill it and never did have a plan to fill it.

5 Again, those are examples of material non-public  
 6 information.

7 And let me focus on that -- another aspect of this  
 8 just very briefly. And that is, is something non-public?  
 9 Do -- what do we know is out there in the public? And it's got  
 10 to be something Mr. Nacchio hasn't told other people. To get  
 11 over that hump and evidence, I'd like you to consider the  
 12 testimony of Mr. Johnstone. And Mr. Wise went through the  
 13 series of questions with him.

14 Great.

15 And those -- this is from the testimony of Drake  
 16 Johnstone, research analyst with Davenport and Company, and you  
 17 remember Mr. Johnstone testified that he was a Wall Street  
 18 Journal number one analyst of the year in the telecom industry  
 19 based on his reporting.

20 The question is, "Now, Mr. Johnstone, did" -- I think  
 21 this is after the first quarter earnings release conference  
 22 call. "Now, Mr. Johnstone, did the defendant tell you and  
 23 investors listening on that first quarter earnings call that in  
 24 2001 recurring revenue had to grow at twice the rate it grew in  
 25 2000 or Qwest wouldn't make its numbers in 2001?"

1 of 2001 that it had included in the first quarter results over  
 2 \$400 million of one-time optical capacity sales."

3 Sorry, one more slide.

4 Question: "Did Mr. Nacchio tell you and other  
 5 investors listening on that call, the first quarter call, that  
 6 as a result of the recurring business not taking off in the  
 7 first quarter that Qwest was relying more on one-time  
 8 transactions that they had planned -- than they had planned,  
 9 particularly in the second half of the year?"

10 Answer: "No."

11 Question: "Did the defendant tell you on that first  
 12 quarter earnings call that the market for IRUs was drying up?"

13 Answer: "No."

14 So that is some of the evidence that we ask you to  
 15 look at to evaluate whether something was public or non-public  
 16 when you go back in your deliberations.

17 Now, there is one more chart I'd like to show you, and  
 18 that is regarding Mr. Mohebbi's warnings.

19 Mike, if you could pull up chart 70. Do that you  
 20 have?

21 Now, these are a couple of warnings -- these are  
 22 Mohebbi's and others, but these are a couple of warnings that  
 23 the defendant received -- and I want to review these with you,  
 24 because he received them fairly early in the game, and they  
 25 came true.

1 Answer: "No."

2 Question: "Did the defendant tell you and the other  
 3 investors on that call that Qwest's recurring business needs to  
 4 literally -- recurring business needs to literally take off by  
 5 April or May time frame or the amount of one-time business  
 6 required to fill the gap will be too large to deal with in the  
 7 second half of 2001?"

8 Answer: "No."

9 Question: "Did the defendant tell you that recurring  
 10 business missed the first quarter plan by nearly 20 percent?"

11 Answer: "No."

12 Next slide.

13 "Did the defendant tell you that Qwest would not have  
 14 made its numbers in the first quarter of 2001 without over  
 15 \$500 million of one-time transactions?"

16 Answer: "No."

17 Question: "Did he tell you that one-time transactions  
 18 amounted to 38 percent of Qwest's growth in the first quarter?"

19 Answer: "No."

20 "When, if ever, did you learn that fact?"

21 Answer: "Qwest published a second quarter 10Q filing  
 22 with the SEC in August of 2001.

23 "And what information did that filing in August of  
 24 2001 contain as it related to one-time transactions?"

25 Answer: "Qwest disclosed in the 10Q filing in August

1 Now, the first one is, there is a billion dollars of  
 2 risk in the 2001 budget. That's the unlikely revenue that  
 3 Ms. Szeliga talked to the defendant about, again, either late  
 4 December or through January. Did it come true? Yes, it came  
 5 true. I'll spoil the surprise.

6 And what's the final result? Qwest takes their number  
 7 down by a billion dollars on September 10, nine, eight months  
 8 later than she told him, warns him of this, and well past his  
 9 trading that brings him here today.

10 The next warning, if Qwest's recurring revenues don't  
 11 take off, there would not be enough one-timers to close the gap  
 12 in the third and fourth quarters of 2001. That's from the  
 13 Mohebbi warning.

14 Yes, that came true. Qwest missed their numbers in  
 15 the third quarter, and the IRU market did dry up. I think  
 16 Mr. Casey testified that it -- I'm sorry, they missed it in the  
 17 third quarter, the IRU market dried up. This is from the Casey  
 18 warning that he gave him in the fall, and, again, in April 13  
 19 of 2001. Yes, it did. October 31, 2001, Qwest missed their  
 20 numbers in the -- Qwest missed their numbers in the third  
 21 quarter. I think there is testimony they missed in the fourth  
 22 quarter as well.

23 So the warnings that the defendant had but didn't heed  
 24 intentionally and deliberately did come true.

25 I want to just wrap up by thanking you again for your