

expenses and \$300,000 for its real estate by WWSW.

WENS applied for the channel following an agreement reached between the two original applicants WWSW and WJAS Pittsburgh, whereby WJAS was given a three-year option to purchase 50% of WWSW Inc. WENS appealed to the courts and received a court order staying the grant until the Commission ruled on the uhf station's petition for a rehearing.

Ch. 4 KDKA-TV is the only commercial vhf station in Pittsburgh.

## Appeals Court Rules 'Marko' Not A Lottery

TELEVISION stations and the Caples Co., Chicago advertising agency, had a green light last week from the U. S. Court of Appeals that *Play Marko* is not a lottery.

The program, a bingo-type game tailored for tv broadcasting, may be undesirable, Circuit Judge David L. Bazelon wrote in the majority opinion (for himself and Judge Charles Fahy), but it is not enough to "brand those responsible as criminals." Circuit Judge John A. Danaher dissented.

The problem arose in 1955 when the FCC issued a show cause order why a cease and desist order should not be issued against KTLA (TV) Los Angeles, implying that the bingo-type program violated the lottery statutes. The Los Angeles station then cancelled the program. The Caples Co., owner of the program, sought an injunction against the FCC in the U. S. District Court in Washington, but this was dismissed as premature. The Chicago advertising agency then asked the FCC for a declaratory ruling. This was issued by the Commission last year, holding the game was a lottery. The appeal which resulted in last week's court decision followed.

At issue in the proceeding was whether the requirement that a viewer pick up a bingo card from retailers stocking sponsors' products was consideration in the sense of the lottery laws. A lottery is defined as the giving of a prize according to chance for a consideration. The court majority held that determining that this was consideration would be "stretching the statute to the breaking point to give it an interpretation that would make such programs a crime." The quoted words are from the 1954 Supreme Court decision reversing the FCC's regulations regarding what constituted a lottery.

Judge Danaher held that this is a specific finding on a specific case, as recommended by the Supreme Court in its lottery decision. Judge Danaher felt that the necessity for a player to go to a specified retail outlet could be considered consideration in the terms of the lottery law. He also felt, he said, that since the advertising agency arranges the "stake" for the player—through arrangements with sponsors for prizes, for distribution of the cards, the production staff, etc., this provides consideration "as surely as though the operator of a roulette wheel staked a player to join in a game at the casino."

## MIAMI CH. 7 CASE REMANDED TO FCC

- Appeals Court reverses grant
- Decision means new hearing

THE FCC erred when it decided that the consulting contract between Niles Trammell and NBC was not adverse to Biscayne Television Corp., winning applicant in the long-drawn out Miami ch. 7 case, a unanimous three-judge U. S. Court of Appeals panel ruled last week.

The court remanded the case to the FCC for further proceeding. It noted that its decision does not "necessarily" disqualify Biscayne.

Biscayne won the vigorously contested Miami ch. 7 grant early last year over three other applicants: Sunbeam Television Corp. East Coast Television Corp., and South Florida Television Corp.

Biscayne is composed of principals of the co-owned *Miami News*, the Knight-owned *Miami Herald* and Mr. Trammell, former NBC president, who owns the middle 15% interest.

At the time of the hearing on applications, the *Miami News* also owned WIOD Miami and the *Herald*, WQAM Miami. The latter was sold in mid-1956 to Todd Storz for \$850,000 in order to comply with FCC rules prohibiting the ownership of two outlets in the same service area by one firm. WIOD became WCKR owned by Biscayne. The ch. 7 WCKT (TV) began operating in the summer of 1956, with an NBC affiliation.

Mr. Trammell, informed of the court order Thursday, said he regretted the decision, but declined to make a statement until he had read the details of the opinion. WCKT will continue to operate, he said, since the court did not order a discontinuance, he noted. "Under established procedures, Station WCKT will continue its normal operation as heretofore, pending final resolution of the problems presented," Mr. Trammell stated.

The court's opinion was written by Circuit Judge Charles Fahy, for himself and Judges Wilbur K. Miller and George Thomas Washington. Judge Fahy pointed out that Mr. Trammell's consulting contract with NBC still had four years to run, that the compensation was \$25,000 yearly, and that the "contract provides that Mr. Trammell will do nothing in conflict with the interests of NBC and that he can be called upon for advice with respect to sales, station problems, talent, films and general policy matters."

Citing Mr. Trammell's important position in Biscayne (he is president and general manager) Judge Fahy declared that the failure of the FCC to cite his contract with NBC as an adverse factor for Biscayne "was a departure from the Commission's established policy that it is desirable for local television stations and network organizations to be independent of each other, and thus to assure that networks can freely compete for affiliation with local stations, and local stations freely compete for network affiliation. . . ."

The decision continued:

"A person under contract to do nothing

in conflict with a particular network of the scope of NBC, from which he receives compensation of \$25,000 per annum, considered with other provisions of the contract to which we have referred, is contractually bound to the interests of the network, though not by the ordinary employe-employer or officer-company relationship. He is an agent 'serving two principals whose interests may not always coincide.' Mr. Trammell's relationship with NBC is of a character that is not unlikely to affect Biscayne's choice of network affiliation, and NBC's choice of a local outlet in the Miami area."

In a reference to the fact that Biscayne involved the amalgamation of two newspaper and radio interests, Judge Fahy noted that although Biscayne received preferences over other applicants in past broadcast experience and past records of its principals, this may have resulted from their "concentration of media of mass communication, which is itself an adverse rather than a preferential factor."

## Bay Area, Rochester Oral Arguments Held

AN APPLICANT'S proposed service to its coverage area was attacked vigorously before the FCC last week during oral argument on the Oakland-San Francisco ch. 2 case. Counsel for San Francisco-Oakland Tv Inc. and Tv East Bay Inc. argued that a grant to the third applicant, Ch. Two Inc. (which was favored in an examiner's initial decision), would be contrary to a Commission ruling in the grant of ch. 8 Petersburg, Va., to Petersburg Tv Corp. (WXEX-TV).

Ch. Two Inc.'s application proposes to concentrate its programming and advertising on the East Bay (Oakland) area, locating its only studio in Oakland. The other applicants proposed main studios in Oakland with auxiliary studios in San Francisco, while programming for both areas. Examiner Thomas H. Donahue leaned heavily on the "service philosophy" of Ch. Two in favoring that applicant [B\*T, June 25, 1956].

In the Virginia grant, the Commission ruled that "Petersburg Tv Corp. merits a distinct preference on the basis of its service philosophy since it . . . will also program for the entire service area in contrast to Southside Virginia Telecasting Corp.'s limited concept of service (i. e., to Petersburg and southside Virginia only)."

The Broadcast Bureau also questioned the initial decision in that it was not consistent with the Petersburg ruling it said.

Ch. Two counsel stated that there are presently four stations operating in San Francisco and that Oakland needed the local service proposed by his client.

Tv East Bay is owned by Edwin A. Pauley (60.85%, Donald A. Norman and others; Ch. Two by Mr. Kennedy (10%), his stepson Stoddard P. Johnston (35%), Howard L. Chernoff (5%) and 50% by Oakland citizens, none owning more than 5%, and San Francisco-Oakland by Ward Ingram, William Pabst and Harry Lubke.

A second oral argument was held on the Commission's 1953 sharetime grant of ch.