

ANALYSIS

To the extent federal regulation has invaded the CATV field such regulation has pre-empted state and local jurisdiction. The FCC's Fourth Report and Order, *supra*, regulates the following CATV operations: program origination, carriage and exclusivity, franchise standards, diversification of control, and technical standards.

When the State Legislature enacts a comprehensive regulatory scheme applicable to a particular industry and to be administered by a particular state agency, the Legislature *ipso facto* withdraws jurisdiction to so regulate from the political subdivisions of the State. *Chicago Motor Coach Co., et al. v. City of Chicago, et al.*, 337 Ill. 200, 169 N.E. 22, 66 A.L.R. 834 (1929). Accordingly, to the extent Chapter 711 of NRS has further invaded the field of CATV regulation, local jurisdiction to so regulate has been withdrawn. Chapter 711 of NRS gives the Public Service Commission jurisdiction to regulate: service areas and extensions thereof, rates, fitness and ability of operator, safety and adequacy of service, and to promulgate and enforce rules and regulations. Accordingly, jurisdiction to regulate the rates, service areas and *operations* of CATV companies has been wholly pre-empted and withdrawn from political subdivisions of the State of Nevada.

The Reno City Charter specifically grants the city council power to lease any municipal property for the purpose of providing service to the public (Sec. 2.150). The power to lease such property to a CATV company has not been pre-empted or withdrawn by federal or state regulation.

At the time of Attorney General's Opinion No. 128, the Nevada Legislature had declared CATV to be a public utility subject to regulation pursuant to [NRS Chapter 704](#). [NRS 704.330](#) requires each public utility to obtain a certificate of public convenience and necessity prior to operation. Such a certificate designates a service area within which the utility has an exclusive right to render the service authorized. This exclusive right is commonly characterized as a "franchise"; nevertheless, the term "franchise" is a generic term referring to a special privilege conferred by a sovereignty which does not belong to citizens generally. *Elliott, et al. v. City of Eugene, et al.*, 135 Ore. 108, 294 P. 358 (1930). It is apparent that the term "franchise," as used in Attorney General's Opinion No. 128, refers to a certificate of public convenience and necessity.

CONCLUSION

Attorney General's Opinion No. 128 is clarified as follows: federal and Nevada state regulations have completely pre-empted the jurisdiction of the City of Reno to regulate the rates, service areas and operations of CATV companies providing services within the city. The City of Reno may, however, lease to that CATV company the use of the city streets, ways, alleys and places.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By GLADE L. HALL, *Deputy Attorney General*

175 [NRS 293.404](#), Recounts—A recount of general election results is merely a retabulation of the ballots in the same fashion as in the original election with each candidate or his representative present as an observer. A candidate's observers may not challenge ballots, but must save challenges for any later election contest.

CARSON CITY, November 25, 1974

THE HONORABLE WM. D. SWACKHAMER, *Secretary of State*, The Capitol, Carson City,
Nevada 89701

DEAR MR. SWACKHAMER:

One of the candidates for the Office of United States Senator from Nevada in the recent general election has indicated to you that he will demand a recount after the Supreme Court canvass on November 27, 1974. You have requested the advice of this office on the nature of the recount.

FACTS

The general election was held on November 5, 1974. There was an election for the Office of United States Senator on the ballot and one of the candidates received, in the unofficial tally, 620 votes more than his opponent. His opponent indicated he would seek a recount after the Supreme Court, pursuant to [NRS 293.395](#), canvassed the vote.

QUESTIONS

Is a recount merely another count of the vote, or is it a procedure whereby the candidates may challenge the legality of the ballots? In this connection, must ballots, which are counted by electronic computer, be counted by hand or once again be counted by the computer?

ANALYSIS

There appears to be some question in the cases researched as to whether a recount is but a mathematical count of ballots previously canvassed and recorded on the tally sheet, or whether it is a recanvass of the votes involving determination as to whether ballots were properly allowed for the original counting. It is certain that a recount is not an election contest. See Words and Phrases, "Recount." Election recounts and election contests are separate proceedings. State ex rel. Booth v. Board of Ballot Commissioners, 196 S.E.2d 299 (W.Va., 1973); 29 C.J.S., Elections § 291. A contest is an adversary proceeding, or suit, between a candidate certified as elected and one not certified for the purpose of determining the validity of an election. McClendon v. McKeown, 323 S.W.2d 542 (Ark. 1959); see also Words and Phrases, "Contest." The differentiation between recount and contest is found in the statutory scheme of [NRS 293.400](#) et seq. There are different procedures stated for each.

It is also certain that recounts and contests did not exist at common law. Therefore, they are subject solely to statutory interpretation. They are special proceedings regulated by statute only. In re Parson, [76 Nev. 442](#), 357 P.2d 120 (1960); 26 Am.Jur.2d, Elections, § 295. The applicable statute for the conduct of a recount is [NRS 293.404](#). Section 1 sets up the recount board, while section 2 describes the basic procedure for recounts. Section 2 provides that:

The recount shall include a count of all ballots, including rejected ballots, and shall determine whether such ballots are marked as required by law. The county clerk shall have authority to unseal and give to the recount board all ballots to be counted. (Italics added.)

The statute specifically orders the recount board to inspect each ballot and to determine if each is marked as required by [NRS 293.293](#) and [293.367](#). By this provision, the recount board conducts the recount in the same manner as was done by the election board in the original count of the ballots after the general election. In other words, in Nevada, a recount is but a replay of the procedures for inspecting and counting the ballots as was done immediately after the general election.

These inspections and determinations are to be the sole responsibility, as provided by [NRS 293.404](#), of the recount board. The position of the candidates or their representatives is to function merely as observers with no power to challenge ballots or interfere in any way with the determination of the recount board in which ballots are to be counted or in how the ballots are to be counted. Such observers are in the same position as observers of the political parties or candidates on election night. See Rules 35 and 39 of the “Rules and Regulations for the Conduct of Primary and General Elections Promulgated by the Secretary of State.” In both instances they are to merely observe and are subject to removal if they interfere in the counting procedures. If such observers believe that illegal ballots are being counted in the recount, they may record such information for their own use in bringing a contest action. Such observers, however, may not challenge ballots. The recount board alone determines which ballots are to be counted and how they are to be counted.

As additional reasoning for this view, we would note [NRS 293.391](#), subsection 3, which states that ballots deposited with the county clerk shall not be subject to the inspection of anyone, except in cases of contested elections. The purpose of this statute, originally enacted in 1879, was to prevent tampering with the ballots by prohibiting anyone but the county clerks from handling, receiving or inspecting the ballots. *State v. Baker and Josephs*, [35 Nev. 1](#) (1912). This statute has been modified by [NRS 293.404](#) by permitting an official recount board to inspect such ballots. However, the original intent remains. No one but the county clerk or his designated recount board, of which the county clerk serves as chairman, may handle, receive or inspect ballots. A candidate or his representative may, however, observe the entire process.

What this means in terms of counting ballots for the recount is as follows. In the case of noncomputer ballots, a recount board hand counts the ballots, determining which ballots are to be counted. In the case of computer ballots, a recount board first inspects the ballots to determine which ballots are to be counted and then proceeds to count such ballots by means of an electronic computer. In both instances, the decision on which ballots to count and how they are to be counted lies with the recount board. In both instances, the candidates or their representatives are merely limited to roles as observers and may not interfere in the recount process. They may merely observe for the purpose of detecting irregularities which may later serve as the basis of a contest.

CONCLUSION

A recount, according to Nevada law, involves a determination by a recount board in each county as to which ballots may be counted and then the recount board proceeds to count such ballots. The process is the same as the process followed by the election boards on election night. In the case of noncomputer ballots, such ballots are hand counted by the recount boards, whereas in the case of computer ballots, such ballots are first inspected to see if they are in accordance with Nevada law on marking ballots and are then counted, as on election night, by electronic computer.

The candidates or their representatives may act as observers, but only as observers. They may not challenge ballots or interfere in any way with the counting of ballots. If observers note any irregularities in the counting of ballots, they may contest such irregularities only through an election contest.

Respectfully submitted,

ROBERT LIST, *Attorney General*

176 Retirement—Police officer or fireman must serve in such capacity for number of years set forth in [NRS 286.510](#) to qualify for early retirement benefits.