

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, L.L.P.

ATTORNEYS AT LAW

RALEIGH, NORTH CAROLINA

MAILING ADDRESS
POST OFFICE BOX 1800
RALEIGH, N.C. 27602

OFFICE ADDRESS
1600 WACHOVIA CAPITOL CENTER
150 FAYETTEVILLE STREET MALL
RALEIGH, N.C. 27601

TELEPHONE (919) 839-0300
FACSIMILE (919) 839-0304

WWW.BROOKSPIERCE.COM

HENRY E. FRYE
OF COUNSEL

J. LEE LLOYD
SPECIAL COUNSEL

FOUNDED 1897

AUBREY L. BROOKS (1872-1958)
W.H. HOLDERNESS (1904-1965)
L.P. McLENDON (1890-1968)
KENNETH M. BRIM (1898-1974)
C.T. LEONARD, JR. (1929-1983)
CLAUDE C. PIERCE (1913-1988)
THORNTON H. BROOKS (1912-1988)
G. NEIL DANIELS (1911-1997)
HUBERT HUMPHREY (1928-2003)

GREENSBORO OFFICE
2000 RENAISSANCE PLAZA
230 NORTH ELM STREET
GREENSBORO, N.C. 27401

WASHINGTON OFFICE
601 PENNSYLVANIA AVENUE, N.W.
SUITE 900, SOUTH BUILDING
WASHINGTON, D.C. 20004

WRITER'S DIRECT DIAL

L.P. McLENDON, JR.
EDGAR B. FISHER, JR.
W. ERWIN FULLER, JR.
JAMES T. WILLIAMS, JR.
WADE H. HARGROVE
M. DANIEL MCGINN
MICHAEL D. MEEKER
WILLIAM G. MCNAIRY
EDWARD C. WINSLOW III
HOWARD L. WILLIAMS
GEORGE W. HOUSE
WILLIAM P.H. CARY
REID L. PHILLIPS
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S. LEIGH RODENBOUGH IV
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MARC D. BISHOP
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JEFFREY E. OLEJNIK
MARK DAVIDSON
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DEREK J. ALLEN
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TERESA DeLOATCH BRYANT
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ROBERT W. SAUNDERS
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JENNIFER A. GALASSI
KATHLEEN A. GLEASON
JANICE L. KOPEC
SUSAN M. YOUNG
DARRELL A. FRUTH
IAIN MACSWEEN
BENJAMIN R. NORMAN
ELIZABETH E. SPAINHOUR

June 22, 2006

Via Hand-Delivery

Ms. Rana Schuler
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
c/o NATEK
9300 East Hampton Drive
Capitol Heights, Maryland 20743

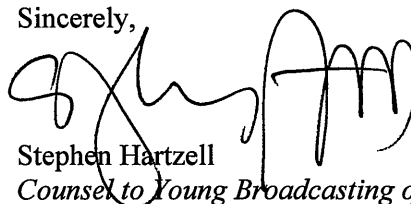
**Re: Young Broadcasting of San Francisco, Inc.
File No. EB-05-IH-2343
Response to Letter of May 31, 2006**

Dear Ms. Schuler:

Please find enclosed, on behalf of Young Broadcasting of San Francisco, Inc., licensee of Station KRON-TV, San Francisco, California, a Response to the May 31, 2006, Letter of William H. Davenport, including a VHS recording of the broadcast material in question. A copy of the transcript of the recording is attached to the Response; the sealed original transcript is enclosed separately.

If any questions should arise during the course of your consideration of this matter, please communicate with this office.

Sincerely,



Stephen Hartzell
Counsel to Young Broadcasting of San Francisco, Inc.

Enclosures

cc: Tom Hutton, FCC (via email)
Rana Schuler, FCC (via email)

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---|---|------------------------|
| In the Matter of |) | |
| |) | |
| Young Broadcasting of San Francisco, Inc. |) | File No. EB-05-IH-2343 |
| |) | |
| Licensee of Station KRON-TV, |) | |
| San Francisco, California |) | |

**RESPONSE OF YOUNG BROADCASTING OF SAN FRANCISCO, INC.
TO THE MAY 31, 2006, LETTER OF WILLIAM H. DAVENPORT**

Young Broadcasting of San Francisco, Inc. (“Young”), licensee of Station KRON-TV, San Francisco, California, by its attorneys, submits this response to the letter dated May 31, 2006, from William H. Davenport (the “Letter”) in connection with the above-captioned matter. Pursuant to an email from Mr. Davenport, the instant Response provides information relating to the time period 6:30-7:00 a.m. rather than the time period 6:30-7:00 p.m. as originally requested in the Letter. Also, pursuant to Mr. Davenport’s email, this Response is being timely filed on or before June 26, 2006.

I. Response to Commission Inquiries

The following numbered paragraphs respond to the three numbered paragraphs listed under the heading “Inquiries: Documents and Information to Be Provided” in the Letter.

1. On November 13, 2005, between 6:30 and 7:00 a.m., KRON-TV broadcast, at approximately 6:58:30 a.m. and 6:59:30 a.m., a commercial promoting an episode of “Dr. Phil” (the “Dr. Phil Promo”) containing a “bleeped” version of the S-Word (the “Material”). The Station did not broadcast the Dr. Phil Promo at any other time between 6:30 and 7:00 a.m. on November 13.

The Material was aired as part of the 30-second Dr. Phil Promo promoting the episode of "Dr. Phil" scheduled to air on November 14, 2005, on KRON-TV.

A recording of the Dr. Phil Promo as it aired on KRON-TV at 6:58:30 a.m. and 6:59:30 a.m. on November 13, 2005, is included with this Response. A written transcript of the recording being submitted herewith is also included with this Response.

As provided to Young by King World Productions ("King World"), the distributor of "Dr. Phil," the Dr. Phil Promo was edited to "bleep" out the Material. As is evident in the recording and transcript provided herewith, the S-word was effectively obscured by the "bleep." Young aired the promo as provided by King World and did not undertake any additional editing of the Material beyond the "bleeping" provided by King World.

2. Although the programming described in the Complaint accurately reflects the material broadcast on the Station, Young differs in its legal conclusion about the nature of the material and submits that the expletive was effectively "bleeped" out.

3. This Response is supported by the Declaration of Mark Antonitis, President of Young Broadcasting of San Francisco, Inc. and General Manager of KRON-TV, which is attached hereto. Included with Mr. Antonitis's Declaration is a copy of the Station's program log for the period 5:58:45 a.m. to 7:58:30 a.m. on November 13, 2005. The fifth and seventh entries in the log indicate that the Dr. Phil Promo aired at 6:58:30 a.m. and 6:59:30 a.m. and ran for 30 seconds. (The Dr. Phil Promo appears in the log as "KR/PR/DR. PHIL MON/MON :30.") As indicated in the response to Inquiry 1, a recording of the Dr. Phil Promo and a transcript thereof are being submitted with this Response.

II. The Material Broadcast Cannot, Constitutionally, Be Determined to Be Actionably Indecent or Profane

The Commission has defined indecency as “language or material that, in context, depicts or describes in terms patently offensive, as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.” *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001) (“*Policy Statement*”), ¶ 4 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978)). To be considered indecent, broadcast material must meet two requirements: (1) the material must depict or describe sexual or excretory activities or organs, and (2) the material must be *patently offensive* as measured by contemporary community standards for broadcasting. *See id.*, ¶¶ 7-8. In analyzing the second prong of the inquiry, the Commission looks “not [to] the sensibilities of any individual complainant” but rather evaluates whether the programming at issue would be patently offensive to “an average broadcast viewer or listener.” *Id.*, ¶ 8 (internal quotation marks and citation omitted). The Commission has stated that “[i]n determining whether material is patently offensive, the *full context* in which the material appeared is critically important.” *Id.*, ¶ 9 (emphasis in original).

In the *Policy Statement*, the Commission summarized the principal factors used in determining whether material is patently offensive:

(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.

Policy Statement, ¶ 10 (emphases in original). No single factor is determinative, and these factors (and possibly other, unidentified factors) are to be balanced in making an indecency determination. *See id.* Generally, the more explicit or graphic, repetitive, or titillating or shocking the material is, the more likely it is that the Commission will find the material to be indecent. *See id.*, ¶¶ 12, 17.

The Material broadcast by KRON was neither explicit nor graphic, because the expletive was effectively “bleeped” out. *See Policy Statement*, ¶ 16 (“In assessing explicitness, the Commission also looks to the audibility of the material as aired.”). Likewise, the edited Material was not dwelled upon but rather lasted only a fraction of a second. Finally, the Material was not used to titillate or for its shock value, but rather only to convey that in an upcoming episode of “Dr. Phil” guests would be grappling with the disbelief and strong emotion that accompany revelations of marital infidelity.

Additionally, in the Dr. Phil Promo, the edited version of the S-Word obviously does not reference an excretory function or product. It is evident from the Dr. Phil Promo that the Material is part of a phrase—“full of [bleep]”—used by a program guest to express her anger and disbelief. As such, the edited expletive does not meet the description of “a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.” *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 (rel. March 15, 2006) (“*Omnibus Order*”).

The *Omnibus Order* marked the first time that the Commission applied a presumption of indecency and profanity to the S-Word, and it did so in the context of the use of *repeated* and *unedited* versions of the expletive. *See Omnibus Order*, ¶¶ 5, 74-75, 81, 91-92, 96, 115-17, 121, 128-30, 133, 138-41, 143. The *Omnibus Order*, in relevant part, built on the constitutionally suspect

decision rendered in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, FCC 04-43 (Mar. 18, 2004) ("*Golden Globes Awards Order*"). In the *Golden Globes Awards Order*, the Commission stated that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." *Id.* at ¶ 8 (emphases added). With respect to the second prong of the analysis, the Commission stated that the "'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," that its use is "shocking," and that whether the use of the word was "unintentional is irrelevant." *Id.* at ¶ 9. The Commission further rejected all previous precedent that may be contrary to its *Golden Globes Awards Order*, see *id.* at ¶ 12, and also put broadcasters "on notice" that the F-Word will henceforth be considered profane as well as indecent, *id.* at ¶ 14. The *Omnibus Order* extended this analysis to the S-Word.

Young acknowledges that an effectively bleeped expletive aired on KRON-TV. It is respectfully submitted, however, that, despite the *Omnibus Order* and its progenitor the *Golden Globes Awards Order*, the Station's edited and fleeting broadcast of the S-Word was not indecent or profane and cannot be proscribed as indecent or profane as a matter of constitutional law.

The Commission's indecency/profanity scheme, as modified by the *Omnibus Order* and the *Golden Globes Awards Order*, is unconstitutional as applied to the KRON-TV broadcast (and is likely unconstitutional on its face). This conclusion follows directly from *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the governing Supreme Court precedent in this realm. Distinguishing features of the KRON-TV broadcast make it clear that the *Pacifica* decision and its rationale can provide no support for a Commission finding of indecency or profanity in this case.

The *Pacifica* decision makes it clear that the fleeting nature of the *edited* utterance here—a “bleeped” version of a word broadcast for only a fraction of one second—may not be proscribed, let alone sanctioned. As Justice Powell stated in his opinion, without which there would have been no majority:

This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary* exposure to it in their homes. . . .

The Commission’s holding, and certainly the Court’s holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

Pacifica, 438 U.S. at 759-60, 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added); *see also id.* at 757 (Powell, J., concurring in part and concurring in the judgment) (noting that the language “was repeated over and over as a sort of verbal shock treatment”). It is impossible to square the *unedited* 12-minute Carlin monologue in *Pacifica*—a “verbal shock treatment” “repeated over and over”—with the edited, momentary, isolated broadcast of a single “bleeped” word.

That *Pacifica* demonstrates that the First Amendment does not tolerate a finding of indecency or profanity in this instance is further bolstered by Justice Brennan’s opinion:

Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F.C.C.2d 94 (1975) and 59 F.C.C.2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the *relentless repetition, for longer than a brief interval*, of “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.” 56 F.C.C.2d, at

98. *For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of “verbal shock treatment” condemned here, or even this “shock treatment” type of offensive broadcast during the late evening.*

Pacifica, 438 U.S. at 772 n.7 (Brennan, J., dissenting) (emphases added).

Application of the *Omnibus Order* or the *Golden Globes Awards Order* standard to the KRON-TV broadcast is also contrary to the critical point made by the Supreme Court in *Cohen v. California*, 403 U.S. 15 (1971), namely that the F-Word, there emblazoned on a jacket, does **not** have a sexual connotation in all contexts and, more importantly, contains an emotive force, if not a strongly cognitive one, that, “practically speaking, may often be the more important element of the overall message sought to be communicated.” *Cohen*, 403 U.S. at 20, 26. Likewise, the S-Word does not have an excretory connotation in all contexts and may contain an emotive force that may be the more important element of the message sought to be communicated. It is apparent that the Dr. Phil guest appearing in the Dr. Phil Promo used the S-Word for its emotive function without any excretory connotation whatsoever¹ and that the Dr. Phil Promo was aired for the purpose of

¹ In the underlying staff decision in the Golden Globes case, the Enforcement Bureau properly interpreted Bono’s use of the F-Word during the Golden Globes broadcast as an intensifier, signifying the singer’s excitement at having won an award, such excitement being the “emotive function . . . of the overall message sought to be communicated.” The *Golden Globes Awards Order* and the *Omnibus Order*, however, entirely ignore the emotional context of certain speech, but that is precisely what was rejected by the *Cohen* Court: “We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function” *Cohen*, 403 U.S. at 26. This is not to suggest that broadcasters have an unbounded right to air strings of expletives because the expletives may be communicating emotions, but, rather, it is to argue that the Commission has unconstitutionally eliminated the necessary consideration of the full context from its indecency analysis, a context that may include the use of coarse language intended to convey strong emotions without excretory or sexual connotation.

advertising the upcoming Dr. Phil episode and communicating to viewers the nature of the emotional subject matter of the episode.

Supreme Court precedent, in short, provides no constitutional basis for the Commission to proscribe the KRON-TV broadcast, and it is clear that the KRON-TV broadcast is protected by the First Amendment.

Finally, even if the Commission were to find that the Material as broadcast on KRON-TV were indecent, no action should be taken because “the licensee was not on notice at the time of the broadcast that [the Commission] would deem the relevant material indecent or profane.” *Omnibus Order*, ¶ 5 (“In these cases, the licensee was not on notice at the time of the broadcast that we would deem the relevant material indecent or profane. For example, we hold that a single use of the word ‘shit’ and its variants . . . in the contexts presented is both indecent and profane. However, we do not propose adverse action in these cases because we have not previously announced this conclusion.”). The Material was aired some four months prior to the Commission’s pronouncement in the *Omnibus Order* that use of the S-Word is presumptively indecent and profane, and, to Young’s knowledge, the Commission has never determined that an effectively edited expletive is indecent or profane.

Various parties have sought review or reconsideration of the relevant portions of the Commission’s *Omnibus Order* and *Golden Globes Awards Order*. Rather than repeat the arguments made by those parties here, Young adopts those arguments and incorporates them by reference as set forth in the margin.²

² See e.g., ABC, Inc., et al. v. FCC, Petition for Review, (D.C. Cir. 06-1139, transferred to and consolidated in 2d Cir. 06-2750); Fox Television Stations, Inc., et al. v. FCC, Petition for
(continued...)

To conclude, it would be an unconstitutional abridgement of Young's First Amendment rights, in the totality of the circumstances presented here, to find KRON-TV liable for the (1) edited, (2) television broadcast of a (3) single, "bleeped" word, (4) lasting for only a fraction of one second, (5) without any other accompanying suggestive words or language or (6) accompanying suggestive images, by (7) the guest on a syndicated program (not a station employee) that occurred in a context that was (8) emotionally charged, (9) wholly non-sexual, and (10) had nothing to do with excretory activities and that was (11) in a promotional commercial for an episode (12) of a critically acclaimed television series provided by a (13) national syndicator.

Conclusion

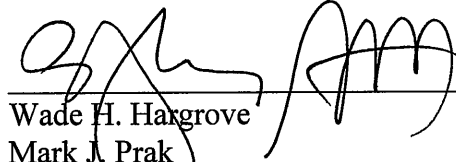
Young regrets that the complainant was offended by the Dr. Phil Promo that was broadcast on November 13, 2005. The Station accepts responsibility for what it broadcast, but it respectfully submits that the broadcast of the material in question cannot be found to be actionable both because the expletive at issue was effectively edited out—i.e., "bleeped"—and because controlling Supreme Court precedent dictates otherwise. Accordingly, Young respectfully requests that the Commission take no further action with respect to the instant Complaint.

²(...continued)

Review (2nd Cir. 06-1760-AG); San Mateo County Community College District, Opposition to Notice of Apparent Liability, File No. EB-04-IH-0260 (filed May 5, 2006); NBC Broadcasting Company, Inc., Petition for Partial Reconsideration, File No. EB-03-IH-0110 (filed Apr. 19, 2004); American Civil Liberties Union et al., Petition for Reconsideration, File No. EB-03-IH-0110 (filed Apr. 19, 2004); Radio-Television News Directors Association, Comments in Support of Petitions for Reconsideration, File No. EB-03-IH-0110 (filed Apr. 29, 2004); Media Institute, Comments in Support of the Petition for Reconsideration Filed by the American Civil Liberties Union, et al., File No. EB-03-IH-0110 (filed May 4, 2004).

Respectfully submitted,

**YOUNG BROADCASTING OF
SAN FRANCISCO, INC.**



Wade H. Hargrove
Mark J. Prak
Stephen Hartzell

**BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.**
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Its Attorneys

June 22, 2006

Declaration of Mark Antonitis

Declaration of Mark Antonitis

I, Mark Antonitis, hereby declare, under penalty of perjury, as follows:

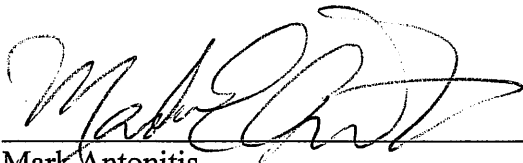
1. I am greater than eighteen years of age and am competent to make this Declaration.
2. I am President of Young Broadcasting of San Francisco, Inc., licensee of Station KRON-TV, San Francisco, California. I am also the General Manager of the Station. I have held both of these positions since July 20, 2004.
3. KRON-TV has exclusive rights to air the "Dr. Phil" program, distributed by King World Productions ("King World"), in San Francisco.
4. To promote the November 14, 2005, episode of "Dr. Phil," King World made available to KRON-TV a 30-second promotional commercial (the "Dr. Phil Promo"). The Dr. Phil Promo features excerpts from the November 14, 2005, episode of Dr. Phil, including oral statements made by guests on the program. One of the guests featured in the Dr. Phil Promo apparently used an expletive to convey her emotional response to a situation, and the Dr. Phil Promo was edited by King World to "bleep" out the use of the expletive. The Station aired the Dr. Phil Promo as provided by King World in its edited form.
5. Station records show that KRON-TV broadcast the Dr. Phil Promo at approximately 6:58:30 a.m. and 6:59:30 a.m. on November 13, 2005, and at no other time between 6:30 and 7:00 a.m. on that date. A copy of the Station's program log for the period 5:58:45 a.m. to 7:58:30 a.m. (which includes the period 6:30-7:00 a.m.) on November 13 is attached hereto. The log accounts for all breaks taken during the 6:30-7:00 a.m. period.
6. The Station possesses a recording of the Dr. Phil Promo as broadcast by the Station at approximately 6:58:30 a.m. and 6:59:30 a.m. on November 13, 2005, and a copy of that recording is being submitted with the Response of Young Broadcasting of San Francisco, Inc. to the May 31, 2006, Letter of William H. Davenport. That recording consists of approximately 30 seconds of promotional material provided originally by King World and broadcast by the Station at 6:58:30 a.m. and 6:59:30 a.m. on November 13, 2005.
7. As the recording shows, at approximately 6:58:30 a.m. and 6:59:30 a.m. on November 13, 2005, the complained-of material—the bleeped out S-Word—aired in its edited form on KRON-TV.
8. The Station received no viewer complaints about its broadcast of the Dr. Phil Promo.
9. I have reviewed the Response of Young Broadcasting of San Francisco, Inc. to the May 31, 2006, Letter of William H. Davenport and hereby verify the truth and accuracy of the information contained therein. All of the documents and information requested by the letter of

inquiry that are in the licensee's possession, custody, control, or knowledge have been produced to the Commission.

[Signature appears on following page.]

I declare, under penalty of perjury, that the foregoing Declaration is true and accurate to the best of my knowledge, information, and belief.

6/20/06
Date



Mark Antonitis
President of Young Broadcasting
of San Francisco, Inc.
General Manager of Station KRON-TV

ACTUAL ON OFF SCHEDULE TIME OPERATOR NAME PROGRAM/ADVERTISER FACILITY DESCRIPTION AUD VID TYPE S ORDERED OPERATOR NAME
 ON OFF SCHEDULE TIME DUR HOUSE# PROGRAM/ADVERTISER FACILITY DESCRIPTION AUD VID TYPE S ORDERED OPERATOR NAME
 PROD CODE ADV ORD SS RS

6:58 OFF OPERATOR NAME 0
 5:58:45A :30 1458 KR/PR/SATC WEEKNIGHTS GENERI KRSATCWNIGHTSG ERV ERV PRO ON AIR PRO 99999 1 1 5 12
 5:59:15A :30 1018 KR/PR/KRON 4 MOBILE (30) KRKRON4MOBILE ERV ERV PRO ON AIR PRO 99999 1 1 5 12
 5:59:45A :15 1632 KR/PR/BAY CAFE TONIGHT :15 KRBAYCAFETON15 ERV ERV PRO ON AIR PRO 99999 1 1 3 12

6:00:00A DR. GENE SCOTT
 INSERT STATION ID, QUICK KEY #8 FOR :04 AT TOP OF HOUR

58:30 SEGMENT 1 RST RST E L

SPONSORED BY:
 DR. GENE SCOTT/
 CM SUN 6-7A 2563 1 7

6:58:30A :30 1583 KR/PR/DR. PHIL MON/MON :30 KRDRPHMONM30 ERV ERV PRO ON AIR PRO 99999 1 1 5 12
 6:59:00A :30 1099 KR/PR/9PM IMAGE MATH :30 KR9PMIIMAGEMATH ERV ERV PRO ON AIR PRO 99999 1 1 5 12
 6:59:30A :30 1583 KR/PR/DR. PHIL MON/MON :30 KRDRPHMONM30 ERV ERV PRO ON AIR PRO 99999 1 1 5 12

7:00:00A IN TOUCH MINISTRIES

"INSERT STATION ID, QUICK KEY
 #8 FOR 4 SECONDS AT TOP OF
 HOUR"

58:30 PADY545 SEGMENT 1 REC REC E L
 545

SPONSORED BY:
 IN TOUCH MINISTRIES/
 KRON 4 NEWS PRESHOW
 CM SUN 7-8A 2052 5 1
 CRD CRD

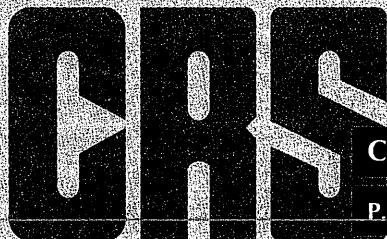
Transcript of Television Broadcast

AIRED ON KRON-TV
NOVEMBER 13, 2005
AT 6:58:30 A.M.
AND 6:59:30 A.M.

TRANSCRIPT OF RECORDING
OF DR. PHIL PROMO

Transcribed by: Michele Boyles
At Raleigh, North Carolina
June 20, 2006

COPY



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2

3

DR. PHIL: They call themselves the first wives
club.

4

5

ANNOUNCER: Their husbands dumped them for younger
women.

6

7

WOMAN: That little bitch.

8

WOMAN: God should strike you dead.

9

DR. PHIL: Got to be willing to say take your best
shot, buddy.

10

11

ANNOUNCER: Now, they come face-to-face with
cheating husbands.

12

13

WOMAN: Disgust me. You really do.

14

WOMAN: It's totally unfair to treat her like
that.

15

16

DR. PHIL: You're really good at cheating, right?

17

MAN'S VOICE: It's the thrill. Not getting
caught.

18

19

WOMAN: You are full of (BLEEP).

20

ANNOUNCER: Doctor Phil and Robin's first wives
club. Monday night at 8:00 on KRON-4. The Bay Area's
news station.

21

22

23

AND THE FOLLOWING

24

AIRED ON KRON-TV

25

NOVEMBER 13, 2005

26

AT 6:59:30 A.M.

2
3 DR. PHIL: They call themselves the first wives
4 club.

5 ANNOUNCER: Their husbands dumped them for younger
6 women.

7 WOMAN: That little bitch.

8 WOMAN: God should strike you dead.

9 DR. PHIL: Got to be willing to say take your best
10 shot, buddy.

11 ANNOUNCER: Now, they come face-to-face with
12 cheating husbands.

13 WOMAN: Disgust me. You really do.

14 WOMAN: It's totally unfair to treat her like
15 that.

16 DR. PHIL: You're really good at cheating, right?

17 MAN'S VOICE: It's the thrill. Not getting
18 caught.

19 WOMAN: You are full of (BLEEP).

20 ANNOUNCER: Doctor Phil and Robin's first wives
21 club. Monday night at 8:00 on KRON-4. The Bay Area's
22 news station.

23
24
25 (THEREUPON, THE RECORDING STOPPED.)

NORTH CAROLINA

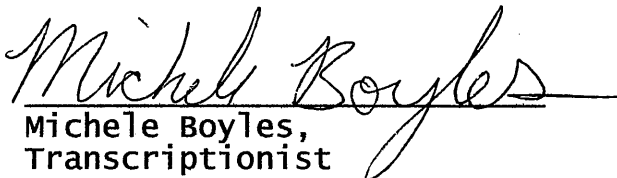
WAKE COUNTY

C E R T I F I C A T E

I, Michele Boyles, transcriptionist, for Court Reporting Services, do hereby certify that the foregoing pages are a direct transcription of an audio/video recording of the matter/cause in this action and that it is as true and accurate as could be determined by such recording.

I do further certify that I am not of counsel for or in the employment of any party to this action.

IN WITNESS WHEREOF, I have hereunto subscribed my name this the 20th day of June, 2006.


Michele Boyles,
Transcriptionist