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Closing arguments made in Nacchio trial

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Herbert Stern stopped short of wrapping up his closing arguments in the trial of his client, Joe Nacchio, on Tuesday.

But U.S. District Court Judge Edward Nottingham said he would be "surprised" if the case doesn't go to the jury on Wednesday.

Nacchio, the former CEO of Qwest Communications International, is charged with 42 counts of insider trading for selling \$101 million in Qwest stock in the first five months of 2001 when he allegedly knew the Denver-based telecommunications company would not meet its guidance for the year.

In Tuesday's closing arguments, Assistant U.S. Attorney Colleen Conry detailed in almost two hours what the executive learned while he exercised and sold millions of shares in Qwest stock.

"He told investors exactly what they wanted to hear ..." Conry said. "How Qwest was growing while the titans of telecom were crumbling -- titans like AT&T."

Rather than disclosing that most of Qwest's growth revenue was coming from non-recurring revenue, Conry said, Nacchio deliberately kept investors in the dark about warnings from other Qwest executives about large revenue gaps while he continued to enjoy riches in the form of stock options.

She urged the jury to find Nacchio guilty of all 42 counts of insider trading.

By employing a catchy rhyme in her closing statements, Conry summoned the spirit of the late Johnnie Cochran, the famed attorney of the O.J. Simpson trial.

"If you don't tell, you can't sell," Conry said. "... It's that simple."

Conry dismissed claims from Nacchio's defense that the CEO had to sell his options before they expired without flooding the market and adversely affecting the stock price.

"He could have exercised and helped the shares, but his choice was not to do it," she said.

Conry also argued that Nacchio conspired with former Qwest counsel Yash Rana by altering stock option certifications because Nacchio was privy to a "lot of bad news" when he moved to redeem \$14 million in shares in December 2000.

"[Nacchio] jumped in a time machine and dated it back to Nov. 3," Conry said. "Why not just make it factually accurate? Because it would have raised too many questions."

Stern smiled, shook his head and rocked in his chair while Conry made the remarks about alleged backdating.

Conry said despite evidence that Qwest would miss its financial guidance for the third and fourth quarters of 2001, Nacchio continued to reaffirm Qwest's revenue guidance of \$21.8 billion for 2001, shoring up the growth numbers by raising expectations on one-time fiber swaps -- despite knowledge that the market for such transactions was drying up.

Nacchio finally restated guidance to \$20.8 billion on Sept. 10, 2001.

In his closing statements, Stern said prosecutors had failed to deliver evidence that Nacchio deliberately intended to mislead investors with the intention of cashing in on stock. He asked the jury to acquit Nacchio.

Stern reiterated that Nacchio used internal growth figures to motivate Qwest workers to step up their efforts shortly after the company's merger with US West in July 2000.

He also pointed out that Qwest's five-year projections of annual growth rates up to 17 percent were based on a report from a consulting firm that was paid nearly \$31 million. He said Qwest executives who testified insinuated the projections were Nacchio's creation when that wasn't the case.

He also said that Nacchio went against the advice of his own financial adviser, David Weinstein, by holding on to stock options he exercised. Weinstein was a witness for the prosecution.

"Weinstein wanted him to exercise and sell, but he didn't. Why? Because he believed in his company," Stern said.

Stern also pointed out that Nacchio used 90,000 shares of Qwest stock to establish a family

partnership worth \$4.5 million when the partnership was established in July 2000. He noted that the partnership has not yet sold the shares.

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"Can anyone doubt that when he made that gift in July 2000 he had anything but the highest expectations for the company?" Stern asked jurors.

In approving Qwest's financial projections, Stern said, Nacchio couldn't possibly anticipate the economic hurdles that were ahead in 2001.

"Maybe the optimistic projections didn't come true," Stern said. "...But that isn't a crime."

Stern is expected to finish his closing arguments on Wednesday morning.

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