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nacchio on trial

Defense: That's a wrap

Apparently confident, attorneys rest case early with no Nacchio testimony

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Joe Nacchio's attorneys rested their case Monday without putting the former Qwest chief executive on the stand to defend himself against criminal insider-trading charges.

Nacchio's attorneys called just three witnesses over two days, an indication that they believe the prosecution didn't prove its case. The government called 20 witnesses over 10 days to make a case that Nacchio sold \$100.8 million in Qwest stock in early 2001 while he had inside information about the company's looming financial problems.

Nacchio's lead attorney, Herbert Stern, offered a simple explanation for the brevity of the defense, which didn't include any mention of the much-touted national-security defense.

"If it ain't broke, you don't fix it," Stern told reporters after the trial adjourned for the day.

Not calling Nacchio to the stand "strongly suggests" that the defense believes it is in good shape, said former federal prosecutor Richard Kornfeld.

"In a white-collar case like this, a lot of times you don't want to put your client on or feel you don't need to unless you believe that you're way behind," said Kornfeld, an attorney with Recht & Kornfeld.

"Reading between the lines, it seems to me that the defense feels pretty good about the fact that they don't believe the government has met its burden of proving its case beyond a reasonable doubt."

The case could go to the jury as early as today after closing arguments and jury instructions. But first, the prosecution plans to take the unusual step of reopening its case by recalling Nacchio's former financial adviser David Weinstein to the stand.

Judge Edward Nottingham ruled that the government could recall Weinstein after granting the defense's motion to introduce hearsay evidence connected to Nacchio's alleged backdating of a stock-sale document.

"This is a very unusual ruling in this kind of case," said former federal prosecutor Tony Leffert.

It could play to the government's advantage because it throws the final spotlight onto the backdating issue, which is the closest thing the government has to a "smoking gun," he said.

On Monday, the defense called Northwestern University law professor and private consultant Daniel Fischel to offer summary testimony about Nacchio's stock sales.

Through a series of charts, Fischel tried to show that Nacchio didn't accelerate his stock sales during early 2001. For example, he referred to a chart in his testimony that showed Nacchio exercised and sold 34.5 percent of his vested stock options in the second quarter of 1999 and 14.5 percent in fourth quarter of 2000. In comparison, Nacchio exercised and sold 12.6 percent and 22.8 of his vested stock options during the first and second quarters of 2001, respectively.

During cross examination, Fischel acknowledged that he has been hired as an expert witness by the government, tobacco companies and other former corporate officials. Fischel testified that he charges all of his clients the same rate: \$1,000 an hour. He said he charged Nacchio's team \$25,000 for Monday's testimony.

Fischel also acknowledged under cross examination that Nacchio sold stock 3.5 times faster during the first four months of 2001 than during a similar period in 2000.

After Fischel was dismissed, the defense introduced several pieces of evidence to the jury, including October 2000 video of Nacchio speaking about expiring stock options that are the focus of the government's case.

"It's use 'em or lose 'em," Nacchio told a meeting of industry analysts in the clip. "I have to sell every quarter."

Another point the defense was able to draw out as the government presented its case was the difference between internal budgets and the external guidance Nacchio provided to Wall Street.

His attorneys have argued that the concerns former Qwest executives raised to Nacchio were about the internal budgets and not the public guidance.

Nacchio's attorneys also raised during the government's case the defense that Nacchio was upbeat on Qwest because he believed the company was slated to receive lucrative top- secret government contracts. But they didn't draw on that national- security defense when presenting their own case.

Besides Fischel, the defense called only two other witnesses: Qwest founder Philip Anschutz and Catholic abbot Giles Hayes.

Nacchio faces 42 counts of illegal insider trading; each count carries a maximum penalty of 10 years in prison and a \$1 million fine.

Nacchio joined Qwest in 1997 and was ousted by the board of directors in June 2002. He built Qwest into one of the country's largest telecommunications companies before it nearly crashed into bankruptcy amid the tech downturn and news of accounting irregularities.

Staff writer Greg Griffin contributed to this report. Staff writer Andy Vuong can be reached at 303-954-1209 or avuong@denverpost.com.

Looking ahead

What's up: Prosecutors and defense attorneys will meet with the judge outside the presence of the jury this morning to discuss the jury instructions.

Who's on the stand: The government plans to reopen its case by calling former Nacchio financial adviser David Weinstein, expected to be the case's last witness, to the stand when the trial resumes at 1 p.m.

What's left: Closing arguments and jury instructions. Prosecutors Colleen Conry and Cliff Stricklin will present the government's closing and rebuttal closing, and Nacchio's lead attorney, Herbert Stern, will present the defense's closing. The judge will then read the instructions to the jury before jury deliberations.