

# FEDERAL MARITIME COMMISSION

REVOCATION OF PASSENGER  
VESSEL OPERATOR PERFORMANCE  
CERTIFICATE NO. P-1397 -- GREAT  
NORTHERN & SOUTHERN  
NAVIGATION CO., LLC DBA  
FRENCH AMERICA LINE

Docket No. 19-08

Served: March 20, 2020

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**BY THE COMMISSION:** Michael A. KHOURI, Chairman,  
Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W.  
BENZTEL, Commissioners.

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## **Order Revoking Certificate (Performance)**

On April 10, 2019, the Commission's Bureau of Certification and Licensing (BCL) notified Great Northern & Southern Navigation Co., LLC dba French America Line (Respondent) that it intended to revoke Respondent's Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation (Certificate). Respondent requested a hearing, and, on October 31, 2019, the Federal Maritime Commission (Commission) granted the hearing request and directed Respondent to show cause why its Certificate should not be revoked for failing to respond to lawful inquiries and requests for information (46 C.F.R. § 540.8(b)(3)), providing willfully false information (46 C.F.R. § 540.8(b)(1)), and failing to maintain qualification as financially responsible in accordance with the requirements of 46 C.F.R. Part 540 (46 C.F.R. § 540.8(b)(2)). Order

Granting Hearing and Directing Great Northern & Southern Navigation Co. LLC dba French America Line to Show Cause, 84 Fed. Reg. 59809, 59810 (Nov. 6, 2019) (Hearing Order).

For the reasons set forth below, we find that Respondent has failed to respond to lawful inquires and requests for information under § 540.8(b)(3) and that Respondent’s repeated failures to adhere to the requirements of its escrow agreement demonstrate it is not financially responsible under § 540.8(b)(2). Consequently, we revoke Respondent’s Certificate.

## **I. BACKGROUND**

### **A. Escrow Agreement and Certificate**

The Commission requires that anyone in the United States desiring to arrange, offer, advertise, or provide passage on a vessel first obtain a Certificate (Performance). 46 C.F.R. § 540.3. The Certificate evidences the Commission’s finding that a passenger vessel operator (PVO) has adequate financial responsibility to indemnify passengers for nonperformance of water transportation. 46 C.F.R. § 540.7(a). The coverage (e.g., surety bond, insurance, or escrow account) is used to reimburse passengers when there has been a failure to perform cruises as contracted and no action to refund passengers has taken place.<sup>1</sup>

Respondent is a Louisiana limited liability company, and Mr. Christopher Kyte is the chairman of its board. Kyte Aff. ¶ 3. On October 4, 2016, Respondent entered into an Escrow Agreement with KeyBank, N.A. for the purposes of providing proof of financial responsibility for indemnification of passengers in the event of

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<sup>1</sup> The certificate requirement derives from 46 U.S.C. § 44102(a), which provides that “[a] person in the United States may not arrange, offer, advertise, or provide transportation on a vessel to which this chapter applies unless the person has filed with the Federal Maritime Commission evidence of financial responsibility to indemnify passengers for nonperformance of the transportation.”

nonperformance. BOE Ex. G at BOE0152.<sup>2</sup> Upon receipt of the Escrow Agreement, BCL issued Respondent Performance Certificate No. P-1397, effective October 5, 2016. *Id.*

Under an escrow agreement, a PVO is to deposit unearned passenger revenue into an escrow account. *E.g.*, BOE Ex. G at BOE0152. If a cruise is completed, the escrow agent transfers these funds to the PVO. If a cruise is cancelled, the funds in the escrow account are available to reimburse passengers of the cancelled cruise. *E.g.*, *id.* at BOE0155. In this way, passengers have recourse in the event a PVO declares bankruptcy or is insolvent.

In actuality, the process set forth in Respondent's Escrow Agreement is more complicated and involves comparing on a weekly basis the amount of unearned passenger revenue with the funds in the escrow account. *Id.* at BOE0153. The Escrow Agreement requires Respondent to submit to KeyBank and the Commission weekly recomputations of unearned passenger revenue and refunds, called Recomputation Certificates. BOE Ex. G at BOE0153-BOE0154. Respondent is also required to submit audit reports that attest to the veracity of unearned passenger revenue recomputations on a quarterly basis. *Id.* at BOE0154.

### **B. Vessel Problems and Cancelled Cruises**

On October 27, 2016, Respondent's sole vessel, the *Louisiane*, suffered a sanitary system failure. Kyte Aff. ¶ 5. Respondent hoped to have its vessel repaired quickly, but ultimately had to cancel multiple sailings. Resp't Mem. at 1-2. Nonetheless, Respondent continued to advertise and accept deposits until October

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<sup>2</sup> The Commission permits PVOs to establish adequate financial responsibility for nonperformance by filing evidence of an escrow account for indemnification of passengers. 46 C.F.R. § 540.5(b). The Commission's regulations provide a sample escrow agreement for parties to use. *Id.*

2017.<sup>3</sup> *Id.* at 2. Respondent’s vessel is currently on charter to the United States Navy as an accommodation vessel. Kyte Aff. ¶ 20. This charter has been extended to March 2020 and may be extended into 2021. *Id.* At present, Respondent has no immediate plans to return to offering cruises, but it nonetheless wishes to retain its Certificate as it may wish to resume operating cruises at some point in the future. *Id.* ¶ 21.

### **C. Compliance-Related Issues**

Since receiving its Certificate in October 2016, Respondent has failed to timely submit quarterly audits as required by the Escrow Agreement, failed to respond to BCL requests for information, failed to maintain good standing with the Louisiana Secretary of State, and failed to notify BCL of a change in address.

#### **1. Quarterly Independent Audits**

Per the terms of the Escrow Agreement, at the end of each quarter, Respondent is required to have independent auditors examine the weekly recomputation certificates and opine “as to whether the calculations at the end of each fiscal quarter are in accordance with the provisions of Paragraph 6” of the Escrow Agreement. BOE Ex. G at BOE0154. These examinations are to be conducted “in accordance with generally accepted auditing standards” and are to be submitted to Respondent and the Commission within forty-five days after the end of the quarter. *Id.*

The Commission did not receive the first independent audit for the 2016 4th Quarter covering October, November, and December 2016 by the due date of February 14, 2017. BOE Ex. C (Singletary Aff.) ¶ 7. Similarly, none of the quarterly independent audits were received on time for any of the quarters in 2017, 2018 and 2019. *Id.*

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<sup>3</sup> Respondent’s website continued to advertise its line and its vessel as recently as August 2019. BOE Ex. I.

On December 22, 2017, Respondent emailed BCL requesting information about the audit process and what was needed for compliance. Singletary Aff. ¶ 14. BCL directed Respondent to paragraph 8 of the Escrow Agreement, which details the requirements for the independent audit. *Id.* ¶ 15. On May 18, 2018, BCL notified Respondent that it was not in compliance with the Escrow Agreement and set a deadline of June 1, 2018, for Respondent to comply and provide BCL with the required audit reports, weekly recomputation certificates, statement of good standing with the state of Louisiana, and Respondent's current operating address. *Id.* ¶ 20. Although the deadline was later extended to June 30, 2018, BCL did not receive the documents. *Id.*

On July 12, 2018, BCL held a conference call with Respondent during which Respondent agreed to submit a final audit report by July 27, 2018. *Id.* ¶ 21. On July 16, 2018, Russell Haynes, an Industry Analyst in BCL, received a phone call from William Toujouse, who stated that he had been employed by Respondent to conduct the quarterly independent audits. BOE Ex. D (Haynes Aff.) ¶ 14. According to Respondent, Mr. Toujouse was told during this call that he met the requirements to perform the audits. Kyte Aff. ¶ 15.

Between July 20 and 24, 2018, at the request of Respondent, BCL emailed Mr. Toujouse copies of Respondent's recomputation certificates. Singletary Aff. ¶ 22-24. On July 26, 2018, Mr. Toujouse told Tajuanda Singletary, the Director of the Office of Passenger Vessels and Information Processing (OPVIP) within BCL, that the delay in the audit reports was due to trying to find documentation stored in a warehouse. *Id.* ¶ 26. BCL did not receive an audit report by July 27, 2018. *Id.* ¶ 21.

On August 27, 2018, Sandra Kusumoto, the Director of BCL, sent Respondent an email regarding its compliance and recapping information from a telephone conversation on August 23, 2018. BOE Ex. A (Kusumoto Aff.) ¶ 28. Ms. Kusumoto noted that

fourteen recomputation certificates were outstanding as of August 27, 2018, and although BCL had received Respondent's first audit report covering October-December 2016 on August 23, 2018, six quarterly audit reports remained outstanding. BOE Ex. M at BOE0304.

The audit report received on August 23, 2018, was prepared by Mr. Toujouse. *Id.* Ms. Kusumoto noted, however, that this report and the subsequently received reports did not resemble the audit reports BCL typically receives from other PVOs' CPAs. Kusumoto Aff. ¶ 6. Mr. Toujouse is not a CPA.

Although neither the Escrow Agreement nor the Commission's regulations require that independent audits be conducted by a CPA, BCL was concerned that Mr. Toujouse's reports were not in accordance with generally accepted auditing standards, as required by the Escrow Agreement. *Id.* Consequently, BCL requested an opinion on the audit report from the Commission's Office of the Inspector General (IG). *Id.* The IG opined that the August 2018 audit report "should not be relied on" because under Louisiana state law, only licensed CPAs can perform audits in accordance with general accepted auditing standards. BOE Ex. G at BOE0147-BOE0149.

In a letter dated February 6, 2019, BCL informed Respondent that the financial audit was not in compliance with paragraph 8 of the Escrow Agreement. BCL gave Respondent 60 days to engage an auditor in accordance with Louisiana law and requested that the auditor's corrections to Mr. Toujouse's reports be submitted by April 8, 2019. Alternatively, BCL proposed that Respondent surrender its Certificate. BOE Ex. G at BOE0288.

Respondent claims it engaged John W. Foard, a CPA in New Orleans, to conduct the audits. According to Respondent, Mr. Foard contacted the Commission to obtain guidance or an example of how the FMC wanted the audit information formatted or presented. When Mr. Foard received no example from BCL, Respondent

asserts, Mr. Foard told Respondent that he was unwilling to prepare the audit. Kyte Aff. ¶ 16.

BCL has no record, however, of a communication from Mr. Foard, but on April 4, 2019, it did receive a call from Aaron Ready, a CPA who advised that he had been authorized to perform audits for Respondent and wanted to know what the requirements were. Haynes Aff. ¶ 19. Commission staff informed him that the requirements were outlined in the Escrow Agreement, that he should seek the appropriate information from Respondent, and that he needed to have a signed engagement letter. *Id.*

The Commission did not receive any audit reports from Mr. Ready or any CPA by April 8, 2019, or thereafter.

## 2. January 2018 BCL Review

On January 25, 2018, BCL sent Respondent a letter notifying it of BCL's intent to conduct a remote review of unearned passenger revenue pursuant to 46 C.F.R. Part 540.<sup>4</sup> Kusumoto Aff. ¶ 5. BCL also requested financial documents commonly maintained by business enterprises such as financial statements and general ledgers. BOE Ex. A at BOE0105.

On January 29, 2018, Respondent requested an extension until February 9, 2018, which BCL granted. When the documents were not received on February 9, BCL emailed Respondent on February 13, 2018, requesting financial statements and general ledgers. At some point, Respondent informed BCL that it did not have the types of documents BCL requested. When BCL asked what financial information Respondent could provide the Commission, Respondent submitted a spreadsheet showing passenger deposits, payments, cancellations, and reimbursements. BOE Ex. A at

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<sup>4</sup> Paragraph 23 of the Escrow Agreement provides that “[t]he Commission shall have the right to inspect the books and records of the Escrow Agent and those of the Customer.” BOE Ex. G at BOE0159.

BOE0105. On February 21, 2018, BCL replied to Respondent advising that they were still awaiting the additional documents requested in their January 25 letter. BOE Ex. M at BOE0292.

BCL has not been provided the books and records supporting the passenger receipts and reimbursements reflected in the spreadsheet provided by Respondent nor any of the additional documents or records requested. BOE Ex. A at BOE0105.

### 3. Respondent's Address

When Respondent entered into an Escrow Agreement with KeyBank, N.A., for the purposes of providing proof of financial responsibility, it identified its address as 700 Churchill Parkway, Avondale, Louisiana 70094. BOE Ex. G at BOE0152. By email on May 18, 2018, BCL contacted Respondent to, among other things, request Respondent's current operating address. BOE Ex. M at BOE0293. At some point, Respondent provided the Commission with a temporary mailing address of 883 Island Drive, Suite 214, Alameda, CA 94502. Later, on May 31, 2018, Respondent emailed BCL and stated that it remained at the 700 Churchill Parkway address. BOE Ex. M at BOE0296.

On July 16, 2018, Commission Area Representative Eric Mintz visited the 700 Churchill Parkway address and did not find Respondent or any signage or other indication that suggested Respondent maintained a presence at the address. BOE Ex. E (Mintz Aff.) ¶ 2. This address is under the control of the Jefferson Parish Economic Development Commission (JEDCO) and Mr. Mintz spoke with JEDCO's president and CEO, who stated that Respondent had been evicted several months previously. *Id.* ¶¶ 1-3. By correspondence emailed July 17, 2018, Scott Rojas, Director of Facilities and IT at the building located at the 700 Churchill Parkway address, confirmed that Respondent vacated the location the week of November 27, 2017. BOE Ex. F at BOE0131.

On or about February 6, 2019, the Commission sent letters

to Respondent about the need to correct audit reports. A letter was sent by courier to the 700 Churchill Parkway address. The letter was returned stating that no one was at that address. BOE Ex. A at BOE0106. Multiple attempts to deliver Commission documents to the 700 Churchill Parkway address on November 1, 4, and 5, 2019, were unsuccessful. BOE Reply at 10.

4. Standing with the Louisiana Secretary of State

When Respondent entered the Escrow Agreement, it warranted and represented that, “it is a Louisiana limited liability company in good standing, and that is qualified to do business in Louisiana.” BOE Ex. G at BOE0156.

By correspondence emailed May 18, 2018, BCL notified Respondent that it was not in compliance with its Escrow Agreement and set a deadline of June 1, 2018, for Respondent to verify that it was in good standing with the Secretary of State of Louisiana. BOE Ex. M at BOE0293. On May 31, 2018, Respondent emailed a letter to BCL in which it stated: “we can verify that the Great Northern & Southern Navigation Co., LLC d/b/a French America Line is in good standing with the Secretary of State of Louisiana.” BOE Ex. M at BOE0296.

As of October 9, 2019, FAL was not in good standing with the Louisiana Secretary of State. BOE Ex. K at BOE0257. On November 22, 2019, Respondent renewed its good standing. BOE Reply at 7.

**II. DISCUSSION**

Although the record does not support revocation under 46 C.F.R. § 540.8(b)(1), grounds for revocation exist under § 540.8(b)(2) and (3). Specifically, Respondent failed to timely submit quarterly audit reports, thereby violating the terms of its Escrow Agreement, and Respondent has failed to respond to numerous inquiries and document requests from Commission staff.

Additionally, the Commission finds that revoking Respondent's Certificate is more appropriate than suspending it.

**A. Burden and Standard of Proof**

While neither Respondent nor BOE addresses the burden of proof or standard of proof in PVO certificate revocation proceedings, in analogous cases involving order-to-show-cause revocation proceedings for ocean transportation intermediary licenses, the Commission held that the burden of proof is on BOE. *In re: Revocation of Ocean Transp. Intermediary License No. 017843 – Washington Movers, Inc.*, 1 F.M.C.2d 5, 8 (FMC 2018). Moreover, the standard of proof in license revocation proceedings is preponderance of the evidence. *Id.* The Commission adopts these standards in certificate revocation proceedings under Part 540 of its regulations.

**B. Grounds for Revocation**

Section 44102 of Title 46 provides that:

(a) Filing requirement. A person in the United States may not arrange, offer, advertise, or provide transportation on a vessel to which this chapter applies unless the person has filed with the Federal Maritime Commission evidence of financial responsibility to indemnify passengers for nonperformance of the transportation.

(b) Satisfactory evidence. To satisfy subsection (a), a person must file

(1) Information the Commission considers necessary; or

(2) A copy of the bond or other security, in such form as the Commission by regulation may require.

The Commission's regulations implementing the statute

provide that “[n]o person in the United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person.” 46 C.F.R. § 540.3. The Commission has held that the purpose of this provision is, “to prevent financial loss and hardship to the American traveling public, who, after payment of cruise passage money, are stranded by the abandonment or cancellation of a cruise.” *Terry Marler and James Beasley dba Titanic Steamship Line*, 22 S.R.R. 359, 369 (ALJ 1983), *aff’d*, 22 S.R.R. 798 (FMC 1984).

The Commission’s regulations at 46 C.F.R. § 540.8(b) further provide that a Certificate (Performance)<sup>5</sup> may be denied, revoked, suspended, or modified for any of the following reasons:

- (1) Making any willfully false statement to the Commission in connection with an application for a Certificate (Performance);
- (2) Circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission;
- (3) Failure to comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission pursuant to the rules of this subpart.

On October 31, 2019, the Commission issued an order granting a hearing and directing Respondent to show cause why its Certificate should not be revoked for four reasons:

- (1) Respondent’s false statements regarding its office address establish that revocation is proper

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<sup>5</sup> This proceeding involves Respondent’s Certificate (Performance). It does not implicate Respondent’s proof of financial responsibility to meet liability incurred for death or injury to passengers, which involves a Certificate (Casualty). *Compare* 46 C.F.R. § 540.1 *with* 46 C.F.R. § 540.20.

under 46 C.F.R. § 540.8(b)(1);

(2) Respondent’s failure to timely submit quarterly independent audits for the past three years, as required by the terms of its escrow agreement, establish that Respondent is no longer qualified to hold a Certificate within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2);

(3) Respondent’s failure to remain a Limited Liability Company in good standing with its state’s authority, as warranted in its escrow agreement, establish that Respondent is no longer qualified to hold a Certificate within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2) and

(4) Respondent’s failure to comply with information and document requests by Commission staff establish that revocation is proper under 46 C.F.R. § 540.8(b)(3).

Hearing Order, 84 Fed. Reg. at 59810.

Each of these bases for revocation is discussed below.

1. Section 540.8(b)(1)

Commission regulations state that a performance certificate may be revoked for “[m]aking any willfully false statement to the Commission in connection with an application for a Certificate (Performance).” 46 C.F.R. § 540.8(b)(1). The Hearing Order alleges that Respondent’s “false statements regarding its office address” constitute grounds for revocation under this regulation. 84 Fed. Reg. at 59810.

Respondent argues that the Commission is being hyper-technical and insists that its mailing address of 700 Churchill

Parkway never changed. Resp't Mem. at 4. According to Respondent, it physically "relocated because it has no employees other than Christopher Kyte, who is the Chairman of the Board." *Id.* Respondent further contends that it has "always maintained its FMC-approved Escrow Account at KeyBank N.A. and all passengers have been refunded the cancelled cruises." *Id.*

Respondent's only evidence of its address is the affidavit of Mr. Kyte, who avers that the 700 Churchill Parkway address is active and points out that this is the address on the Louisiana Secretary of State website. Kyte Aff. ¶ 17. According to Kyte, Respondent "had no employees working there due to the fact" that the absence of funding "necessitated letting staff go." *Id.* He also states in his affidavit that he gave BCL a temporary physical address, and Respondent's email address has not changed. *Id.* ¶ 18.

BOE counters that Respondent provides no evidence to support the claim that 700 Churchill Parkway is a working mailing address, and it provides evidence that the address is no longer active. Among other things, a Commission Area Representative visited the address and did not find Respondent, there are numerous examples of undelivered mail and failed service, and an email from the director of facilities at 700 Churchill Parkway states that Respondent left the address in November 2017. BOE Reply at 6, 9-10.

Although the preponderance of the evidence favors BOE's argument that 700 Churchill Parkway is not Respondent's mailing address, revocation under § 540.8(b)(1) has not been established. Section 540.8(b)(1) does not say that a certificate can be revoked for making a false statement, but rather for making a "willfully false statement *in connection with an application.*" (emphasis added). In the instant matter, BCL records indicate that when Respondent filed its application for a certificate, it listed 700 Churchill Parkway, Avondale, Louisiana 70094 as its address. Resp't Ex. 1. Respondent also entered into the Escrow Agreement using the 700 Churchill Parkway address. BOE Ex. G at BOE0152. There is no allegation or

evidence that at the time of the application and at the time of the signing of the Escrow Agreement, 700 Churchill Parkway was not the address of the Respondent. That is, there is no evidence that Respondent made willfully false statements about its address in connection with its application for a certificate.

BOE argues that a business address is a vital piece of information and that the “Commission’s regulations require that address information be accurate and updated with every change.” BOE Reply at 9 (emphasis added). But revocation under § 540.8(b)(1) must involve false statements in connection with an application; it says nothing about apprising the Commission about changed information.<sup>6</sup> Further, BOE does not cite any regulation requiring a PVO to notify the Commission if its address changes.<sup>7</sup> Commission regulations do require a PVO to amend an application in the event that there are “material changes” to the facts reflected in an application. 46 C.F.R. § 540.4(g). But the regulations define “material changes” as those which: (1) result in a decrease in the amount submitted to establish financial responsibility to a level below that required to be maintained; or (2) require that the amount to be maintained be increased above the amount submitted to establish financial responsibility. *Id.* A change in address is not a material change that implicates the duty to amend. *Id.*<sup>8</sup>

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<sup>6</sup> In the Commission’s 1966 proposed rule implementing Public L. No. 89-777, the equivalent of § 540.8(b)(1) provided that a certificate could be revoked for making “any willfully false statement to the Commission in connection with an application for a Certificate (Performance) *or its continuance in effect.*” NPRM: Security for Protection of Public, 31 Fed. Reg. 15703, 15705 (Dec. 13, 1966) (emphasis added). This italicized language was omitted from the final rule. Final Rule: Security for Protection of the Public, 32 Fed. Reg. 3986, 3989 (Mar. 11, 1967). The removal of this language suggests the intention to limit this ground for revocations to false statements in connection with applications for certificates.

<sup>7</sup> Other regulated entities like OTIs and foreign-based unlicensed NVOCCs are required to notify BCL of changes in addresses, but no similar provision exists in Part 540. *See* 46 C.F.R. §§ 515.20(e), 515.19(f).

<sup>8</sup> Section 540.9(h) requires certificate holders to “submit to the Commission a semi-annual statement of any changes with respect to the information contained

In sum, while it is likely that Respondent has misled the Commission about the accuracy of its mailing address, a misleading statement is not enough to revoke a certificate under § 540.8(b)(1). Therefore, Respondent’s statements regarding its office address do not justify revocation under § 540.8(b)(1).

2. Section 540.8(b)(2)

Under § 540.8(b)(2), the Commission may revoke a Certificate (Performance) for “[c]ircumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission.” 46 C.F.R. § 540.8(b)(2). There is little guidance on what these circumstances are, and the regulation is unchanged from its initial adoption in 1967. The regulations themselves, however, provide some context. Section 540.8(a) provides that “[r]egardless of a hearing, a Certificate (Performance) shall become null and void upon cancellation or termination of the . . . escrow account.” “[C]ircumstances whereby the party does not qualify as financially responsible,” therefore, are not limited to situations where a PVO’s escrow account is terminated – otherwise § 540.8(b)(2) would be superfluous in light of § 540.8(a). There must therefore be some circumstances that permit revocation under § 540.8(b)(2) other than termination of the escrow account itself.

a. *Failure to Submit Timely Audit Reports*

The first circumstance alleged to justify revocation under 46 C.F.R. § 540.8(b)(2) is Respondent’s “failure to timely submit quarterly independent audits for the past three years, as required by the terms of its escrow agreement.” Hearing Order, 84 Fed. Reg. at 59810. Respondent concedes that it was “on occasion” “dilatary in

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in the application or documents submitted in support thereof or a statement that no changes have occurred.” This provision, however, is not referenced in any submission by BOE, and there has been no allegation that Respondent failed to comply with it.

providing information and document[s] to” the Commission, including requested reports. Resp’t Mem. at 3-4. It argues, however, that revocation is not justified because: (1) it was dilatory because it was temporarily effectively out of business; (2) it was in regular written and telephonic communication with the Commission; (3) it filed the required recomputation certificates; (4) its quarterly audits are current through June 30, 2018, although the Commission rejected them on technical grounds; and (5) the Commission is aware that there is nothing to audit because there are no passenger deposits, given that Respondent stopped taking them as of October 2017. *Id.* at 4.

BOE counters that Respondent has failed to comply with audit requirements of its Escrow Agreement. BOE Reply at 11. BOE further argues that any audit reports submitted by Respondent could not be relied upon because they were not in accordance with Louisiana law or generally accepted accounting procedures. BOE Reply at 10. BOE also suggests that Respondent should not be able to unilaterally determine which aspects of the Escrow Agreement it follows by stating that it is a dormant PVO. *Id.* at 12.

BOE has established that Respondent’s failure to timely submit the audit reports as required by the Escrow Agreement constitute “circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission” under § 540.8(b)(2). It is undisputed that the Respondent failed to timely file any of its quarterly audit reports, including the 2016 4th Quarter Audit, and all the 2017, 2018, and 2019 quarterly audits. Singletary Aff. ¶ 7.

These are not simply technical failures. Rather, they threaten to thwart the purpose of escrow accounts and undermine the Commission’s ability to ensure that Respondent has the resources in place to protect passengers. *See, e.g.,* Royal Venture Cruise Line, Inc., Order of Investigation, 61 Fed. Reg. 58413, 58413 (Nov. 14, 1996) (“When a passenger vessel operator relies upon an Escrow Agreement to establish its financial responsibility, the Commission

must have accurate, credible and reliable information concerning the collection of passenger deposits and fares to ensure the protection of passengers and the integrity of the Escrow Agreement.”). Unlike surety bonds, which involve a third-party surety guaranteeing compensation to passengers, the escrow account process relies on the PVO itself to ensure that it maintains adequate funds in escrow. This makes it vital for PVOs such as Respondent to comply with the Escrow Agreement. Its repeated failure to do so here demonstrates that it can no longer be considered financially responsible.

Respondent’s arguments are unpersuasive. Respondent’s justification for its untimely submission of documents – that it was temporarily out of business – is no valid excuse. The passenger vessel responsibility requirements were put in place to protect passengers in situations such as insolvency. *See Wall Street Cruises Inc. – Failure to Qualify for Performance Certificate*, 12 S.R.R. 950, 952 (FMC 1972) (“In enacting PL 89-777, Congress expressed its intent to insure that the traveling public be protected from financial loss at the hands of vessel owners and operators or other persons booking transportation on oceangoing vessels”). As for Respondent’s “constant” communication with the Commission, this is not a mark in Respondent’s favor. The communication was necessitated by Respondent’s inability to timely submit documents or accurately respond to customers. *See, e.g.*, Singletary Aff. ¶¶ 16, 18, 20, 28; Haynes Aff. ¶¶ 13, 18; Kusumoto Aff. ¶ 7; BOE Ex. B (Johnson Aff.) Aff. ¶¶ 5, 8; BOE Ex. H at BOE0165-BOE0172; BOE Ex. M at BOE0229-BOE0305.

As for the recomputation certificates, Respondent argues that while it was delinquent, they have all been provided. Kyte Aff. ¶ 14. But late compliance is still non-compliance, and it took the repeated efforts of BCL to obtain these and other documents from Respondent. *See, e.g.*, Johnson Aff. ¶8; Singletary Aff. ¶ 20; Haynes Aff. ¶18.

Most concerning is Respondent’s contention that it did not need to submit recomputation certificates or quarterly audits to the

Commission after it stopped taking passenger deposits in October 2017. Kyte Aff. ¶13 (“As of October 2017, [Respondent] was no longer advertising or taking deposits, . . . Accordingly, there was no activity to audit and the weekly recomputations since then have shown no activity.”); *id.* ¶ 14 (“In this regard, once [Respondent] stopped marketing and collecting deposits, it stopped preparing recomputation certificates.”); Resp’t Mem. at 4 (“The Commission is fully aware of the fact that there is nothing for an auditor to review since there are no deposits.”). The Escrow Agreement requires submission of these documents, and Respondent cites no authority that would permit it to unilaterally cease compliance.

Further, the Commission has previously required compliance even when operators are not accepting money. In *Wall Street Cruises*, the Commission found that the active collection of fares is not crucial to finding a violation of PL 89-777. 12 S.R.R. at 953. There the operator was advertising for a cruise without a certificate and the Commission found a violation and issued a cease and desist order even though the respondent had not collected any deposits. *Id.* Similarly, Respondent in this case is not freed from its obligation to follow the terms of the Escrow Agreement merely because it is not accepting deposits.

Respondent points out that its “quarterly independent audit reports were current through June 30, 2018,” but rejected by the Commission on technical grounds. Resp’t Memorandum. Respondent does not challenge BCL’s basis for rejecting the audit. But Mr. Kyte, Respondent’s chairman, suggests in his affidavit that BCL’s rejection of the audit reports was unjustified because: (a) BCL staff told Mr. Toujouse that he could perform the audit and then rejected the audit report because Mr. Toujouse was not a CPA, Kyte Aff. ¶ 15; and (b) when Respondent subsequently engaged a CPA and asked BCL for guidance or an example on how the audit should be formatted, BCL said there was no guidance or example, causing the CPA to decline to prepare a report, Kyte Aff. ¶ 16.

These contentions are unsubstantiated. The only reference to

Commission staff approving the use of Mr. Toujouse as auditor is in the affidavit of Mr. Kyte. Kyte Aff. ¶ 15. Respondent did not submit an affidavit from Mr. Toujouse, nor did Mr. Haynes mention the event is his affidavit. Mr. Kyte's statement about what Mr. Haynes told Mr. Toujouse is likely inadmissible hearsay. *See* 46 C.F.R. § 502.204(a); Fed. R. Evid. 802. There is no other evidence substantiating this telephone call. As for Respondent's claim that it had an auditor lined up but the Commission declined to provide audit guidance, Kyte Aff. ¶ 16, Mr. Haynes's affidavit does not mention this. Rather, he describes a phone call with a different auditor about audit requirements, and Mr. Haynes told the auditor that the requirements were outlined in the Escrow Agreement, that he needed to seek appropriate information from Respondent, and that he needed a signed engagement letter. Haynes Aff. ¶ 19.

Finally, even if BCL should not have rejected the August 23, 2018, audit report, BCL informed Respondent that it was not in compliance on February 6, 2019, and gave Respondent two months to furnish a compliant audit report. BOE Ex. M at BOE0288. Respondent did not comply by the deadline. Additionally, Respondent does not explain how these events are related to or justify its failure to timely file the other quarterly audit reports. Per the terms of the Escrow Agreement, Respondent was required to submit an additional audit report on November 14, 2018, but it failed to do so. Singletary Aff. ¶ 7. This was prior to being told by BCL that the submitted reports were unacceptable. Kusomoto Aff. ¶ 7. As noted above, the Respondent also failed to submit any of the audit reports for 2019. Singletary Aff. ¶ 7.

The Escrow Agreement is evidence of the financial responsibility of Respondent and in the instant matter, Respondent has not complied with the requirements of the Agreement since 2017 and remains out of compliance. As a result, circumstances exist whereby Respondent does not qualify as financially responsible, and grounds for revocation exist under 46 C.F.R. § 540.8(b)(2).

b. *Respondent's Standing with the Louisiana Secretary of State*

The second circumstance alleged to justify revocation under § 540.8(b)(2) is Respondent's "failure to remain a Limited Liability Company in good standing with its state's authority, as warranted in its escrow agreement." Hearing Order, 84 Fed. Reg. at 59810. Respondent does not address this allegation in its memorandum other than to state that "[i]t is a company in good standing with the State of Louisiana." Resp't Mem. at 4. BOE in reply notes that although Respondent was not in good standing with the Louisiana Secretary of State in October 2019, it renewed its good standing on November 22, 2019. BOE Reply at 7. BOE does not otherwise argue that the good-standing issue justifies revocation.

As noted above, compliance with the terms of escrow agreements is vital to escrow accounts serving their purpose under the Commission's PVO financial responsibility program. In the Escrow Agreement, Respondent warranted and represented that it was in good standing. BOE Ex. G at BOE0156. But temporary failure to maintain good standing does not justify, standing alone, revocation of a PVO certificate. The link between Respondent's conduct – failing to maintain good standing – and its qualification as financially responsible is attenuated, or at least not clear. The record indicates that Respondent lost its good-standing status because it failed to file its annual report after May 29, 2018. BOE Ex. K. There is no clear link between this error and Respondent's financial responsibility within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2).

3. Respondent's failure to comply with information and document requests

The final ground for revocation alleged in the Hearing Order is Respondent's failure to comply with information and document requests by Commission. 84 Fed. Reg. at 59810. Section 540.8(b)(3) of the Commission's regulations allows for the revocation of a

certificate for “[f]ailure to comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission pursuant to the rules of this subpart.” 46 C.F.R. § 540.8(b)(3).

As noted above, Respondent concedes that it submitted documents in an untimely fashion but asserts that it has been in “continuous written communications and verbal communications with the FMC” and has kept the Commission advised as to its current status. Resp’t Mem. at 2-3. In its reply, BOE states that Respondent’s equitable arguments do not provide good cause to avoid revocation. BOE Reply at 11. BOE also stresses the importance of the documents requested to the Commission’s assessment of Respondent’s financial responsibility. *Id.* at 12.

BOE has established that Respondent has failed to “comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission.” 46 C.F.R. § 540.8(b)(3). Even if one discounts the untimely submission of recomputation certificates, Respondent failed to respond in a timely fashion, or respond at all, to many direct requests and inquiries made by the Commission. In January and February 2018, Respondent failed to provide corrections to discrepancies in passenger refund lists as requested by Commission staff. Haynes Aff. ¶ 13. Also, in February 2018, Respondent failed to provide all the requested documents connected with a remote review of Unearned Passenger Revenue. BOE Ex. A at BOE0105. In February 2019, Respondent was advised to submit corrections to its audit reports by April 8, 2019. Respondent has still not submitted these reports. Kusumoto Aff. ¶ 7.

Commission staff also inquired about whether the 700 Churchill Parkway address was a working address on several occasions. Though Respondent continues to assert it is a working mailing address, there exists significant doubt as to whether this remains a mailing address for Respondent. BCL has been unable to send mail to this address for Respondent and the building manager

of this address stated that Respondent left the premises in November 2017.

The Commission has previously found that failure to respond to Commission requests for information or documents warrants action under 46 C.F.R. § 540.8(b). In *Royal Venture Cruise Line*, an operator was denied a certificate when it was found, among other issues, that it, “misled and failed to comply with lawful inquiries by the Commission’s staff.” 27 S.R.R. at 1074. In that case, the Commission ultimately denied the operator’s application for a certificate. *Id.* at 1073.

Respondent cites communication with the Commission regarding his compliance as a defense. However, communication with the Commission about coming into compliance does not remove the obligation of complying with Commission regulations. The Commission has previously corresponded with parties it believes may be in violation of the Part 540 requirements. *See Royal Venture*, 27 S.R.R. at 1077 (operator received at least three warning letters from Commission staff urging him to come into compliance).

Additionally, while Respondent did respond to some Commission inquiries and often requested extensions of deadlines, many of these deadlines were broken and there remain several outstanding unfilled requests and inquiries from the Commission. The record establishes that Respondent has failed to comply with document requests and inquiries from the Commission, and revocation is proper under 46 C.F.R. § 540.8(b)(3).

### **C. Appropriate Sanction**

Because grounds for revocation exist under 46 C.F.R. § 540.8(b)(2) and (3), the question is whether the Commission should revoke Respondent’s Certificate or take some lesser action, or no action. Section 540.8(b) is permissive and contemplates sanctions other than revocation: “A Certificate (Performance) may be denied, revoked, suspended, or modified” if grounds exist.

(emphasis added).

Respondent states that its “preference” is “that it not surrender its Performance Certificate” even though its vessel is not engaged in passenger cruises and it is not being marketed or advertised. Resp’t Mem. at 4-5; Kyte Aff. ¶ 20 (“At the present time [Respondent] has no intention of offering any cruises, and is not marketing/advertising the Louisiane as a passenger cruise vessel.”). According to Respondent, it intends to return the vessel to the river cruise ship market in the future and wishes to remain in good standing with the Commission. Kyte Aff. ¶ 21. At the same time, however, Respondent does not want to be obligated to complete weekly recomputation certificates and quarterly audits when it is not advertising the vessel and it cannot serve as a cruise vessel currently. *Id.*

Respondent asserts that it is and always has been financially responsible. Respondent also points out in its submissions that all passenger monies had been paid into the Escrow Account, and that all passenger deposits were returned after the cruises were cancelled. Resp’t Mem. at 2, 5; Kyte Aff. ¶ 9 (“There is not a single passenger who was not refunded.”).

BOE does not address the suspension argument directly, but notes that Respondent’s desire to not comply with Commission regulations because it is not currently providing passenger services but still keep its Certificate so it can resume services without having to reestablish financial responsibility is “intrinsically contradictory.” BOE notes not only Respondent’s “numerous and repeated compliance failures,” but also points out that:

- BCL had to work with Respondent to correct misrepresentations to passengers about the refund process. BOE Reply at 12 (citing BOE Ex. H at BOE0163-BOE0166);
- At the time of the issuance of the Hearing Order,

Respondent's website continued to advertise its line and vessel as a river cruise vessel despite Respondent's claim that it is not advertising. BOE Reply at 13-14 (citing BOE Ex. I); and

- “[M]ultiple complaints” about Respondent have been made to industry advocates, the news media, and the Commission (BOE Reply at 15).

The record establishes that Respondent has engaged in numerous actions and inactions that warrant revocation rather than suspension. As BOE notes, the ultimate purpose of the financial responsibility regulations is to “ascertain, from past experience and present resources, whether there is a reasonable assurance that future passengers will not be stranded and left without financial recourse in the event of nonperformance of transportation.” *Pac. Far East Line*, 17 S.R.R. at 1548. Although Respondent's passengers received their deposits back, doing so required substantial assistance from BCL. Respondent's history of noncompliance with the Escrow Agreement and Commission regulations gives little assurance that it will act appropriately in the future. Finally, nothing prevents Respondent from reapplying for a certificate if it offers cruises again.

### **III. CONCLUSION**

For the reasons set forth above, grounds for revocation exist under 46 C.F.R. § 540.8(b), and we therefore **REVOKE** Respondent's performance certificate.

By the Commission.

Rachel E. Dickon  
Secretary