

66931

ORIGINAL

Decision No. _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations of Communication Common Carriers for hire in Domestic Public Land Mobile Radio Service, also known as Miscellaneous Common Carriers, and private mobile carriers which offer such service to the public in general, for the purpose of determining whether or not such carriers should be required to obtain a certificate of public convenience and necessity as public utility telephone corporations and to file tariffs of their rates and charges, and for the further purposes of prescribing rules and classifications governing regulation of such carriers.

Case No. 6945

(Appearances are listed in Appendix A)

O P I N I O NThe Proceeding

This phase of the Commission's investigation in Case No. 6945 is directed to a determination of whether Motorola Communications & Electronics, Inc. (MC&E), Radio Corporation of America (RCA), or General Electric Company (GE) are furnishing private mobile radio lease-maintenance service to the public for compensation within California in such a way as to make them subject to regulation by the Commission as public utility telephone corporations. By the Third Interim Opinion and Order herein (Decision No. 64809) dated January 22, 1963, MC&E, RCA and GE, among others named therein, were directed to file with the Commission responses to a questionnaire in the form attached to the order.

Following the filing of responses to the questionnaire by respondents, hearings were held on June 26, 1963 and on July 1, 2 and 15, 1963 before Examiner Dunlop in San Francisco, limited to an inquiry into the private mobile lease-maintenance services of MC&E, RCA and GE.^{1/} Concurrent briefs were filed by MC&E, RCA and GE on October 1, 1963 and this phase of the investigation now is ready for decision.

The significant characteristic of the three respondents (MC&E, RCA and GE) is that they are nationally known manufacturers of radio and electronic equipment or, as in the case of MC&E, a subsidiary of such a manufacturer.

Private Mobile Radio Communications Systems

Private mobile radio communications systems with which this phase of the proceeding is concerned include, typically, a remote control console at the operator/licensee's office or headquarters which is operated by him or by one of his employees for the control and dispatching of other employees in vehicles or other mobile equipment. The dispatcher's microphone is connected by a wire line or radio circuit to a base station transmitter/receiver operated by the customer. Voice communication between the dispatcher and the mobile units or between mobile units is effected by means of the base-station transmitter/receiver and transmitter/receivers in the mobile units. A typical system is portrayed in Exhibit 27.

Such systems are used for private two-way voice communication among employees of the operator and, under the rules

^{1/} By its Fourth Interim Order (Decision No. 65784, dated July 30, 1963), the Commission discontinued the investigation as to 29 respondents whose responses indicated they were not engaged in lease-maintenance activities and continued it as to the remaining respondents.

of the Federal Communications Commission, may not be used for common carrier transmission of messages. In essence, such private systems provide closed-circuit communication within the organization of the operator of the system.

Uses of Private Systems

Private mobile radio systems find many valuable and useful applications in the fields of public safety, transportation, industry and business. Representative public safety uses include those of police departments, fire departments, highway departments and forestry and conservation agencies. Such systems are also used to control and dispatch vehicles and other equipment operated by taxicab companies, public utilities, common carriers, and service enterprises.

FCC Regulation

Regulations of the Federal Communications Commission (FCC) require the operator of a private mobile radio system (including those secured from respondents MC&E, RCA and GE) to secure a license from the FCC for the class of service for which the operator/licensee is eligible. Use of the system is limited to the channel or frequency assigned to the licensee by the FCC. Transmitting equipment must meet engineering minimum standards prescribed by that agency. The operator/licensee is required to have that equipment maintained in accordance with those standards.

Operation and Maintenance

The FCC requires that the operator/licensee operate his own system (the base station and the mobile units associated with it). Maintenance work on transmitting equipment can only be performed by technicians licensed by the FCC to perform such work. The licensee may fulfill his responsibility for the maintenance of

his equipment by use of his own employees. As an alternative, he may arrange for maintenance from an independent maintenance organization under a monthly or annual contract or on an as-required basis.

Methods of Acquisition

Private mobile radio systems are manufactured by a number of companies, including Motorola, Inc., RCA and GE. Users of private mobile radio systems may acquire and pay for the equipment in a variety of ways. The equipment may be purchased outright for cash from the supplier; it may be purchased on a deferred payment basis under a conditional sale contract or pursuant to a fully amortizing or partially amortizing lease; or, in more rare and exceptional instances, secured for a term of years or months pursuant to a normal lease.^{2/} MC&E, RCA and GE use each of these means of making private mobile radio equipment available to their customers.

Applicable Criteria

The relevant judicial precedent is Commercial Communications, Inc. v. Public Utilities Commission, 50 Cal. 2d 512, 327 P.2d 513 (1958), in which the Supreme Court of California upheld an order of this Commission (Decision No. 54438, 55 CPUC 387) holding that the Commission had jurisdiction over the furnishing by The Pacific Telephone and Telegraph Company of private mobile radio systems on a lease-maintenance basis pursuant to a tariff filed with the Commission.

^{2/} A fourth possible method of acquisition, not here involved, is to secure leased equipment, installation and maintenance as a single service under a public utility tariff offering such as represented by Schedule No. 103-T of The Pacific Telephone and Telegraph Company. By Decision No. 61067, dated November 15, 1960, Pacific was authorized to cancel the schedule effective January 24, 1961, and to withdraw from furnishing such service on a tariff basis by that date.

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In its Decision No. 54438, this Commission expressly disclaimed any intention to assert any jurisdiction over providers of private mobile service until there should be evidence that they had dedicated or were willing to dedicate their service to the public, which The Pacific Telephone and Telegraph Company had done.

The question of Commission jurisdiction over the operations of respondents, MC&E, RCA and GE, in the private mobile radio field, involves two basic lines of inquiry:

1. What is the nature of the activity engaged in by MC&E, RCA and GE?
2. Has MC&E, RCA, or GE dedicated this service to the public?

Motorola Communications & Electronics, Inc.

MC&E is a wholly owned subsidiary of Motorola, Inc., a major manufacturer of radio, television, communications and electronic equipment. MC&E's primary function is the sale and distribution of items manufactured by the communications equipment division of Motorola, Inc. MC&E's operations in California and in eleven other western states are conducted from its western area office in Burlingame, California, under the supervision of its vice president and western area manager. At that location, MC&E's staff is engaged in order processing, filling of parts orders, billing, credit analysis, administration of service contracts, communications system engineering, and refurbishing used equipment received in trade for new equipment.

In California, regional sales offices are maintained in San Diego, Los Angeles, and San Carlos, with a zone office at Sacramento. Sales representatives are employed by MC&E to sell communications equipment manufactured by Motorola. MC&E field

service engineers assist customers in the design of communications systems and in the selection and subsequent operation of such equipment secured from MC&E.

MC&E's operations in the private mobile radio field in California are summarized in the tabulation following:

<u>Type of Transaction</u>	<u>Number of</u>		<u>Mobile Units</u>	<u>Percentage of Dollar Volume 1962</u>
	<u>Customers*</u>	<u>Base Stations</u>		
Cash Sales	-	-	-	86%
Conditional Sales	-	-	-	5
Constructive				
Conditional Sales	455	655	4,092	8
Without Maintenance	304	348	2,098	-
With Maintenance	151	307	1,994	-
Regular Leases	5	81	640	1
Without Maintenance	2	71	527	-
With Maintenance	3	10	113	-

* One customer purchasing equipment under a constructive conditional sale contract also secured equipment under a regular lease.

Thus, in 1962 about 86 percent of MC&E's dollar sales volume in California consisted of direct sales for cash payable within 30 days after shipment or installation. Another 14 percent of MC&E's 1962 sales volume consisted of sales under two types of time-sales instruments. The first, employed in approximately five percent of sales, is a standard-form conditional sale contract of a type widely employed in deferred-payment sales transactions (Exhibit 28). Under this conditional sale contract, the seller or its assignee retains title to the equipment for security purposes until the purchase price is paid, at which time title passes to the buyer.

The second type of time-sales transaction, reflecting eight percent of the 1962 sales, is represented by a document entitled "lease" (Exhibit 29). Respondent MC&E maintained that such "leases" are essentially constructive conditional sale

contracts because: (1) the intent of the parties is to effect a sale; (2) the contracts are self-liquidating;^{3/} (3) the contracts are assigned and title to the equipment is transferred to a nonaffiliated finance company; (4) upon payment of the contract price, the customer receives title to the equipment; and (5) the transactions are treated as sales for tax purposes.

The last group of transactions is represented by regular leases which MC&E maintained are exceptions to its normal pattern of sales. As of February 1, 1963, MC&E leased private mobile radio equipment in conjunction with maintenance to two customers, and equipment was leased without maintenance to a third.^{4/} In addition, MC&E from time to time enters into "spot" or accommodation rental arrangements with present or potential customers. Such spot rentals are on a monthly basis and are usually not represented by a formal lease or contract. Only one customer was receiving equipment and maintenance on this basis.^{5/} The three customers to whom equipment is leased have declined to purchase the equipment and will deal with MC&E only under arrangements pursuant to which they acquire no equity in the equipment. MC&E maintains that it does not hold itself out to make such equipment available under lease and that whether it will lease to a customer who does not wish to buy depends upon the circumstances of each particular case.

3/ A number of contracts entered into prior to February 10, 1961, are not self-liquidating in that there is a balance due at the end of the contract term of from 14 to 16 percent of sales price. Such balance may be liquidated by one of three ways: (1) making a lump-sum payment, (2) by extending the contract term, or (3) by returning the equipment. These options are communicated to the customer by means of an option letter (Exhibit 30). Discharge of the balance due by return of the equipment practically never occurs.

4/ These three customers are Standard Oil Company of California, Rohr Corporation and Lockheed Aircraft Corporation.

5/ East Bay Municipal Utility District.



Equipment secured from MC&E by purchase or lease may be installed under various arrangements. The customer may install it; he may make his own arrangements for installation with an installer selected by him; or he may request MC&E to make arrangements for installation pursuant to a separate installation contract (Exhibit 32). Where request is made of MC&E, the actual work of installation is performed by an independent contractor under an installation subcontract with MC&E (Exhibit 33).

Maintenance is not an integral part of securing equipment from MC&E. If an operator of a private mobile radio system desires to secure maintenance on a continuing basis from MC&E, it is provided under a standard form of maintenance contract (Exhibit 34). These contracts are usually for a term of one year, whereas the sales or lease contracts may be for terms as long as ten years. Some customers contract with MC&E for maintenance at some locations and provide it themselves at others. Maintenance charges are made at a flat monthly or annual rate or on a time-and-material basis, at the customer's election. These charges are based upon quotations made to MC&E by independent subcontractors. To the charges quoted by the subcontractor, MC&E adds a charge for administration of the maintenance contract.

It is MC&E's policy and practice wherever possible to have the maintenance service called for by its maintenance contracts performed by an independent contractor designated as a Motorola Service Station (MSS). In California MC&E has designated 43 subcontractors as MSS's. MC&E neither owns, controls nor has any interest in any MSS. The MSS is an independent businessman. Only at Yreka and Fresno, where MC&E has been unable to make satisfactory arrangements for an independent MSS, is maintenance service

temporarily provided by an MC&E owned and operated service station.

MC&E has arranged for three antenna sites in areas where such sites are not readily available to its customers. These are at Mount Otay, San Diego County; near Bakersfield, in Kern County; and at Fresno. Facilities provided by MC&E at an antenna site are those necessary for the installation and operation of the customer's base station, antenna and related equipment. MC&E does not own the transmitting or base station facilities on the sites.

MC&E has on a number of specific occasions, documented in the record, declined to deal with members of the public.

MC&E maintained that its activity with respect to private mobile radio differs significantly from that of The Pacific Telephone and Telegraph Company (Pacific) under its Tariff No. 108-T and reviewed in Commercial Communications Inc. These differences, according to MC&E, are:

1. MC&E's primary business is that of selling mobile radio equipment manufactured by its parent Motorola, Inc. Pacific, on the other hand, has for many years been engaged exclusively in providing public utility common carrier communications service under the regulation of the Commission. Pacific does not offer to sell communications equipment to the public.

2. With minor exceptions, MC&E deals only in Motorola equipment. Pacific employed equipment secured from numerous sources.

3. MC&E does not retain title in the equipment, except for security purposes, and even in those cases, the retained title is transferred to nonaffiliated finance companies. The only exceptions are the three regular leases and one "spot" or

accommodation rental. Pacific, on the other hand, always retained title to the equipment.

4. Equipment furnished by MC&E may be installed by the customer, by an independent installer or by contract with MC&E. Except in the case of entire systems purchased by Pacific, it performed the installation of all of its equipment.

5. MC&E customers are not required to, and very often do not, secure maintenance from MC&E. Maintenance secured through MC&E is subject to an individually negotiated separate contract having a different term than the sale or lease contract. Except at Fresno and Yreka, MC&E subcontracts the maintenance work to unaffiliated subcontractors. Under Pacific's tariff, equipment and maintenance were provided for by a single charge under a uniform schedule of rates. Equipment and maintenance were not available separately under Pacific's tariff.

6. Except in the case of the two regular leases and one "spot" rental in connection with which maintenance is furnished, it is the expectation and practice that upon expiration of the contract term, the MC&E customer will secure title to the equipment. Under Pacific's operations, it was neither the intention nor the practice that the customer would ever secure title to the equipment.

7. MC&E's prices for equipment and maintenance are individually negotiated and reflected in separate contracts with each customer. Pacific's rates and charges were published on a uniform basis in a tariff filed with the Commission.

8. MC&E does not hold itself out unreservedly to provide equipment and service to the public or any portion thereof, whereas by its tariff offering, Pacific made an unrestricted offering of its equipment and service.

9. A substantial portion of MC&E's business is done pursuant to its responses to solicitations for bids, in which cases MC&E's offer was solicited by the customer. Pacific's tariff filing, on the other hand, constituted a continuing offer to provide equipment on the terms and conditions set forth in the tariff.

10. With rare exceptions, all of MC&E's contracts are for a fixed term, which cannot be changed or terminated at the customer's option. By contrast, Pacific's lease-maintenance service arrangements could be terminated at any time by the customer, subject only to the payment of the basic termination charge if termination occurred within five years.

11. MC&E provides a combination of leasing and maintenance to only three customers (including one "spot" rental). This represents less than one percent of the dollar volume of MC&E business in 1962. By contrast, all of Pacific's mobile radio equipment was furnished on a lease-maintenance basis. There was no other basis on which it could have been secured.

12. MC&E is not engaged in any public utility activities which would support regulation of its private mobile radio business as a necessary part of the regulation of the remainder. Pacific, on the other hand, was exclusively engaged in furnishing regulated public utility communications services. Pacific's lease-maintenance service under a tariff offering was but a part of a larger regulated activity in the field of public utility communications services.

MC&E maintained that it has never, either directly or inferentially, held itself out to serve the public nor has it ever dedicated its property or services to the public and that it does not desire so to do.

Radio Corporation of America

RCA is a Delaware corporation. Among other things, it manufactures and sells private mobile radio communications equipment (hereinafter called "equipment"). RCA's activities relating to said equipment in California are under the supervision of the Western Regional Sales Manager for the Communications Productions Department, with headquarters in Hollywood, California. RCA maintains private mobile radio communications equipment in California through Radio Corporation of America Service Company, a separate division of RCA. On occasion RCA Service Company subcontracts its obligation to maintain private mobile communications equipment to an independent service organization. Some subcontractors are RCA authorized independent communication centers; others are not.

RCA's basic policy is to sell private mobile equipment for cash, although it also makes such equipment available in California under conditional sale contracts (Exhibit 16) and leases (Exhibit 17). Cash sales represent about 40 percent of RCA's equipment business in California; conditional sales represent about 25 percent and leases about 35 percent. On every conditional sale the purchaser delivers a note to RCA for the full purchase price of the equipment. RCA recovers the full purchase price over the initial term of every lease. The cash customer takes title to the equipment immediately; the conditional sale purchaser takes title when his note is paid; and the lessee obtains title by paying a nominal amount, generally 20 percent of the purchase price at the expiration of the initial lease term.^{6/}

^{6/} A lessee generally is given two other options: He can return the equipment to RCA at his expense and negotiate another lease-purchase of equipment, or he can retain his equipment and renew his lease at reduced rental. These options are seldom exercised. The usual practice is for the lessee to take title.

RCA never conditions a conditional sale or lease of equipment on an agreement by the purchaser or lessee to accept RCA installation or maintenance and has refused to agree to maintain equipment it has sold or leased. RCA has between 21 and 50 customers who are presently purchasing equipment on conditional sale in California and between 101 and 500 Californians who are lessees of equipment. About 50 percent of RCA's conditional sale purchasers and 55 percent of its lease customers have chosen to have their equipment maintained by RCA. In the ordinary case in which RCA maintains the equipment of a customer who has selected RCA maintenance, the equipment is maintained under separate contract; the term of the maintenance contract is almost never coextensive with the term of the customer's conditional sale contract or lease; and ordinarily the customer is billed separately for maintenance. Such maintenance is the responsibility of a separate RCA division, which maintains equipment manufactured and sold or leased by RCA as well as equipment manufactured, sold or leased by competitors of RCA, or subcontracts such maintenance to others.

An RCA cash customer, conditional sale purchaser, or lessee may or may not request RCA to install and maintain his equipment for him, and RCA may or may not agree to perform any installation or maintenance requested. Whether the equipment is sold for cash, on conditional sale, or lease, and whether or not RCA agrees to perform any installation or maintenance requested, the equipment is controlled, operated, and managed by the cash customer, conditional sale purchaser or lessee.

RCA does not consider itself obligated to supply equipment or maintenance to anyone. In the past it has refused to make equipment available in some cases, it has refused to add equipment

to existing leases and it has refused to maintain equipment which it has been willing to sell or lease. RCA has negotiated individual contracts with each conditional sale purchaser or lessee and with each purchaser of an RCA maintenance contract. Neither equipment nor maintenance is always made available to all customers on the same terms. Each of RCA's lease-maintenance agreements (fewer than ten in number) was specifically drafted to meet the needs of a large customer,^{7/} each was individually negotiated and each differs from all the others in its terms and conditions.

RCA Service Company rents and manages various antenna sites in Southern California which are owned by third parties, including the U.S. Forest Service and Meridian Sales and Service, not affiliated with RCA. RCA, in turn, subleases such sites to various private mobile customers pursuant to a tower site lease agreement (Exhibit 26).

RCA maintained that: (1) its primary interest is in selling equipment; (2) its activities in California are not at all like the activities of The Pacific Telephone and Telegraph Company considered by the Supreme Court in the Commercial Communications case; (3) it has not dedicated any of its equipment or maintenance facilities to the public or any portion thereof, nor is it willing to do so; and (4) it is not providing public utility service as a telephone corporation in California.

General Electric Company

General Electric Company manufactures and sells a variety of products, including private two-way mobile radio equipment. Its sales and distribution activities in California and in the eleven western states are under the direction of a Regional Manager with headquarters at the GE Communications Equipment Center

^{7/} Southern California Gas Company and Southern Counties Gas Company of California each have lease-maintenance agreements with RCA.

in Redwood City, California. GE employs sales personnel as well as independent commission agents franchised as Manufacturer's Representatives. It also has a field technical staff of communication engineers. GE also selects and appoints independent radio equipment maintenance agencies, which are franchised as authorized General Electric Service Stations for the purpose of providing installation and maintenance facilities to accommodate the needs of GE users as well as other mobile radio users. There are approximately 56 authorized General Electric Service Stations in California.

GE merchandises mobile two-way radio equipment in California through cash sales, conditional sales and leases. The choice of the type of financing is solely the customer's. Cash sales account for about 63.5 percent of GE's dollar volume of such equipment in California; conditional sales account for 19 percent and leases for about 17.5 percent. Three types of leases are used by GE: (1) lease with option to purchase (Exhibit 42); (2) lease without option to purchase (Exhibit 43); and (3) communications service lease agreement (Exhibit 44).^{8/} A majority of GE's leases are of the first type, lease with option to purchase. A large majority of these transactions are sold to an affiliate, GE Credit Corporation, by assignment. Under this lease (Exhibit 42) the lessee also has the option to terminate the lease after one year upon payment of specified termination charges and also has the option to renew the lease at a substantially reduced monthly rental. The lease without option to purchase

^{8/} One-half of one percent of GE's California transactions involving private mobile radio equipment are attributable to the service lease (Exhibit 44).

(Exhibit 43) is similar to Exhibit 42 except it does not contain the purchase option. It does, however, contain the option to renew at substantially reduced monthly rental and the option to terminate after one year upon payment of specified termination charges. GE has three customers in California under the communications service lease agreement (Exhibit 44). The three systems are small, consisting of six or seven mobile units each. This type of lease is on a month-to-month basis and may be terminated on 30 days' written notice. GE provides equipment and assumes responsibility for maintenance thereof to the lessee. At its option, GE may provide new, reconditioned or used equipment under this type of lease (Exhibit 44).

GE performs no maintenance directly for its private mobile customers regardless of the method of financing used in merchandising the equipment. It does, however, assume the obligation of maintenance to the customer under two types of agreements^{9/} and subcontracts the maintenance out under agreement (Exhibit 46) with an independent service agency. Usually, but not always, such agency is an authorized General Electric Service Station. As previously indicated, GE has three customers in California with leases of the type contained in Exhibit 44. It has seven customers in California with maintenance agreements of the type contained in Exhibit 45. GE does not set the rate for maintenance work to be performed; it is set by the subcontractor, the price to the customer being ten percent over the subcontractor's price to defray GE's administrative overhead and costs of collection.

^{9/} Communications Service Lease Agreement (Exhibit 44) and Communication Service Equipment Agreement (Exhibit 45).

GE does not own, operate or maintain any antenna sites in California, nor does it operate any repeaters.

GE maintained that: (1) it reserves the arbitrary right to do business with whomever it pleases; (2) it has not intended and does not intend to dedicate its business of merchandising private two-way mobile radio equipment to the public; (3) its merchandising transactions are all individually negotiated by separate contracts; and (4) it has never applied for a certificate of public convenience and necessity for any private two-way mobile radio business manufactured by it.

Findings

Upon consideration the Commission finds that:

1. The nature of the activities engaged in by respondents, Motorola Communications & Electronics, Inc., Radio Corporation of America and General Electric Company, is markedly dissimilar from that of The Pacific Telephone and Telegraph Company under its tariff schedule 108-T which was reviewed in the Commercial Communications case.

2. There is no compelling public need for an assertion of Commission jurisdiction over the private mobile radio operations of MC&E, RCA or GE.

3. None of the three respondents (MC&E, RCA or GE) is presently a regulated public utility; none has held itself out to serve the public or dedicated its property or service to the public; nor has any of said three respondents expressed a willingness to do so.

4. Respondents (MC&E, RCA and GE) are not furnishing private mobile radio lease-maintenance service to the public for compensation within California in such a way as to make them

subject to regulation by the Commission as public utility telephone corporations within the meaning of Section 234 of the Public Utilities Code of the State of California.

We conclude that the investigation with respect to Motorola Communications & Electronics, Inc., Radio Corporation of America and General Electric Company should be discontinued but that the investigation should continue with respect to the remaining respondents hereto.

O R D E R

IT IS ORDERED that the investigation under Case No. 6945 is discontinued with respect to Motorola Communications & Electronics, Inc., Radio Corporation of America and General Electric Company. However, said investigation is continued with respect to the remaining respondents hereto.

The Secretary is directed to cause a copy of this order to be served upon each respondent.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 24th day of MARCH, 1964.

William A. Beard
President
Edith E. Mitchell
George T. Grover
Frederick B. Holbluff

Commissioners

Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A

Appearances*

Mary Moran Pajalich, Paul Popenoe, Jr., and Sidney J. Webb, for the Commission staff.

Brobeck, Phleger & Harrison, by Robert Lowry and Gordon E. Davis, and Francis L. Cross of Cross, Brandt, Hayes & Merrill, for Motorola Communications & Electronics, Inc., respondent.

Gerald H. Trautman and Frederick O. Koenig, for Radio Corporation of America, respondent.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, by W. W. Godward, Augustus Castro and Ronald Jacobson, for General Electric Company, respondent.

Lester W. Spillane, for Allied Telephone Company Association, interested party; Knox La Rue and Delta Mobile Radio Service, respondents.

Homer Harris, for Industrial Communications Systems, Inc., respondent.

Donald R. Cook, for Cook's Communication Corporation, respondent.

K. K. Kidd, for Radio Dispatch Engineering Company, respondent.

*At hearings on June 26, July 1, 2 and 15, 1963.