



THE FCC AND QUASI-COMMON CARRIAGE A Case Study of Agency Survival

The Federal Communications Commission (FCC) was established in the mid-1930s with broad authority to regulate common-carrier telegraph and telephone operators and radio broadcasters as public utilities. Over time, the communications industry evolved dramatically, with new technologies, new entrants, and deregulation bringing increased competition, lower prices, and greater consumer choice. Much of the FCC's original purpose has been rendered obsolete, but the agency's authority has increased while many other industry-specific common-carrier regulators have been abolished.

A new study for the Mercatus Center at George Mason University examines how the FCC has managed to survive and even thrive despite its declining relevance as an economic regulator. While some scholars have argued that the FCC should survive as a regulator of economic "bottlenecks," their explanations miss the FCC's shift away from economic regulation toward social regulation and its blurring of the line between common carriage and private carriage. The shift toward social regulation and "quasi-common carriage" has allowed the FCC to ensure its survival for the foreseeable future, despite the lack of an economic need for the FCC.

To read the study in its entirety and learn more about the authors, Brent Skorup and Joseph Kane, see "[The FCC and Quasi-Common Carriage: A Case Study of Agency Survival.](#)"

BACKGROUND

Today, monopoly in long-distance and local telephone has disappeared, and the growth in radio, cable, and Internet media outlets has eliminated the need for top-down allocation of broadcast spectrum. Accordingly, the Telecommunications Act of 1996 granted the FCC the ability to forbear from enforcing many of its common-carriage regulations and repeal its media-ownership rules. However, deregulation of communications has stalled or reversed in recent years. The agency has replaced economic regulation with wide-ranging interventions premised on social and cultural concerns. Coinciding with and reinforcing this pivot to social regulation is the rise of quasi-common carriage,

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an unworkable but persistent legal category that is used to justify significant interventions in competitive markets like mass media distribution.

KEY FINDINGS

The Breakdown of Regulatory Silos Led to the Creation of “Quasi-Common Carriage”

The Communications Act of 1934 originally divided regulated industries into two silos, common carriers and private carriers. Telecommunications companies were treated as the former and broadcasters as the latter. Telephone companies had common-carrier duties to charge just and reasonable rates, not discriminate between customers, and not censor any content transmitted across the network—duties which did not originally apply to private carriers like broadcasters. However, as the industries evolved, these distinctions blurred.

- *Broadcasters were subjected to nondiscrimination requirements.* By the 1940s, the FCC had ensured that radio and TV broadcasters did not have absolute control over their facilities and content. Elements of common carriage, like nondiscrimination among speakers and the Fairness Doctrine, entered broadcasting. Common carriage and private carriage blurred further as broadcasters used excess capacity to provide telecommunications-like services such as paging and telemetry.
- *Deregulation left telephone companies in a gray area.* Telephone companies were originally restricted to common-carrier services. However, with the advance of computerization and deregulatory norms since the 1970s, the FCC and Congress have allowed and encouraged phone companies to provide non-common-carrier services like TV and information services.
- *Cable and satellite confounded regulatory silos.* The introduction of cable television challenged the FCC because cable operators had elements of both common and private carriage. While cable companies were originally passive distributors of broadcasters’ content, they eventually developed and distributed their own content. Both cable companies and their new satellite competitors were required to fulfill many common-carriage obligations while remaining nominally private carriers.

The FCC Became a Social Regulator

Public choice theorists have noted that shifting to social regulation can forestall agency obsolescence and, perhaps, abolition. As the need for economic regulation in communications and media diminished, the FCC embraced social objectives, and its role in noneconomic goals such as universal service, media diversity, and the “open Internet,” has expanded. By applying quasi-common-carriage rules in pursuit of these goals, the FCC gives a veneer of continuity to this post hoc transformation.

An illuminating example of this evolution is the FCC’s net neutrality rulemaking, characterized by its chief economist as “an economics-free zone.” The FCC largely ignored economic considerations such as market power in justifying the application of quasi-common-carriage rules to Internet service providers, relying instead on noneconomic concerns such as protecting free speech and limiting the power of media “gatekeepers.”