1 So the other documents I have in
2 front of me are the ones that you just handed
3 up.
4 MR. CARROLL: Yes, Your Honor.
5 JUDGE SIPPEL: And we might as
6 well move those in too, at the same time.
7 MR. CARROLL: Yes, Your Honor.
8 That would be Exhibit 730 and 715.
9 JUDGE SIPPEL: Okay. Well, let's
10 take those one at a time. Let me mark -- 715
11 is marked for identification as you have
12 identified it.
13 That's the equity agreement of --
14 equity agreement of --
15 MR. CARROLL: Dish.
16 JUDGE SIPPEL: -- Dish.
17 MR. CARROLL: Yes, Your Honor.
18 JUDGE SIPPEL: The co-star being
19 Dish. Correct.
20 Any objections?
21 MR. PHILLIPS: No, Your Honor.
22 JUDGE SIPPEL: Then that is

1 received into evidence, also, as Comcast
2 Exhibit 715.
3 (The document, having been marked
4 previously for identification as
5 Comcast Exhibit 715, was received
6 in evidence.)
7 And then last but not least is
8 Exhibit -- marked as Exhibit Number 730.
9 Those have been adequately
10 described as samplers of minutes of board
11 director meetings, Tennis Channel. I will
12 identify those for the purposes of record, and
13 you're moving them into evidence also, sir?
14 MR. CARROLL: Yes, Your Honor.
15 JUDGE SIPPEL: Received in
16 evidence, Comcast Exhibit 730 as described by
17 Mr. Carroll.
18 (The document, having been marked
19 previously for identification as
20 Comcast Exhibit No. 730, was
21 received in evidence.)
22 Okay. Thank you.

1 MR. CARROLL: Thank you kindly,
2 Your Honor.
3 And, Your Honor, I'm going to
4 change chairs here as well, and turn this next
5 witness for cross examination purposes over to
6 my colleague, Edwin Moss, who will take this
7 chair.
8 JUDGE SIPPEL: All right. Mr.
9 Moss?
10 MR. MOSS: Good morning, Your
11 Honor.
12 JUDGE SIPPEL: If Judge Steinberg
13 were here, I could switch with him, but he's
14 not here today.
15 (Laughter.)
16 MR. MOSS: Thank you, Your Honor.
17 JUDGE SIPPEL: Mr. Moss, good
18 morning, sir.
19 MR. MOSS: Good morning, Your
20 Honor.
21 JUDGE SIPPEL: We have a witness?
22 MS. POGORILER: Your Honor, with

1 your permission, Tennis Channel would call
2 Gary Herman.
3 JUDGE SIPPEL: Mr. Herman, please
4 come forward, sir. Thank you for being so
5 patient.
6 WHEREUPON,
7 GARY HERMAN
8 WAS CALLED FOR EXAMINATION BY COUNSEL FOR
9 TENNIS CHANNEL, AND HAVING FIRST BEEN DULY
10 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:
11 JUDGE SIPPEL: Please, have a
12 seat.
13 You've got your water?
14 THE WITNESS: Thank you.
15 JUDGE SIPPEL: You can help
16 yourself to our china, glasses, if you care,
17 whatever makes you comfortable.
18 DIRECT EXAMINATION
19 BY MS. POGORILER:
20 Q Good morning, Mr. Herman.
21 A Good morning.
22 Q If you could just state your full

1 name for the record.

2 A Yes. I'm Gary Herman.

3 MS. POGORILER: Your Honor, if I

4 could have permission to show the witness a

5 document that's been submitted as his written

6 direct testimony? It's marked Tennis Channel

7 Exhibit 15.

8 (Whereupon, the above-referred to

9 document was marked as Tennis

10 Channel Exhibit No. 15 for

11 identification.)

12 JUDGE SIPPEL: Please do.

13 THE WITNESS: Thank you very much.

14 Thank you.

15 BY MS. POGORILER:

16 Q Mr. Herman, if you could just take

17 a look at the document I handed you, and

18 confirm that it is your written testimony?

19 A Yes, it is.

20 Q And it's your signature on page

21 12?

22 A Yes.

1 MS. POGORILER: Your Honor, we
2 move this into evidence.
3 JUDGE SIPPEL: Any objection?
4 MR. MOSS: Your Honor, we don't
5 have any objection to the admission into
6 evidence of the written portion of the
7 testimony. However, we do have an objection
8 based on lack of completeness to the exhibits
9 in Mr. Herman's testimony.
10 We'd submit, Your Honor, that we
11 could resolve that objection if Your Honor
12 would allow us to introduce into cross a more
13 complete version of those charts that we could
14 cross examine him on.
15 JUDGE SIPPEL: You're talking
16 about the tabs a, b, and c?
17 MR. MOSS: Yes, Your Honor.
18 JUDGE SIPPEL: Well, we'll come to
19 that on cross examination. But you have the
20 substance of the written testimony itself, as
21 it stands without tabs a, b, and c, you have
22 no objection to it?

1 MR. MOSS: No objection, Your
2 Honor.
3 JUDGE SIPPEL: All right. Then
4 subject to your objections, Tennis Channel
5 Exhibit 15 is marked and received in evidence
6 at this time.
7 (The document, having been marked
8 previously for identification as
9 Tennis Channel 15, was received in
10 evidence.)
11 And Counsel may proceed.
12 BY MS. POGORILER:
13 Q Mr. Herman, I just want to briefly
14 review what's in your testimony. What is your
15 position at Tennis Channel?
16 A I'm the Senior Vice President of
17 Access.
18 Q And how long have you worked in
19 the ad industry?
20 A Since 1983. So for the past 27
21 years, I've either been selling ads or
22 managing staff sub-teams that have been

1 selling ads.

2 Q If you could just tell us briefly

3 some of the companies that you've sold ads

4 for?

5 A Sure. Prior to Tennis Channel, I

6 worked with Westinghouse, Broadcasting Group

7 W, a company that launched the first over-the-

8 air broadcast station in the United States.

9 I've worked for CBS and E.W.

10 Scripps in their cable division that owns and

11 operates channels like Home and Garden

12 Television, Food Network, and Do It Yourself

13 Network.

14 Within those companies, I've

15 always been in the sales side. I've had most

16 of the jobs that are available. I've been a

17 local account executive, local sales manager,

18 a national sales manager, a national regional

19 sales manager, a vice president, and a senior

20 vice president.

21 And of my 27 years, about 16 were

22 spent on the local and national broadcast

1 side, and the past 11 had been on network
2 cable.
3 Q What are your responsibilities
4 today at Tennis Channel?
5 A I lead the division that's
6 responsible for selling Tennis Channel's ads
7 on air and online. There are, I guess, four
8 departments that report to me, the actual
9 sales A.E.s and vice presidents of sales that
10 call on the accounts, the New York research
11 department, the operation and planning
12 departments that do the back office work for
13 Tennis Channel, and we have a national rep
14 firm that sells for us, and they also report
15 into me.
16 Q Now, do you have client contact in
17 your work?
18 A Yes, I do. It's not as much as it
19 was when I was an account executive. Most of
20 the day-to-day client relationships are
21 maintained by my staff, but I still enjoy
22 going on sales calls, and I try to get out.

1 Q And do your responsibilities
2 require you to have an understanding of the
3 competitive landscape of the ad market?
4 A Yes, of course. I mean, I have,
5 you know, there are seven sales people that
6 are on the street. They bring me deals. I
7 have to approve or not approve the deals, and
8 it's important for me to understand the
9 competitive marketplace that we're working in
10 so I can make an informed decision about our
11 assets.
12 Q Now, based on your experience
13 selling advertising for Tennis Channel, is
14 Tennis Channel an ad-supported network?
15 A Yes. I mean, we depend upon ad
16 sales to supplement our affiliate license
17 fees. This money is critical for us to
18 survive and to grow our business.
19 Q Mr. Herman, can you just give us a
20 brief overview of Tennis Channel's competitive
21 marketplace?
22 A I mean, not to overstate the

1 obvious, but Tennis Channel's a sports
2 channel, and we compete primarily against
3 other sports channels, the single sports
4 channels like Golf Channel, the Football
5 Channel, the Hockey Channel, and the multi-
6 sport channels, ESPN, Versus. That's our
7 field.
8 Q You just named a few specific
9 networks. How do you know that you compete
10 with those networks?
11 A Well, through the buying process,
12 through part of the discovery process, when
13 we're working with agencies, they tell us
14 which -- they tell us what budget we're
15 submitting on.
16 So they'll say, you know, we have
17 the budget up, for instance, for ING, and it's
18 a sports budget. We want you guys to submit.
19 So we know directly from the agencies that
20 we're submitting on sports budgets.
21 We also know because we can pull
22 reports after the fact on those accounts, and

1 we can see what channels they bought, and the
2 overwhelming majority of all of our national
3 accounts also buy other sports channels.
4 Q Can you give me some examples of
5 purchasing parameters that ad buyers give you?
6 A Yes, I mean, you know, in a
7 simplified version, there are a lot of factors
8 that go into the decision process.
9 Demographics and programming
10 content are king. So the way it would
11 normally work is the ad agency would supply us
12 with a buying demographic, for instance,
13 adults 25 to 54, and they'd use that so they
14 can get a relative comparison of what
15 different channels' programming costs.
16 And they have a budget. And for
17 example, they would split the budget up among
18 different programming categories. So they
19 might say, you know, a third of the budget is
20 going to prime time, a third of the budget is
21 going to news, a third of the budget is going
22 to sports. So Tennis Channel would compete

1 for that portion of the budget, the third that
2 is assigned to sports channels.
3 Q Do you -- I just want to follow up
4 on the last point you were saying.
5 A Sure.
6 Q So do you, in those parameters, do
7 you have an understanding of the specific
8 other channels that you're competing with?
9 A Sometimes we do. The agencies
10 will tell us exactly who the competitive set
11 is. Sometimes they make -- they'll use a
12 broad umbrella and just say that it's a sports
13 budget, and they won't tell us.
14 Q Now, do you compare Tennis
15 Channel's demographics to those of your
16 competitors when you're making pitches or
17 proposals to ad buyers?
18 A Yes. I mean, it's a multi-step
19 process. But for us to determine what our
20 pricing should be and what our packages should
21 look like, we need to have the understanding
22 of what the competitive situation is.

1 But we also want to provide as
2 much reliable information to the buyer so they
3 can make good decisions.
4 Q Now, does the fact that you
5 distinguish yourself from other networks mean
6 you don't compete with them?
7 A I mean, I would think the fact
8 that we do distinguish ourselves from other
9 networks is exactly what -- and that's -- the
10 differences are what establish the competitive
11 field. That's what competition is about.
12 It's comparing differences.
13 Q How would you describe Tennis
14 Channel's audience profile?
15 A We have an affluent audience of
16 active adults. We're gender mixed. We tend
17 to be a little more male. On a total day
18 outlook, when you look at all the programming,
19 about 60 percent of our audience, on average,
20 is men, 40 percent women.
21 It changes program by program. The
22 large tournament plays tend to be maybe 65 to

1 75 percent men, but on average, it's an adult
2 audience that's skewed to men.
3 Q Now, are there other networks that
4 Tennis Channel competes with that offer
5 similar audience profiles?
6 A You know, I think most of the
7 sports networks share common characteristics.
8 They tend to have more men watching then
9 women. They tend to have -- probably be a
10 little more affluent in terms of income. But,
11 yes, I mean, we're all basically speaking to
12 similar kinds of sports fans.
13 Q Now, does Tennis Channel have the
14 exact same audience profile as Golf Channel
15 and Versus?
16 A No, and I'm not -- you know, I
17 would be surprised if any channels had the
18 exact same profile.
19 Q Does Tennis Channel tend to have
20 more women in its audience than Golf Channel
21 and Versus?
22 A Yes. We do.

1 Q Does that difference mean, in your
2 mind, that Tennis Channel does not compete
3 with Golf Channel and Versus?
4 A I mean, I've been there now for
5 close to four years, and I haven't seen that
6 to be the case. I can recall one example
7 where an advertiser didn't do business with us
8 where they cited the -- our demographic gender
9 skew as a reason.
10 But I don't see it as being a
11 factor. And it's evidenced by the fact that,
12 you know, we have a lot of national council on
13 the air that buy sports.
14 Q Now, I just want to follow up on
15 that one example. And without naming names,
16 I think because the courtroom is open --
17 A Right.
18 Q -- did that ad buyer give you
19 other reasons, or also other reasons for not
20 wanting to buy ads on Tennis Channel?
21 A Yes. I mean, they had compared
22 where their -- it was a retailer, and they had

1 a map of where their major stores were, and a
2 lot of their key stores were in top 15
3 markets.
4 They asked us what our
5 distribution was in those markets, and we
6 didn't have a level of distribution in many of
7 those markets that they thought was important.
8 And by the way, you know, it was
9 New York -- some of the key markets were New
10 York, Philadelphia, Boston, and Chicago.
11 Q And is it your understanding that
12 that several of those are markets dominated by
13 Comcast Cable?
14 A My understanding is that, you
15 know, the last three are -- Comcast has a
16 significant footprint in those last three
17 markets.
18 Q Now, Mr. Herman, have you studied
19 the overlap between Tennis Channel's actual
20 and potential advertisers and those of Golf
21 Channel and Versus?
22 A Yes.

1 Q What did you do to study that
2 issue?
3 A So, I looked at the top 30
4 accounts based upon revenue on both Golf
5 Channel and Versus. I compared which one of
6 those accounts also purchased Tennis Channel,
7 which ones do we have on the air, or had on
8 the air, and which one of those top 30
9 accounts we had made presentations to or we
10 had discussed advertising with.
11 And I did it for both channels.
12 And, you know, the results were no surprise,
13 really. The majority of accounts that
14 represent Golf Channel's top 30 accounts are
15 accounts that either do business with Tennis
16 Channel or we're pitching, because we both end
17 up, like all the sports channels, primarily
18 competing against the same basic set of
19 advertising accounts.
20 MS. POGORILER: Your Honor, could
21 I have permission to show the witness a visual
22 aid?

1 JUDGE SIPPEL: Yes. Check with
2 Mr. Moss before you show it to him. I mean,
3 just let him see it first, that's my point.
4 Thank you. It's been marked as
5 Tennis Channel Exhibit 188 for identification.
6 (Whereupon, the above-referred to
7 document was marked as Tennis
8 Channel Exhibit No. 188 for
9 identification.)
10 Is that correct?
11 MS. POGORILER: Yes, Your Honor.
12 And we would offer this into evidence.
13 JUDGE SIPPEL: Objection?
14 MR. MOSS: Subject to
15 completeness, objection as we discussed
16 earlier, Your Honor. No objection.
17 JUDGE SIPPEL: Wait a minute.
18 Wait a minute. Okay, now we'll receive it
19 into evidence as Tennis Channel number 188.
20 (The document, having been marked
21 previously for identification as
22 Tennis Channel No. 188, was

1 received in evidence.)
2 Okay, you may proceed.
3 BY MS. POGORILER:
4 Q Mr. Herman, since we're in an open
5 courtroom, I'm hoping to just walk through
6 this with the numbers. Everybody who needs to
7 know the numbers can see them.
8 JUDGE SIPPEL: Now, do you want --
9 does anybody want to close the court for this?
10 I mean, I'm not -- I'm perfectly happy to go
11 along this way, but does anybody feel that we
12 should be closed to get this more specifically
13 on the record, because you all are going to be
14 writing the findings?
15 MR. MOSS: Well, Your Honor, from
16 our perspective, the numbers I believe were
17 used here were publically available numbers
18 from the Golf Channel perspective, so we don't
19 have any problem with that.
20 MS. POGORILER: Okay. Let's try
21 to do it without identifying the numbers, but
22 just sort of, everybody can see it who needs

1 to see the numbers.

2 JUDGE SIPPEL: Appreciate that.

3 BY MS. POGORILER:

4 Q If you could just tell us what

5 this chart shows and then sort of walk us

6 through what each piece of the pie chart tells

7 you?

8 A Okay. The total pie chart

9 represents the billing from Golf Channel's top

10 30 accounts according to Nielsen Ad Views.

11 The dark green parts that says

12 percent are the revenue that those accounts

13 represented on Golf Channel, the Tennis

14 Channel also does business with.

15 The yellow part, the percent,

16 represents the revenue from the Golf Channel

17 top 30 accounts, the Tennis Channel has made

18 a presentation to, has been in conversations

19 with, concerning buying advertising.

20 Basically, the yellow and the dark

21 green are the accounts where a Tennis Channel

22 salesperson is talking to the same buyers that

1 the Golf Channel salespeople are talking to.
2 The percent in tan are accounts
3 that the Tennis Channel either did not do
4 business with or we have not made a
5 presentation to.
6 Q And did you draw any conclusions
7 from the total numbers here?
8 A Yes, I mean, you know, it's what I
9 had said before. It didn't come as a surprise
10 that when you look at Golf Channel's targets
11 that are primarily affluent accounts that buy
12 sports, that they're the same kind of accounts
13 that would buy other sports channels,
14 including Tennis Channel.
15 Q Now, I do want to back up just one
16 minute --
17 A Sure.
18 Q -- to discuss the methodology you
19 used in creating this data.
20 Did you exclude any advertisers
21 from your analysis?
22 A Yes. And, you know, when we went

1 through it, we tried to take out the
2 advertisers that, you know, sold products or
3 services in Golf Channel's case that you
4 needed to play golf, like golf clubs, golf
5 balls, golf shoes, because it was our feeling
6 at that point that those advertisers were more
7 likely just to buy Golf Channel, and those
8 budgets wouldn't be available for channels
9 like Tennis Channel or ESPN or Football
10 Channel to compete on.
11 So we thought it was a more
12 reasonable approach if we eliminated those
13 accounts, even though it reduced the billing
14 base, and said, okay, if you only look at
15 these accounts, it's a substantial overlap of
16 pieces of business that we all compete for,
17 and that was the point that this chart is
18 supposed to show.
19 MS. POGORILER: Your Honor, do I
20 have permission to hand out a similar chart,
21 which is Tennis Channel Exhibit 189, which is
22 similar information for Versus?

1 JUDGE SIPPEL: Yes. Just a
2 minute. Let me be sure I've got this.
3 Now, what -- I'm going to go
4 through these columns again. percent, does
5 that represent either Golf or -- what does
6 percent represent again? I mean, the green,
7 I'm sorry.
8 THE WITNESS: Yes.
9 JUDGE SIPPEL: Is it one of those
10 channels?
11 THE WITNESS: Yes.
12 JUDGE SIPPEL: Golf or --
13 THE WITNESS: The whole pie
14 represents Golf -- the revenue received from
15 Golf Channel's top 30 accounts. The whole
16 pie.
17 JUDGE SIPPEL: The whole pie,
18 okay.
19 THE WITNESS: The dark green parts
20 are -- means that Tennis Channel has accounts
21 on our air, advertising accounts, that
22 represented percent of the revenue that

1 those top 30 Golf Channel accounts received.
2 JUDGE SIPPEL: So that's basic --
3 that's head-on-head competition for those
4 accounts. Is that right?
5 THE WITNESS: Correct.
6 JUDGE SIPPEL: Okay. And okay, so
7 that's percent there. Now, what about the
8 percent?
9 THE WITNESS: The percent,
10 Tennis Channel did not receive any advertising
11 revenue for, but we had made presentations to
12 those accounts and discussed advertising with
13 those accounts.
14 JUDGE SIPPEL: Got it.
15 THE WITNESS: But at this point,
16 they haven't made a buy.
17 JUDGE SIPPEL: Got it.
18 THE WITNESS: And the percent
19 were accounts that were on the Golf Channel
20 top 30 list that neither do we get advertising
21 from, but I couldn't find anybody on my staff
22 that had made a presentation to those

1 companies that represented percent of Golf
2 Channel's revenue.
3 JUDGE SIPPEL: So basically, no
4 interest from Tennis Channel for that
5 percent.
6 THE WITNESS: Correct.
7 JUDGE SIPPEL: Got it. Thank you.
8 Go ahead. Yes, ma'am. You may
9 proceed.
10 MS. POGORILER: Thank you.
11 (Whereupon, the above-referred to
12 document was marked as Exhibit 189
13 for identification.)
14 JUDGE SIPPEL: Thank you.
15 BY MS. POGORILER:
16 Q Mr. Herman, before I ask you about
17 this, I just have one question just to clarify
18 the record.
19 A Sure.
20 Q Is the source for this data and
21 these charts the tables that are attached to
22 your declaration at tab b?