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Gregory discovery
Sets 5, 6
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UNITED STATES NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
TEXAS UTILITIES ELECTRIC COMPANY, et al.,	)	Dkt. No. 50-445-CPA
	)	
(Comanche Peak Steam Electric Station Unit 1)	)	

CONSOLIDATED INTERVENORS' REPLY
TO TUEC'S OPPOSITION TO MOTION TO COMPEL
RE: GREGORY DISCOVERY (Sets 5 & 6)[1]

I. The Cresap Audit Was Not Prepared Primarily For Or In Anticipation of Litigation

The focus of TUEC's Opposition is on the "work product" qualified exception to discovery, which is embodied in 10 CFR §2,740(b)(2) and has its origin in Rule 26(b)(3) of the Federal Rules of Civil Procedure. The qualified exception applies to work done primarily in anticipation of or for the hearing which this Board has concluded means for any hearing or litigation.

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[1] Although both CASE and Meddie Gregory have joined in seeking to compel production of the Cresap audit and underlying documents, the request for production was filed only by Meddie Gregory, who is not a party to the OL nor to any proceedings before the Texas Public Utilities Commission and has no intent of participating in those proceedings.

TUEC has the burden of proving that it qualifies for the exception (4 Moore's Federal Practice 26.64[2], p. 26-352) and that the primary purpose of the Cresap audit was to develop evidence for use in litigation (United States v. Gulf Oil Corp., 760 F.2d 292, 296 (TEAC 1985)). That proof consists of a summary affidavit submitted by Homer Schmidt and cryptic answers to several interrogatories. Significantly, none of this proof addresses or explains the obvious inconsistencies between the affidavit and answers on the one hand and the Work Specification, Retrospective Audit of the Comanche Peak Steam Electric Station Project, Texas Utilities Generating Company (attached to Motion to Compel) ("Work Spec.") on the other hand. Unlike the affidavit and answers, the Work Specification was not primarily prepared with an eye to supporting legal arguments to avoid production of the Cresap work. Moreover, the details of the Work Specification, which TUEC admits have not been changed, are the best currently available evidence of what the audit is about and why it was prepared. These work details in their clear untutored language are more persuasive than the conclusory and crafted language of the Schmidt affidavit.

For example, Mr. Schmidt asserts that the decision to conduct the audit included, but apparently was not based principally upon, "advice of its counsel" (Affidavit, 2) and that the reports were made to a management team of which TUEC counsel was but one member. Affidavit, 3. The intended implication of these assertions is that the study was attorney-

ordered and directed. But the Work Spec. indicates that the data was sought by TUEC and results would be reported to TUEC and that while "public disclosure" of the audit was prohibited, oversight by the Texas Public Utilities Commission (which would not be immune to public access) and sharing of data with TUEC "agents," which would include essentially everyone of the 5,000 person workforce, was contemplated. Work Spec., pp. 1, 9-10. While the Work Spec. preamble noted that the audit was prepared because TUEC anticipated a rate case, the use of the audit in such a case was at best remote and would result in its use in the hearing only after a further contract was negotiated. Work Spec., pp. 1, 9, 14-15. This reference in the Work Spec. preamble to the rate case is also not consistent with the actual work description and may reflect the only input of legal counsel.

Mr. Schmidt also asserts (Affidavit, 5):

> [I]t was expressly contemplated and understood that the work done by the chosen expert would be for the use of TU Electric's lawyers in the rate-making hearings, would be kept confidential by those expert auditors, and that no interim reports on the experts' conclusions or assessments would be received by TU Electric until the entire audit had been completed.

This language is totally inconsistent with the Work Specification which contemplates and intends that (Work Spec., p. 9):

> The auditor will, as required, hold interim technical briefing(s) concerning the audit. The content of these briefings may include key facts, preliminary conclusions, emerging issues and strengths, possible future recommendations, and other relevant technical matters.

TUEC in its opposition also ignores the interim technical briefings. Opposition, p. 18, fn 13. If, as the Work Spec.

clearly intends and contemplates, the audit was intended to feed back to TUEC and its agents, not to TUEC's lawyers, any relevant technical findings, preliminary conclusions, emerging issues and strengths, and possible future recommendations, it is obviously not the kind of attorney-directed and controlled or litigation-motivated work product that Rule 26(b)(3) was adopted to address.

Where does the truth lie -- with the Work Specification or with the Schmidt affidavit? We submit the truth is that the principal purpose of the prudency audit was as a part of the ongoing audit program at Comanche Peak, a program which contemplated and expected periodic reviews of the performance of management and others. Such audits are license requirements for nuclear facilities (10 CFR Part 50, Appendix B, XVII) and in this instance the importance of the requirements was underscored by the already emerging findings of the TRT and the contemplated findings on QA/QC which were issued in early January 1985. See TRT letters dated 9/18/84, 11/29/84, and 1/8/85.

The full breadth of the NRC Staff concern with the causes of past problems and their implications for the plant are summarized in SSER 11 (P-36):

> TUEC shall evaluate the TRT QA/QC findings and consider the implications of these findings on the quality of construction at Comanche Peak. TUEC shall then submit to the NRC a program plan and schedule for completing a detailed and thorough assessment of the QA issues presented in the enclosure to this supplement. The programmatic plan and the plans for its implementation will be reviewed and evaluated by the NRC staff.
>
> The TRT considers the findings to be generic to both Units 1 and 2, and the program plan and schedule should address both units. This program plan should: (1)

> address the root cause of each finding and its generic implications on safety-related systems, programs, or areas, (2) address the collective significance of these deficiencies, (3) address the total impact of one discipline-related finding in other disciplines, and (4) propose an action plan that will correct all problems identified and ensure such problems do not occur in the future.
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> * * * *
>
> The actions shall also consider the use of management personnel with a fresh perspective to evaluate the TRT's findings and implement corrective actions. TUEC shall consider the use of an independent consultant to provide oversight to the program. TUEC shall also investigate the role of the principal contractor personnel (Brown & Root and Ebasco) in regard to Quality Assurance/Quality Control concerns. Although the TRT QA/QC Group realizes that TUEC is ultimately responsible for the plant, the contractor (constructor) was directly responsible for construction and quality control. TUEC shall also consider the prudence of continuing to rely on contractor management personnel involved in ongoing work and recovery efforts when they are the same people directly responsible for the problems identified herein.

As early as the Fall of 1984 TUEC had anticipated the need for a retrospective review of plant construction as it began to develop and implement the CPRT. Of course TUEC's official view, then and now, was that the question of past management performance was irrelevant to the licensing hearing. Thus it is reasonable that, in order to meet the licensing requirements imposed by the Staff and to maintain its legal position in the hearing, TUEC would conduct the retrospective review of management's performance that the Staff expected in an audit separate from the CPRT. Thus, we submit, the real driving force behind the Cresap audit was to meet the more immediate licensing requirements being imposed by the Staff and specifically to avoid

preparing material for a hearing. It is for this reason that participation at PUC hearings was only a possibility, the compensation for which would be negotiated separately (Work Spec., pp. 14-15) and that the objectives of the audit do not even mention testimony before the PUC or preparation of data to satisfy PUC requirements. Work Spec., p. 2.

The NRC is not the only regulatory agency which imposes an obligation on TUEC to find and disclose facts that may reflect on the performance of its management. The SEC has issued numerous releases relating to disclosure obligations, the most pertinent of which is "SEC Comment on Timely Disclosure of Material Corporate Developments," Exchange Act Release No. 8995 (October 15, 1970): "[T]he company 'has an obligation to make full and prompt announcements of material facts regarding the company's financial condition;' 'not only must material facts affecting the company's operations be reported; they must also be reported promptly.'" Quoted in 5A Arnold S. Jacobs, The Impact of Rule 10b-5, at 4-4 n. 6.

Courts, too, have held that a corporation has an obligation to exercise diligence in ascertaining and verifying errors or omissions of material facts which it knows or suspects exist. see, e.g., Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 363-64, 396-99 (2d Cir. 1973); Lanza v. Drexel & Co., 479 F.2d 1277, 1306 n. 98 (2d Cir. 1973; Steinberg v. Carey, 439 F.Supp. 1233, 1239 (S.D.N.Y. 1977) (Weinfeld, J.).

As the evidence from the TRT investigation became available, it is clear that TUEC had an obligation to its investors and potential investors to assess management's past performance and to determine both the possible scope of the problems and the role of present management in those problems.

The currently asserted suspension of the Cresap audit may be for several reasons and not merely the fact that TUEC is waiting to complete the plant before it completes the audit. For instance, the periodic technical briefing may have revealed damaging information that forced TUEC to realize that management was imprudent and that rather than continue to spend money to learn more bad news it would now be prudent to accept the consequences of these findings and reinspect essentially the entire plant construction and design.

In addition to the unexplained inconsistencies between the Schmidt affidavit and the more reliable evidence of the Work Spec. details, there is yet another reason to question the Schmidt affidavit. The affidavit is essentially a list of evidentiary conclusions devoid of any evidence. It is the province of the Board to decide after reviewing documents and other primary evidence sources whether the "primary motivating purpose behind" (United States v. Gulf Oil Corp., supra 760 F.2d at 296) the audit was to "assist counsel in presenting TU Electric's case to the PUC" (Schmidt Affidavit, 3) and not for Mr. Schmidt to assert it. Similarly Mr. Schmidt tells us his conclusion that "it was expressly contemplated and understood

that the work done by the chosen expert would be for the use of TU Electric's lawyers in the rate-make hearings" (Schmidt Affidavit, 5) but does not attach the primary evidence on which the conclusion is based. In Kleinerman v. United States Postal Service, 100 F.R.D. 66, 70 (D. Mass., 1983) just such conclusory statements were rejected as inadequate to meet the burden of proof of the party asserting the privilege. In addition, as we are sure the Board remembers, the language used in conclusions of ultimate facts offered in affidavits, briefs, and letters by TUEC in the NRC proceedings has often proven to be at odds with underlying facts. See, e.g., Memorandum and Order (Reconsideration of Misrepresentation Memorandum) 11/25/85; Memorandum (Lipinsky Privileges) 11/16/84; CASE and Meddie Gregory Motion For Appointment of Legal Counsel for the Minority Applicants and for Clarification of Discovery and Other Responses Received from Applicants, 3/9/87. At a minimum these past experiences should justify this Board in rejecting the Schmidt Affidavit as insufficient evidence of the primary purpose of the Cresap audit.

When the foregoing factual analysis is viewed in the context of the case law, the errors in TUEC's argument are particularly obvious. In Binks Mfg. Co. v. Nat. Presto Industries, Inc., 709 F.2d 1109 (7th Cir. 1983), the Court found that documents prepared by an in-house attorney who was investigating the performance of equipment installed at the company's facility as part of the development of the company's factual base to use in

an ongoing contract dispute with the supplier of the equipment was not attorney work product because it was still not sufficiently probable that the contract dispute would end in litigation. The Court, citing 8 Wright & Miller [Federal Practice and Procedure, Civil, Section 2024], reasoned that the mere fact that the company had acted prudently in anticipating litigation did not mean that the document was prepared for litigation and that the focus is on whether the document was prepared in the ordinary course of business -- i.e., would it have been prepared regardless of the litigation. Judged by that standard, the objective evidence here is that licensing requirements of the NRC Staff, disclosure requirements of the SEC, and the prudent conduct of TUEC's business required that TUEC find out what role management played in causing the schedule delays and cost overruns and to what extent the problems were beyond management control and thus excusable.

In Scott Paper Co. v. Ceilcote Co., Inc., 103 F.R.D. 591, 595 (D.Maine, 1984), the Court held that the existence of an "unfortunate event, that might lead to litigation" creates among well run organizations an ordinary business desire to find out what went wrong and to avoid its repetition, and that even though the "unfortunate event" may also lead to litigation this does not rob the investigation and report of their ordinary business character. TUEC certainly has not argued here that it is totally oblivious to the need to find out what went wrong and to avoid its repetition. In fact, TUEC has argued that it intends to find

out the cause of its past problems and to eliminate the causes. Consolidated Intervenors, taking a more cynical view, contend that the search for the cause of the past problems is motivated by a desire to continue to pursue the same basic program of regulatory avoidance but to pursue it more successfully. Regardless of which view is correct, the fact is that TUEC as a matter of ordinary business prudence needs to know why its past conduct resulted in major problems and the role of management in that conduct. The Cresap audit is the principal study for answering that question and TUEC has not proven that it is being conducted primarily in anticipation of Texas PUC rate proceedings.

Finally, in Burlington Industries v. Exxon Corporation, 65 F.R.D. 26 (Md., 1974), the Court held, in reliance on Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D.Ill., 1972), that while documents prepared by a nonlawyer may be protected there needs to be sufficient guidance from a lawyer to reflect the employment of the attorney's expertise. While there is and has been substantial controversy over the more extreme view from Thomas Organ that unless a lawyer is first consulted there cannot be any work product privilege (e.g., APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 16-18 (Md. 1980)), the view expressed in Burlington Industries, that a critical factor in evaluating whether a document is "work product" is the existence of evidence of the attorney's expertise in the document is generally accepted. APL Corp. v. Aetna Cas. & Sur. Co.,

supra, 91 F.R.D. at 17. In this case there is no evidence that TUEC's attorney actually provided any expertise in defining the nature or scope of the Cresap audit nor was continued involvement of a TUEC attorney in the implementation of the audit contemplated. It is only when there is direct involvement of the lawyer and a greater need to protect the lawyer's mental processes that courts have even considered stretching the work product privilege to cases like this. In Re International Systems and Controls Corporation Securities Litigation, 693 F.2d 1235, 1240 (5th Cir. 1982), and Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), aff'd per curiam by an equally divided court 400 U.S. 348 (1971). A TUEC attorney as a member of a larger committee chaired by TUEC nonlawyer personnel with interim reports made back to TUEC plant personnel is totally inconsistent with the attorney involvement necessary to convert this ordinary business prudency audit into a document prepared primarily in anticipation of litigation. See In Re Grand Jury Subpoena Dated December 19, 1978, 599 F.2d 504, 511 (2d Cir. 1979) ("Participation of the general counsel does not automatically cloak the investigation wtih legal garb").

Since TUEC has not carried its burden of proving the Cresap audit was prepared primarily in anticipation of litigation, neither the narrow exception of 10 CFR §2.740(b)(2) nor the provision of Rule 26(b)(4) of the Federal Rules of Civil Procedure (which the NRC has never specifically adopted, apparently no Appeal Board has ever addressed, and about which

licensing board decisions are not uniform (see Opposition, p. 20 fn 15)) are applicable here and the discovery should be allowed.

II. Even If the Cresap Audit Was Prepared In Anticipation of Litigation, It Should Be Produced.

Even "work product" is discoverable if there is a substantial need for it in the case and it cannot be obtained by the party seeking it without undue hardship. It is virtually axiomatic in this case that Consolidated Intervenors meet these tests given the cost and delay inherent in having them conduct their own prudency audit of TUEC's past performance, not to mention the difficulty of obtaining full and unfettered access to all the documents and management personnel necessary to carry out the audit contemplated by the Work Specification.

The critical fact ignored by TUEC in its opposition to the Motion to Compel is that the central issue in this proceeding is the central issue of the Cresap audit plus management's response to that audit. The admitted contention charges TUEC management with deliberately disobeying NRC regulations in the hopes of saving time and money and not getting caught by the NRC and with then failing to discard and repudiate these past management policies after they were caught. The Cresap audit is intended, inter alia, to "develop an increased understanding of the primary factors causing cost and schedule changes." Work Spec. p. 2. The present hearing is focussed on whether TUEC has a "good cause" for its failure to complete construction on time. 10 CFR

§50.55(b). The importance of this critical fact which TUEC ignores will be abundantly clear in the following discussion.

The courts have developed a number of factors to be considered in deciding whether to allow production of work product. The overwhelmingly determinative one has been whether the material sought goes to the heart of the issue in the case. E.g., Bird v. Penn Central Company, 61 F.R.D. 43, 47 (E.D.Pa. 1973). No only is the Cresap audit specifically directed at the management conduct which Consolidated Intervenors contend is the cause of the delay in construction but, now that some work has been done, it is vital to evaluate how TUEC management has responded to the Cresap audit work to test whether they have discarded and repudiated the management practices that led to the delays in completing construction. The facts here closely parallel the situation in Bird, supra, where the issue was whether management had acted in bad faith and the need to see what information management received and how they reacted to it was central to the case.

Apparently to avoid the force of this argument, TUEC devotes considerable attention to the argument that if prudency audits are discoverable it will inhibit the willingness of companies to conduct such audits and the conduct of rate cases in Texas. Principal reliance for this argument is placed on two decisions of the Texas PUC, both of which focussed on the entirely different balance that is presented where the privilege asserted and proved is the attorney-client privilege or work actually

prepared by an attorney and not merely a representative of the party. Without belaboring the difference, it is sufficient to note that the two decisions discuss at length the special need to preserve the confidentiality of attorney-client communications and to preserve the thinking processes of an attorney. That concept is also embodied in the last sentence of 10 CFR §2.740(b)(2). See also discussion, pp. 10-11, supra. This is not such a case and the audit materials, or documents examined by the auditors (lists of which TUEC also refuses to produce) are in no way established to be the product of an attorney's mind but are exclusively the product of the auditors' work and of course represent independent judgments of the auditors.

Similarly the argument that revealing the Cresap audit methodology will destroy the confidentiality of the case preparation for rate cases reflects TUEC's confusion of the legal strategies and work product of their rate attorney and the work of an independent auditor whose work product, to be useful at all, must be introduced into evidence at the rate proceeding and the underlying work of preparation of the audit must also be revealed. See Wheeling-Pittsburgh Steel v. Underwriters Labs, 81 F.R.D. 8 (N.D.Ill. 1978), holding that calculations made to support damage claims must be revealed, even though the work was prepared under the supervision of and for the benefit of the party's attorney because it was not work product of the attorney and would have to be revealed at trial to support the claims.

There is a countervailing policy consideration which, at least here, must supersede any Texas rate case policy (which policy was not addressed to the kind of material involved here) on the discoverability of relevant information of the type contemplated by the Work Specification. Such work is the heart of the 10 CFR Part 21 requirements, is the heart of this Board's 14 Questions which TUEC is obligated to answer in the OL with regard to each CPRT Results Report, and is the heart of the ultimate issue in this proceeding. The logical extension of TUEC's argument here is that so long as a document is prepared with an eye to possible use in any litigation it and the materials and methodology used in preparing it can be withheld from disclosure to the NRC even though it contains information that is vital to the NRC in carrying out its health and safety functions. Needs far less significant to the public than protection of life and health have been found to be sufficient to compel production of documents prepared by attorneys or at their direction and under their control and even where the attorney-client privilege is involved. E.g., Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970, cert. denied 401 U.S. 974 (1970), relating to cases involving shareholder claims of securities frauds against the corporation.[2] The relationship of ratepayers

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[2] Admittedly the Garner nine-point test for disclosure does not directly fit this case and Consolidated Intervenors probably cannot fully meet every test, but the central concept of the case and the principal elements of the test are met and the Court's reasoning is important guidance here. See Garner, supra, 430 F.2d at 1104.

and nearby residents to a monopoly utility such as TUEC is at least as strong as a shareholder to the corporation and, more important, the interests they seek to protect are far more urgent than the shareholder's economic interests. If, as Consolidated Intervenors contend, TUEC management have deliberately evaded NRC safety requirements and intend to continue to do so to the extent they can get away with it, the consequence of this fraudulent conduct is to endanger the health and safety of millions of people in Texas and surrounding states.

The Court in Garner, supra, recognized that in cases such as that (and this one) where the motives of the party are involved and scienter is a factor, it is the more confidential and honest assessments (such as the Cresap audit and data which was examined for that audit) that may reveal the true motives. Id. at 484-85.

In addition to meeting the need test, Consolidated Intervenors also meet the test of undue hardship which includes consideration of the costs. In Re International Systems, supra at 1241 ("unusual expense has constituted undue hardship.") What TUEC casually dismisses as an obvious alternative to discovery of the Cresap audit and underlying documents (Opposition, p. 17) would entail a complete audit of the same scope and depth as the Cresap audit at the same price and without the benefit of a cooperative client anxious to satisfy a contractor whose costs they are paying. The cost and delay attendant upon such an

enterprise which would merely seek to duplicate an "independent"[3] audit conducted by an "independent" auditor pursuant to well established audit standards would impose an undue hardship on any litigant and certainly these Consolidated Intervenors. See City Consumer Services, Inc. v. Horne, 100 F.R.D. 740 (D.Utah 1983), allowing discovery of one party's compilation of documents from a large body of documents that was equally accessible to both parties.

CONCLUSION

Meddie Gregory seeks access to the work of an independent auditor commissioned by TUEC to find out whether, and if so how, management was responsible for the delay in completion of construction of Comanche Peak. What is sought is the documents examined, analyses made of those documents, notes of the auditors, any communications between TUEC and the auditors, and any tentative or final conclusions reached. In opposing this request TUEC, contrary to the rules and relevant cases, has

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[3] TUEC took umbrage at our earlier reference to the independence of the audit making it more appropriate for discovery. Opposition, p. 15, fn 10. Their defensive response is unwarranted. Our only point was that the independence of the audit and its underlying papers and methodology strips the audit of its attorney involvement claim and makes it less sacrosanct. To acknowledge that studies done by or for attorneys are more controlled is not to impugn their integrity but to acknowledge their weakness. On previous occasions TUEC has commissioned independent views and then sought to restrict access to the data and/or cut short the independent inquiry. E.g., O. B. Cannon and Cygna. That conduct illustrates the difference between independent work and the value of it as compared to the kind of work product contemplated by 10 CFR §2.740(b)(2).

refused to even identify the documents to which the privilege is alleged to attach and has alleged that such identification would reveal the methodology of an independent auditor whom they may call to testify in a subsequent rate proceeding, but fails to explain what is so secret and what will be able to remain so secret about that methodology. By this tactic TUEC attempts to force this Board to accept the conclusory affidavit of Homer Schmidt as the sole basis for judging whether the broadly claimed but narrowly applied work product privilege should be allowed here.

At a minimum this Board should require in camera review of the disputed documents, starting with a list of all documents (at least by precise categories) and including minutes of all meetings of the Project Audit Team, notes or minutes of all meetings between any Cresap personnel and any TUEC personnel, including contractors, other consultants, and the like, copies and notes from all interim technical briefing, and copies of all draft or final reports or conclusions prepared by Cresap, including progress reports. Production at least of these documents for Board inspection is an essential predicate for this Board to rule that the limited privilege asserted should be allowed. In Re Uranium Antitrust Litigation, 552 F.Supp. 517-18 (N.D.Ill. 1982). Without such production this Board must deny the privilege as unsubstantiated even if the overly generous view

of the audit materials claimed by TUEC counsel is to be accepted.

Respectfully submitted,

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Dated: April 20, 1987

UNITED STATES NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
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TEXAS UTILITIES ELECTRIC COMPANY, et al.,	)	Dkt. No. 50-445-CPA
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(Comanche Peak Steam Electric Station Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that CONSOLIDATED INTERVENORS' REPLY TO TUEC'S OPPOSITION TO MOTION TO COMPEL RE: GREGORY DISCOVERY (SETS 5 & 6) was served today, April 20, 1987, upon the following by first class mail, postage prepaid, or by hand where marked with an asterisk (*), or by Federal Express where marked by two asterisks (**).

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