

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Assessment and Collection of Regulatory Fees)	MD Docket No. 21-190
For Fiscal Year 2021)	
)	

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

October 21, 2021

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby submits the following comments in response to the Commission’s Notice of Proposed Rulemaking concerning adopting new regulatory fee categories and improving the regulatory fee process regarding all categories of service.²

This year, the Commission took necessary action in response to concerns expressed by NAB and other broadcasters to ensure that its fiscal year 2021 fee allocation accounted for the lack of any benefit broadcasters receive from the Commission’s broadband mapping activities.³ Though NAB greatly appreciates the Commission’s efforts in this regard, the Commission’s current fee methodology requires further reform to conform to the law.

¹ The National Association of Broadcasters (NAB) is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Assessment and Collection of Regulatory Fees for Fiscal Year 2021*; Notice of Proposed Rulemaking, 86 FR 52429 (Sept. 21, 2021) (NPRM).

³ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2021*, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 21-190, at ¶ 16 (rel. Aug. 26, 2021) (R&O and NPRM).

The Commission has broad statutory authority to assess regulatory fees to entities that benefit from the Commission’s activities.⁴ This authority is guided by the statutory requirements that the Commission’s fee schedule collects the total amounts appropriated in a given year and that the “fees reflect the full-time equivalent number of employees within the bureaus and offices of the Commission, adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”⁵ Importantly, the D.C. Circuit has interpreted this statutory mandate to require the Commission to assess fees that take into account ‘benefits provided to the payor of the fee by the Commission’s activities.’”⁶

The Commission routinely violates this statutory requirement by basing its fee schedule solely on the number of direct full-time equivalent employees (FTEs) in the four “core” bureaus of the Commission. The result of this methodology is a fee schedule that reflects only the work performed, and the benefits provided, by a mere *quarter* of the Commission’s operations. The Commission’s approach is unlawful and unconstitutional because, among other things, it forces broadcasters and others to subsidize Commission activities which substantially benefit other regulatory fee payors or other entities that currently contribute nothing to the Commission’s funding in violation of the law and general federal fee policy.

⁴ *Telesat Can. v. FCC*, No. 20-1234, 2021 U.S. App. LEXIS 16677 at *7 (D.C. Cir. June 4, 2021) (*Telesat*) (Section 9 “provides a general guide to the FCC that it should charge regulatory fees to those that benefit from its regulations.”); 47 U.S.C. § 159.

⁵ 47 U.S.C. § 159(d).

⁶ *Telesat* at *13.

By seeking further comment on how the Commission might expand its base of payors to include other beneficiaries of Commission activities and how the Commission might otherwise reform its fee allocations, the NPRM is another important step in making necessary changes to the Commission's regulatory fee structure so that regulatory fees more fairly, accurately, and lawfully reflect the work performed by the Commission and the benefits received by various industries as a result of the Commission's activities and complies with the law. NAB urges the Commission to take several additional steps to bring its fee structure into compliance with its statutory mandates.

First, the Commission should fundamentally reassess its proportional allocations of indirect Commission costs to determine whether such allocations align with the actual amount of work performed by the noncore bureaus and offices on behalf of regulatory fee payors. Specifically, the Commission should undertake an accounting of the actual functions of FTEs in the noncore offices and bureaus of the Commission, including the Consumer and Governmental Affairs Bureau, the Office of Engineering and Technology, and the Enforcement Bureau to determine whether some or all of that work could be ascribed as direct work performed on behalf of certain regulatory fee payors and allocated accordingly.

Second, the Commission should perform the analysis necessary to add a fee category for broadband service providers or exempt broadcasters from paying for any broadband costs. There is no question that the Commission's primary focus is ensuring that broadband service is available to every American and therefore broadband providers "benefit" from the Commission's activities. The Commission should expeditiously add a fee category for such providers to which all FTE costs associated with the Commission's broadband activities should be allocated. If the Commission continues to treat these costs as "indirect," they should be allocated across only those regulatory fee payors that benefit

from broadband activities and not require broadcasters to shoulder the burden. There is simply no plausible argument that broadcasters should be footing those bills, directly or indirectly.

Third, the Commission cannot lawfully turn a blind eye to the fact that Big Tech – companies such as Facebook, Google, Microsoft, and Amazon – take up significant Commission resources under the banner of “unlicensed spectrum,” yet pay no associated regulatory fees as a result. For example, over the last few years Big Tech helped lead a massive and expensive push to use 6 GHz spectrum for their benefit (and to the detriment of many licensed operators, including broadcasters). Big Tech companies drained significant Commission resources, and yet remarkably, broadcasters and others footed the bill. The Commission has the authority and the responsibility to add a fee category for these beneficiaries of the Commission’s activities.

Fourth, the Commission should consider raising the de minimis threshold above the current \$1,000 level. As the Commission’s budget continues to increase, very few small businesses will fall below the threshold. Given the ongoing impacts of the coronavirus pandemic, the Commission should consider whether increasing the threshold will serve the public interest by limiting the impact of regulatory fee increases on small and rural broadcasters and saving the Commission the time and expense it incurs in collecting fees from small entities.

II. THE COMMISSION SHOULD OVERHAUL ITS REGULATORY FEE METHODOLOGY TO ENSURE THAT INDIRECT COSTS ARE ALLOCATED IN A MANNER THAT ACCOUNTS FOR THE BENEFITS RECEIVED BY THE PAYOR OF THE FEE

In 2018, Congress amended the Commission’s fee authority and specifically directed the Commission to amend the schedule of regulatory fees “so that such fees reflect the full-time equivalent number of employees within the bureaus and offices of the Commission,

adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”⁷ In other words, it is not sufficient for regulatory fees to merely reflect changes in the “full time equivalent number of employees within the bureaus and offices of the Commission,” if the fees do not also bear a reasonable relationship to the amount of work the Commission performs for the benefit of the payor.

As NAB and others have explained in previous filings, the Commission’s current methodology fails to make the statutorily required adjustments.⁸ Instead, the Commission bases the entire fee schedule solely on an analysis of the number of FTEs in each of the Commission’s core bureaus – approximately 25% of Commission FTEs. The costs associated with the remaining 75% of Commission FTEs are mechanically allocated in proportion to the direct FTEs, with the Commission making no effort to even try to quantify or analyze the extent to which any industry benefits from the offices and bureaus not directly related to the function of an identified industry.⁹

Those percentages are astounding in how inaccurately they reflect the “benefits received” from current payors. How can the Commission assess fees with a straight face on the basis of a 25% sample, especially when the Commission has admitted that the work of the noncore bureaus and office may focus disproportionately on certain industries and that

⁷ 47 U.S.C. § 159(d).

⁸ See, e.g., Comments of NAB, MD Docket No. 21-190 (June 3, 2021) (FY 2021 NAB Comments); Joint Reply Comments of the State Broadcasters Associations, MD Docket No. 21-190 at 5-16 (June 21, 2021) (State Broadcasters Comments); Letter from R. Kaplan (NAB) to M. Dortch (FCC), MD Docket No. 21-190 (Aug. 20, 2021).

focus may shift over time?¹⁰ The Commission cannot simply throw up its hands and proclaim that it is too hard to allocate the remaining 75% in the manner that Congress has required. The law requires that the Commission do far better than getting things 25% correct.

This gross inaccuracy and frankly, laziness, has concrete consequences for regulatory fee payors. As a result of this flawed methodology, each year broadcasters are responsible for nearly 20% of the costs associated with noncore bureaus and offices including the Consumer and Governmental Affairs Bureau, the Office of Engineering and Technology, the Office of Economics and Analytics, the Office of the Inspector General and the Enforcement Bureau, without any consideration for what amount of the work performed by these offices and bureaus actually relates to the broadcast or any other industry. For instance, there is no analysis of the extent to which the Consumer and Governmental Affairs Bureau's workload may disproportionately focus on telecommunications issues as opposed to broadcast issues, or that the vast majority of the work of the Office of Engineering and Technology is focused on unlicensed spectrum, or the fact that Media Bureau FTEs rather than Enforcement Bureau FTEs handle many broadcast enforcement matters.¹¹ Broadcasters are nevertheless

¹⁰ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2013; Procedures for Assessment and Collection of Regulatory Fees; Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, 28 FCC Rcd 7790, ¶ 29 (“Further analysis indicates, however, that work of the FTEs in a support bureau may tend to focus disproportionately more on some of the core bureaus than others and that this focus may shift over time.”).

¹¹ See *Enforcement Overview*, Federal Communications Commission Enforcement Bureau at 5, n. 4 (April 2020), available at:

https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf (*Enforcement Overview*) (noting that the “Media Bureau enforces the Commission’s rules in the license renewal context when it evaluates if a licensee’s broadcast station ‘has served the public interest convenience and necessity’ and whether there have been serious violations of the Act or FCC Rules” and “the Media Bureau has enforcement responsibilities in certain discrete areas, including enforcement of the Commission’s political programming rules, the

responsible for 100% of the Media Bureau FTE costs associated with these enforcement activities and must also pay for nearly 20% of all other Enforcement Bureau costs, even those attributable to divisions of the Enforcement Bureau that are wholly dedicated to matters pertaining to other industries.¹² These issues are compounded by the fact that, as discussed below, the Commission labels significant amounts of its work as “indirect” rather than requiring the primary beneficiaries of that work to pay for it through regulatory fees. As the State Broadcasters have pointed out, the end result is “that the licensees who are the most heavily regulated, through no fault of their own, shoulder an outsized burden for all the activities and facilities of the FCC, while others who benefit from the FCC’s non-licensing activities, escape all or most of the costs associated with those activities.”¹³

While NAB understands that it is not possible for the Commission to perfectly align regulatory fees with the costs of regulating a particular payor or industry, its routine failure to do any analysis whatsoever as to what amount of work performed by the indirect bureaus and offices of the Commission relates to broadcasters or any other regulatory fee payor results in a fee schedule that is unfair, inequitable, unsustainable, and in violation of the law. Rather than do nothing, the Commission should undertake an accounting of the actual functions performed by FTEs in the noncore bureau and offices to determine whether those

cable and broadcast must-carry rules, and the rules related to broadcast retransmission consent, among others”).

¹² For example, the Telecommunications Consumers Division is focused “on protecting consumers from fraudulent, misleading, and other harmful practices involving telecommunications,” the Fraud Division “has primary responsibility for investigating and enforcing the most complex and egregious violations of the Communications Act and the FCC’s rules as they pertain to USF support,” and the Spectrum Enforcement Division “conducts investigations and takes enforcement actions against complaints primarily involving wireless equipment matters.” *Enforcement Overview* at 5-6.

¹³ State Broadcasters Comments at 6.

functions properly align with the Commission’s proportional allocation of costs. To the extent they do not, the allocation of indirect fees should be revised accordingly. Moreover, to the extent there are significant numbers of FTEs in the noncore bureaus that consistently focus on work benefiting a subset of regulatory fee payors, those costs should not continue to be treated as indirect costs that are the responsibility of all fee payors but instead should be allocated as direct costs payable by those regulatory fee payors.

Given the limited information that the FCC makes available regarding the number of FTEs and activities of the various divisions in the noncore bureaus, NAB cannot propose with greater specificity how these indirect costs should be allocated amongst regulatory fee payors. However, as discussed further below, ensuring that broadcasters are not paying for “indirect” costs associated with the Commission’s broadband activities is one place to start. In a fee system where benefits, not licenses, are the “touchstone” of whether it is reasonable for the Commission to collect fees from a particular payor,¹⁴ the Commission cannot continue to rely solely on its accounting of 25% of Commission FTEs to determine the benefits received by payors from the activities of the Commission as a whole, and must ensure that its proportional allocations corresponds in a meaningful way to the actual work performed by indirect Commission FTEs.

¹⁴ See *Telesat* at *12-13 (“Congress made clear that the Commission’s regulatory fee schedule should take account of ‘the benefits provided to the payor of the fee by the Commission’s activities.’ 47 U.S.C. § 159(d). This suggests benefits—not licenses—should be the touchstone for whether it is reasonable for the FCC to collect regulatory fees.”).

III. THE COMMISSION SHOULD PERFORM THE ANALYSES NECESSARY TO ADD A FEE CATEGORY FOR BROADBAND SERVICE PROVIDERS OR EXEMPT BROADCASTERS FROM PAYING FOR BROADBAND COSTS

NAB appreciates the significant efforts the Commission undertook in FY 2021 to ensure that broadcasters did not have to pay for broadband mapping activities that did not regulate or benefit broadcasters, and respectfully requests that the Commission go further and either require broadband service providers pay for the Commission's broadband activities or, at the very least, exempt broadcasters from paying for these costs. Despite the fact that pursuing a "100% broadband" policy is the Commission's primary strategic goal,¹⁵ the FCC does not have a fee category for broadband service providers and therefore is unable to require those providers to pay for the costs associated with broadband work performed by Commission FTEs.¹⁶ Instead, these costs are categorized as "indirect costs," making broadcasters responsible for nearly 20% of the bill.

There is simply no justification for this outcome in a regulatory fee regime in which benefits are supposed to be the "touchstone" for the Commission's collection of regulatory fees.¹⁷ The Commission devotes significant resources in both core and noncore bureaus to broadband activities, including those relating to the Commission's oversight of the Universal Service Fund (USF) which alone costs \$22.4 million for the Commission to regulate,¹⁸ and

¹⁵ See *2022 Budget Estimates to Congress*, Federal Communications Commission, at 9 (May 2021) available at: <https://www.fcc.gov/document/fcc-fy-2022-budget-estimates-congress> (FY 2022 Budget Estimate).

¹⁶ See R&O and NPRM at ¶ 17 (explaining that FCC does not have a fee category for broadband service providers).

¹⁷ See *Telesat* at *12-13.

¹⁸ See FY 2022 Budget Estimate at 26 (showing the estimated costs that the Commission will incur in overseeing USF activities).

from which broadband service providers plainly benefit.¹⁹ For example, according to the FCC’s FY 2022 Budget Estimate, there are over 550 FTEs throughout the Commission working on broadband activities, including 63% of Media Bureau FTEs.²⁰ The Enforcement Bureau has an entire fraud division dedicated to USF issues.²¹ Even the work of the Office of the Inspector General’s Office of Investigations appears focused on broadband issues as it “often address[es] allegations of criminal misconduct or civil fraud in the Commission’s Universal service programs” and the Commission expects that in the upcoming year it will “conduct investigations to fulfill our mandate to deter and detect fraud, waste and abuse in the COVID 19 Telehealth program, the Emergency Broadband Benefit Program and the Emergency Connectivity Fund program.”²² The Commission also requested budget authority for additional FTEs in FY 2022, in part to address new mandates associated with funds appropriated in part to fund was the Emergency Broadband Benefit Program.²³ Absent the

¹⁹ See Carol Matthey, *USForward: FCC Must Reform USF Contributions Now: An Analysis of the Options* (Sept. 2021) available at: <https://www.ntca.org/sites/default/files/documents/2021-09/FINAL%20USForward%20Report%202021%20for%20Release.pdf> (report written by Carol Matthey of Matthey Consulting LLC in conjunction with Incompas, NTCA and the Schools, Health & Libraries Broadband Coalition advocating that it would be appropriate to require broadband service providers to contribute to USF as a matter of public policy “because all four programs in the USF promote universal broadband.”).

²⁰ See FY 2022 Budget Estimate at 15 (depicting the distribution of Commission FTEs by Commission goals and indicating that there are 564 Commission FTEs working to further the Commission’s goal to “Pursue a ‘100 Percent’ Broadband Policy,” including 84 of 132 Media Bureau FTEs).

²¹ See *Enforcement Overview* at 6 (“The Fraud Division (FD) has primary responsibility for investigating and enforcing the most complex and egregious violations of the Communications Act and the FCC’s rules as they pertain to USF support, with a particular emphasis on addressing fraudulent activity.”).

²² See FY 2022 Budget Estimate at 23-24.

²³ *Id.* at 19.

addition of a fee category for broadband service providers, the Commission will continue to treat these costs as “indirect,” making broadcasters responsible for approximately 16% of the costs of these activities (\$3.5 million for USF alone). That bears repeating: because of the Commission’s listless approach to regulatory fees, broadcasters are forced to pay \$3.5 million for administering the USF program, a program from which they receive no benefit whatsoever. Given the tremendous amount of emphasis on broadband and Commission work that benefits broadband service providers, there is no logical explanation as to why the Commission should not add a fee category for broadband providers rather than continue to force broadcasters to subsidize these costs.

NAB cannot provide more specific recommendations on how the Commission would go about adding this fee category due in part to the limited information the Commission provides regarding its regulatory fee process and the nature of the information the Commission has indicated it would require in order to add the fee category.²⁴ However, NAB understands that there is data available that may help the Commission (and even outside parties, if the information is released) perform the necessary analysis. For example, the Commission is required by the Broadband DATA Act to collect information from broadband service providers regarding the services provided to further its broadband mapping

²⁴ See R&O and NPRM at ¶ 17 (stating that in order to add a broadband provider fee category the FCC would need information regarding “the amount of broadband services offered by entities that also provide services subject to existing regulatory fees and by entities that provide broadband services that are not currently subject to regulatory fees.”).

activities.²⁵ This data, in conjunction with other information regarding existing regulatory fee payors may be helpful to the Commission’s analysis.

Moreover, to the extent that the Commission determines that it cannot or should not add a fee category for broadband service providers, it should nevertheless ensure that broadcasters who do not provide broadband services and therefore do not benefit from the Commission’s broadband activities are not assessed these costs. To do so is plainly unlawful. While other regulatory fee payors may benefit from the Commission’s broadband activities, as the Commission has acknowledged, broadcasters simply do not share in those benefits. No public interest goal is served by requiring broadcasters who provide a free service to the public to subsidize broadband costs that benefit other regulatory fee payors, many of which also serve as broadcasters’ well-funded competitors.

IV. THE COMMISSION SHOULD REQUIRE BIG TECH COMPANIES THAT UTILIZE AND BENEFIT FROM COMMISSION RESOURCES TO PAY THEIR FAIR SHARE OF THE COMMISSION’S COSTS

As NAB has highlighted previously, the current regulatory fee system is unfair and unsustainable in part because broadcasters subsidize the costs to the Commission of supporting deep-pocketed technology companies’ business models through proceedings which reduce the ability of licensed broadcasters to serve viewers and listeners.²⁶ The NPRM is therefore a welcome first step in determining how Big Tech companies might pay their fair

²⁵ *Id.* at ¶ 11 (“Among other things, the Broadband DATA Act requires the Commission to collect standardized, granular data on the availability and quality of both fixed and mobile broadband Internet access services” and “requires the Commission to include uniform standards for the reporting of broadband internet access service data from ‘each provider of terrestrial fixed, fixed wireless, or satellite broadband internet access service.’”).

²⁶ See, e.g., FY 2021 NAB Comments at 12-14; Comments of NAB, MD Docket No. 20-105, at 9-14 (June 11, 2020) (FY 2020 NAB Comments).

share of the Commission’s activities. The NPRM seeks comment on the “proposed methodology for assessing regulatory fees on unlicensed spectrum users” as well as whether the Commission should “assess regulatory fees on large technology companies based on a different basis, such as any advantages they receive because of the Commission’s universal service or other activities.”²⁷

It is abundantly clear, especially in light of the *Telesat* decision, that the Commission has the authority to require unlicensed spectrum users to pay for Commission activities that benefit their businesses.²⁸ As NAB has explained in previous filings, there is no question that Big Tech companies not only benefit from internet infrastructure, but also utilize Commission resources and profitably derive direct benefits from Commission proceedings in which they actively participate.²⁹ While there may be good policy reasons for not imposing fees on every small appliance and other home good equipment manufacturer whose devices make use of unlicensed spectrum at this time, it makes little sense to delay imposing regulatory fees on Big Tech companies that actively participate in Commission proceedings, benefit economically from the Commission’s activities (often at the expense of other regulates), and actively compete with broadcasters and other regulatory fee payors for advertising revenues.

Although the FCC possesses the relevant information, expertise, and data required to develop the methodology to require these beneficiaries to help pay for the Commission’s activities, despite not having access to such information, NAB believes there are many ways that the Commission could go about adding fee categories to include large technology

²⁷ NPRM at ¶ 1.

²⁸ See Reply Comments of NAB, MD Docket No. 21-190 (June 21, 2021) (FY 2021 NAB Reply Comments).

²⁹ *Id.*; see also FY 2021 NAB Comments at 12-14; FY 2020 NAB Comments at 9-14.

companies. To avoid capturing small entities in the fee category, the Commission could look to how Big Tech has been defined in proposed legislation in Congress as a starting point to define the category.³⁰ Costs could be allocated to this fee category based on the percentage of FTE time spent in the Office of Engineering and Technology, the Enforcement Bureau and other relevant bureaus and offices of the Commission working on unlicensed spectrum issues. The Commission could also require these entities be responsible for a portion of the costs the Commission incurs in promoting its 100% broadband policy, including efforts in support of its Universal Service Fund activities. These fees could be assessed annually on a per subscriber or revenue basis. NAB would welcome the opportunity to engage in collaborative discussions with Commission experts and other stakeholders to further refine these proposals to determine how best to include unlicensed spectrum users in the base of regulatory fee payors.

V. THE COMMISSION SHOULD CONSIDER INCREASING THE DE MINIMIS FEE AMOUNT

Currently, a regulatory fee payor is exempt from paying regulatory fees if the total of its annual regulatory fee liability is \$1,000 or less.³¹ However, the Commission's budget increases will result in significant fee increases for all entities, leaving few small radio broadcasters that continue to qualify for this exemption. Indeed, the Commission's initial FY 2021 fee proposal eliminated the de minimis exemption for many small broadcasters that had previously qualified. With the Commission's fee requirements slated to increase even

³⁰ See, e.g., H.R. 4905 – 117th Congress: Big Tech Accountability for Broadband Act, available at: <https://www.govtrack.us/congress/bills/117/hr4905/text> (using the number of users and revenue of an online platform to define Big Tech).

³¹ See R&O and NPRM at ¶ 87.

further in FY 2022, this is all but certain to occur again. As a result, some small broadcasters will see their fees increase from \$0 to more than \$1000, despite there being no change to the broadcaster's financial situation or the level of Commission resources required to regulate them.

The Commission should therefore consider increasing this threshold to serve the public interest in free over-the-air broadcast service and to improve the efficiency of the fee process. The financial impact of regulatory fees on small broadcasters is substantial, especially as broadcasters cannot pass on their regulatory fee costs to consumers and must incorporate the fee payment into operating costs to be paid with general operating revenue, directly impacting their bottom line. Broadcasters in small and rural markets often have no option but to seek fee relief from the Commission, which increases the costs of collecting fees. Raising the de minimis threshold could help minimize the administrative burden the Commission incurs in collecting regulatory fees from entities that require a minimum amount of Commission resources to regulate in the first instance and that will simply not be in a position to pay the fee on time and without additional intervention from the Commission.

VI. CONCLUSION

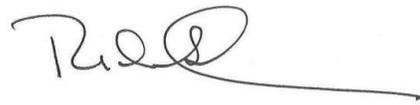
The Commission must continue to reform and modernize its fee structure to bring it into full compliance with the Commission's statutory mandate. To do so, the Commission must take steps to closely examine how indirect costs are allocated to ensure that they reflect the benefits received by the payors of regulatory fees from Commission activities and expand the base of payors to include broadband providers and Big Tech companies that plainly benefit from Commission activities. The Commission should also consider raising the de minimis fee threshold to ensure that regulatory fees do not impair small broadcasters'

ability to remain economically viable in a competitive marketplace, and undermine their ability to provide quality, free service to the public.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

Rick Kaplan
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Emily Gomes

October 21, 2021