ORDER: 84-9-24
ISSUED JAN. 10, 1984

(INTERLOCKING RELATIONSHIP)

*1984 CAB LEXIS 395, **

UNICORN AIR LTD., FITNESS INVESTIGATION

Order 85-9-24;
Docket 41306

Civil Aeronautics Board

1984 CAB LEXIS 395

January 10, 1984

CORE TERMS: citizenship, voting, aircraft, transportation, certificate, scheduled, nacelle, public convenience, technology, air, ownership, engineering, flight, charter, air carrier, senior, traffic, interlocking, presently, passenger, fitness, personnel, Federal Aviation Act, financial plan, financing, forecast, stock, vice president, air carriers, regulations

ACTION-1: [*1]

RECOMMENDED DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE ELIAS C. RODRIGUEZ

ISSUEDBY-1: Elias C. Rodriguez, Chief Administrative Law Judge

Served: * January 10, 1984

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* The Service List is attached as Appendix A.

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Recommended:

That Unicorn Air, Ltd., has not established that it is a citizen of the United States as defined by section 101 (16) of the Federal Aviation Act, and that its application for a certificate of public convenience and necessity should, therefore, be denied.

Appearances:

Stephen L. Gelband, Esq., and Robert S. Freideman, Esq., Hewes, Morella, Gelband and Lamberton, P.C., 1010 Wisconsin Ave., N.W., Suite 640, Washington, D.C., for Unicorn Air Ltd.

[illegible] A. Brown, Esq., for the Bureau of International Aviation, Civil Aeronautics Board.

I. Background of Proceeding

On September 17, 1982, Unicorn Air Ltd., filed an application in Docket 40994 for a certificate of public convenience and necessity to provide scheduled interstate and overseas air transportation, and for a fitness

determination. **[*2]** On the same day, Unicorn Air filed a companion application in Docket 40995 for a certificate to provide scheduled foreign air transportation between points in the United States and points in the United Kingdom, including London; the Federal Republic of Germany, including Frankfurt; The Netherlands, including Amsterdam; and Belgium, including Brussels. Order 82-9-121, issued on September 982 under delegated authority, deferred processing Unicorn Air's application pending receipt from the cant of certain information required by Part 204 of the Board's Economic Regulations as listed in an evidence request attached to the Order. In response, Unicorn Air filed amended applications and exhibits on November 26, 1982. n1

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n1 No answers were filed to Unicorn Air's applications.

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The Board's Order 83-2-89, adopted on February 24, 1983, consolidated Unicorn's applications in Dockets 40994 and 40995 into Docket 41306 for the purpose of instituting the Unicorn Air, Ltd., Fitness Investigation for an oral evidentiary **[*3]** hearing. Noting the limited-entry features of the bilateral agreement between the United States and the United Kingdom, Order 83-2-89 dismissed Unicorn's request for scheduled service authority between those two countries without prejudice to the refiling by Unicorn of a more narrowly drawn application. The instituting order directed that the case consider (1) whether Unicorn Air is a citizen of the United States as defined by section 101(16) of the Federal Aviation Act; (2) whether the applicant is fit, willing, and able to perform scheduled interstate, overseas and foreign air transportation of persons, property and mail, and to comply with the Act and the Board's rules, regulations and requirements; and (3) whether the Board should approve, exempt, or disclaim jurisdiction over any control or interlocking relationships under ions 408 or 409 which may exist.

er 83-2-89 directed Unicorn to provide within 30 days the information specified in an attached request for evidence, and directed that petitions for leave to intervene should be filed by March 14, 1983. No petitions for leave to intervene were filed. On March 18, 1983, Unicorn filed its responses to the request for **[*4]** evidence of the instituting order.

At a prehearing conference held in this proceeding on March 21, 1983, the parties concurred on the issues to be considered as set forth in the instituting order and on additional information to be submitted by Unicorn. Procedural dates were established for the submission of Unicorn's information response, for the Bureau's rebuttal exhibits and for a hearing to be held on April 29, 1983. At the conference the parties also discussed two motions filed by Unicorn Air requesting that certain information contained in its exhibits be withheld from public disclosure pursuant to Rule 39 of the Board's Rules of Practice (PHC Tr. 22-29). Unicorn's motion filed November 26, 1982, had requested confidentiality for personal data on certain "key personnel" selected to occupy senior positions in Unicorn but then employed by other companies. Its second motion to withhold information from public disclosure, filed March 18, 1983, sought to protect the identity of various companies for whom consulting services had been performed by Unicorn's senior officials on the grounds that such information constituted a "trade secret" and "commercial . . . information" within **[*5]** the purview of 5 U.S.C. 552(b)(4). The Bureau stated that it did not object to the grant of confidentiality to the identity of Unicorn's prospective key officials. In its subsequent answer of March 28, 1983, the Bureau concluded that it did not oppose Unicorn's motion of March 18, 1983 in view of the considerations cited by Unicorn and of the Board's continuing ability to obtain desired information under section 401 of the Act and Part 204 of the Board's Economic Regulations. The Chief Judge's order of March 31, 1983, granted the two motions of Unicorn for non-disclosure of the information in question.

The procedural dates established at the prehearing conference were extended and postponed, at the request icorn, by the Chief Judge's orders of April 13, June 2, and July 12, 1983. The July 12 order, noting orn's request to defer the hearing until early September, postponed the hearing until further notice and directed Unicorn to submit revised updated exhibits by no later than September 15, 1983, together with its recommendations for further procedural dates. By letter dated September 15, 1983, counsel for Unicorn submitted the applicant's updated exhibits and indicated **[*6]** its readiness to proceed to a hearing.

Following consultations between the parties, and on receipt of their recommendations, the Chief Judge's order of October 13, 1983, established procedural dates for rebuttal exhibits, for a hearing and for briefs. Pursuant thereto, the Bureau's rebuttal exhibits were filed on November 29, and the briefs of the Bureau and the applicant were received on December 20, 1983. The record of the proceeding is now ready for decision. n2

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n2 Section 401(c) of the Act provides that a recommended decision shall issue not later than 150 days after an application is set by the Board for a public hearing, but if the applicant fails to meet the procedural schedule adopted in the proceeding the statutory period may be extended for a period equal to the delay thereby caused. Pursuant to that provision, the postponement of the hearing from April 29 to November 29, 1983, resulting from the applicant's requests for extension, extends the statutory due date for the decision by an equivalent period.

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II. Description of the Applicant

Unicorn Air, Ltd., is a nonoperating company incorporated on May 18, 1982 under the laws of the State of Delaware (UA-102, pp. i and ii). It has no employees, and its only activities are to seek its certification by the Board. Its Greenwich, Connecticut address is the address of its founder and president, Mr. Peter C.M.S. v. Braun. The three present company officials, who are also the three members of its Board of Directors are Mr. Braun, serving as president and chief executive officer, Mr. Kenneth B. Wallis, managing director, and Mr. Richard W. Wheeler, Unicorn's financial officer (UA-104, p. i) n3. No other prospective officers have been identified nor recruited, except for the Vice President for Flight Operations and the Vice President for Engineering and Maintenance for whom confidentiality was requested and granted.

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n3 In Exhibit 104 attached to its original application, Unicorn had indicated that its Board of Directors would have four members. However, in its March 18, 1983 response to Order 83-2-89, the applicant stated that Unicorn did not intend to fill that position "at this time or in the near future".
[*8]
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Unicorn Air proposes to offer one-class high quality service, with personalized passenger attention and special amenities, at standard industry fares. It is designed to appeal to the first class air travel market through direct marketing to major corporations and banking institutions. The inducements to be offered will include more spacious on-board accommodations, customized baggage and limousine service, in-flight air humidifiers and air-to-ground telephone communications, modified restroom facilities for women, high staff-to-passenger ratios, and superior food and beverage. To perform these services, Unicorn Air proposes to purchase or lease six DC-8-62 aircraft which are to be configured for 72 passengers (UA-101; UA-104, p. i).

Unicorn does not anticipate beginning its operations before 1985, and plans to offer Los Angeles-New York services initially. After those services are in place, Unicorn would then commence New York-Frankfurt scheduled services and a daily charter flight between New York and London. It would propose to offer the same schedule and fares year-around without peak or seasonal **[*9]** variations. Unicorn anticipates carrying, during its first normal year of operations, 29,200 passengers in its domestic service and 58,400 in international operations for a projected operating profit after taxes of $14.5 million (UA-201; UA-202; UA-203; UA-403; Tr. 41-41).

Mr. Braun, a U.S. citizen, and Mr. Wallis, who holds British citizenship, were each issued 4,175 shares of Unicorn stock on June 5, 1982, which constituted the total amount of issued stock of the corporation. In order to meet the Act's citizenship requirements, Messrs. Braun and Wallis entered into a Voting Trust Agreement,

thus publicly seeking to place control of more than 75 percent of the outstanding stock of the corporation in Mr. Braun's hands (UA-104).

Unicorn anticipates that it will require some $27.5 million of capital resources to commence operations. The applicant stated that, of that amount, $10 million would be obtained from the sale by Unicorn of technology developing a nacelle modification process designed to bring DC-8-62/63 aircraft within the noise requirements of the Federal Aviation Administration. The noise reduction process was sold by Unicorn to Aeronautical Acoustic Technology, **[*10]** Inc., (AAT) owned by Messrs. Braun and Wallis, who also own Unicorn. Testimony presented at the hearing indicated that the $10 million would not be available until such time as the nacelle acoustic process is approved by the FAA and the modifications involved are sold to owners of such DC-8 aircraft. The remaining capital requirements are to be obtained through debt financing from investment firms and commercial banks (UA-107).

The present financial and operation plans of Unicorn Air make it evident that the feasibility and time of commencement of its air carrier activities are largely dependent on the success of the development and marketing of the nacelle acoustic process. However, Mr. Braun and Mr. Wheeler testified that the concept and marketability of its proposed air transport services were independently viable, and would be pursued even if the noise suppres sion technology is not certificated or is delayed for a long period of time (Tr. 71; 101).

III. Statutory Requirements

The basic statutory requirements for the grant of an air carrier certificate set forth in section 401 of the Act include a finding that the operations are consistent with the public convenience **[*11]** and necessity and a finding that the applicant is fit, willing and able to perform such services. In addition, it is necessary to determine that the applicant satisfies the Act's citizenship requirement, and to ensure that statutory and policy concerns as to energy and the environment have been satisfied. In the present proceeding, the instituting order specifically prescribed that one of the issues to be considered would be whether Unicorn Air is a citizen of the United States.

Citizenship

Section 401(a) of the Federal Aviation Act, as amended, provides that "no carrier shall engage in any air carrier transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation. . . ." Section 101(3) defines "Air Carrier", in pertinent part, as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in such air transportation. . . ." Section 101(16), in pertinent part, provides that "citizen of the United States" means "(a) an individual who is a citizen of the United States or one of its possessions . . . or (c) a corporation or association **[*12]** created or organized under the laws of the United States or of any State, Territory or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions".

In its applications in Dockets 40994 and 40995, Unicorn Air declared that the applicant is a citizen of the United States as defined by Section 101(16) of the Act. Unicorn furthermore submitted an Affidavit of Citizenship, signed by Mr. Braun, stating that the applicant is a citizen of the United States within the meaning of section 101(16) of the Act, "in that 75 % of the voting interest in the Applicant is owned or controlled by persons who are citizens of the United States and that the President and two-thirds or more of the board directors and other managing officers of the Applicant are also citizens of the United States" (UA-103).

In its exhibits, Unicorn Air reported that Mr. Kenneth B. Wallis, a British citizen, holds 50 percent of the outstanding stock of Unicorn Air, **[*13]** and described the steps taken in an effort to bring Unicorn Air into compliance with the citizenship requirement. Initially, Unicorn contemplated that 2,088 of Mr. Wallis's 4,175 shares of Unicorn stock would be made subject to a voting restriction in favor of Mr. Braun, thus placing 75.1 percent of the voting control of the company in the hands of a U.S. citizen. However, in lieu of relying on the voting restrictions, Messrs. Wallis and Braun, on April 18, 1983 signed a Voting Trust Agreement which gives Mr. Braun unrestricted authority as voting trustee to exercise all shareholder voting rights and powers over 2,088 of Mr. Wallis's 4,175 shares of stock. n4 Unicorn Air concludes in its exhibits that by virtue of the Voting Trust Agreement "(1) the voting rights of Mr. Wallis's 2,088 shares have been separated from the

other attributes of ownership; (2) the voting rights granted are intended to be, and are in fact, irrevocable for a definite period of time; and (3) the purpose of the Agreement is the acquisition by Mr. Braun of voting control of the Corporation" (UA-104, pp. i and ii).

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n4 Unicorn declared that the Voting Trust Agreement, appointing Mr. Braun as voting trustee of the 2,088 shares, satisfies the requirements of section 8-218 of the General Corporation Law of Deleware, the state of incorporation, and further cited authorities in support of its contention that Delaware law has long recognized that a shareholder may serve as the voting trustee. The terms of the voting trust is ten years, the maximum initial term allowable under section 8-218, but may be renewed for ten-year extensions (UA-104, p. ii).
[*14]
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The Bureau takes the position in its brief that Unicorn meets some but not all of the citizenship requirements of section 101(16); and therefore should not, as presently structured, be deemed a U.S. citizen. It notes that Unicorn Air is created and organized under the laws of a State of the United States, and that the applicant's president and two-thirds or more of its board of directors and other managing officials are U.S. citizens. However, the Bureau does not believe that Unicorn Air meets the ownership and control requirement of section 101(16). Citing the Board's recent determinations in Page Avjet and Premiere Airlines, the Bureau rests its position on the Board's established finding that section 101(16) requires both 75 percent ownership by U.S. citizens of the applicant's outstanding voting stock and that as a factual matter the carrier must actually be controlled by U.S. citizens. n5

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n5 Page Avjet Corporation, Order 83-7-5; Premiere Airlines, Inc., Fitness Investigtion, Order 82-5-11.
[*15]
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As to the ownership element, the Bureau states that Mr. Braun's right to vote 75.1 percent of the stock does not change the fact that Mr. Wallis is still the owner of the 25.1 percent held in trust. The relevant and determining fact of ownership, in the Bureau's view, is that Braun and Wallis own 50 percent each. With respect to control, the Bureau's position is that, while the applicant may nominally satisfy the technical requirements of section 101(16), it does not believe that the voting trust as presently structured in this case ensures that Wallis would be prevented from exercising control over the applicant. Noting that Braun and Wallis are co-owners of AAT, and that, in the words of Mr. Braun, the $10 million that AAT owes Unicorn is "a very significant piece of the balance sheet" (Tr. 53, emphasis added), the Bureau concludes that "[w]ith the apparent interdependency between Unicorn and AAT, clearly there is a potential for Mr. Wallis to exercise control over the applicant indirectly through AAT".

Unicorn's brief reiterates that it meets the Act's citizenship requirement, arguing that **[*16]** through the voting trust mechanism Wallis owns only 24.9 percent of the voting interest in Unicorn Air and that Braun has "absolute control over Unicorn Air through his 75.1 % voting interest therein". Unicorn contends that the Board's determinations in Premiere, supra, have no applicability to the issues at hand here because that case, and such analogous cases such as Page Avjet, supra, concerned an actual control problem, which is not found in the instant proceeding. In Unicorn's view, Premiere and Page Avjet stand for "the sensible and logical policy that irrespective of technical 'ownership', U.S. certification should not be granted to carriers which are in fact controlled by foreign individuals and entities".

Unicorn submits that that policy consideration is absent in the present case since actual control rests squarely in the hands of Mr. Braun. It points out that Unicorn has effective control over AAT, the only other relevant corporation in the proceeding, by virtue of Braun and Wallis's sole and equal ownership of AAT, that AAT's sole reason for existence is to provide consulting services to AATI, an unrelated corporation, and that should AAT **[*17]** default on its obligations, control of the acoustic technology would revert to Unicorn Air. It

concludes that without the presence of that important public policy consideration - or any other similar overriding factor - there is no reason for the Judge or the Board to read an "and" into the statute where "or" actually exists.

Section 101(16) clearly requires, inter alia, that in order to meet the requirement of United States citizenship at least 75 per centum of the voting interest must be "owned or controlled by persons who are citizens of the United States. . . ." However, in the landmark **Daetwyler** case, the Board cautioned that "where an applicant has arranged its affairs so as to meet the bare minimum requirements set forth in the Act, it is the Board's view that the transaction must be closely scrutinized, and that the applicant bears the burden of establishing that the substance of the transaction is such as to be in accordance with the policy, as well as the literal terms of the specific statutory requirement". n6 The Board further declared its belief that the "interest of Congress . . . was to ensure that air carriers issued licenses by the United States as **[*18]** U.S. air carriers would be owned and controlled by citizens of the United States" (emphasis added). n7 That point was further underscored by the Board in concluding that "[t]o adopt the examiner's supposition that a construction to the effect that either ownership or control alternatively might suffice would defeat the congressional purpose of the citizenship provision". n8

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n6 Willye Peter **Daetwyler,** d/b/a Interamerica Airfreight Co., Foreign Permit, 58 C.A.B. 118 (1971).

n7 Id. at 120.

n8 Id. at 121.

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The Board's position on this issue was reaffirmed in 1982 in the Premiere Airlines, Fitness Investigation, Dockets 38965 and 39158, cited above, which stated "we have consistently held that section 101(16) requires (1) . . . that 75 percent of the outstanding stock must be owned by U.S. citizens; and (2) that as a factual matter, the carrier must actually be controlled by U.S. citizens". n9 In Premiere, the Board went on to to state ". . . the voting trust cannot be used to meet the 75 percent **[*19]** ownership test of section 101(16). Rather we will only permit use of a voting trust to meet the actual control test". n10

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n9 Order 82-5-11, May 5, 1982, at 3.

n10 At the hearing on November 29, 1983, the Chief Judge specifically pointed out to the parties that the citizenship requirement would need to be carefully considered in this proceeding, will reference to the Board's determinations in the Premiere case, and other proceedings therein cited (Tr. 17-18).

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Even more recently in Page Avjet Corporation in Docket 40905, in an order adopted on July 1, 1983, the Board has not only restated and reaffirmed its holding in **Daetwyler** and Premiere, but has further emphasized the need to look beyond "the bare technical requirements" of citizenship "to see if the foreign interest has the power - either directly or indirectly - to influence the directors, officers or stockholders". In Page Avjet, where 1,000 shares of "voting" stock were owned by U.S. citizens and only 100 "nonvoting" shares were owned **[*20]** by foreign citizens, the Board ruled that Page Avjet was not a U.S. citizen as defined by the Act because the nonvoting stockholders "have the right to influence many of the crucial decisions of the company". n11 In its brief, Unicorn seeks to distinguish Page Avjet on the basis that Page's organization plan left control over such corporate actions as mergers, acquisitions, dissolutions and

liquidations in the hands of the nonvoting stockholders. That distinction fails to take note of the broad principles that the Board amply elaborated on in its decision. n12 The relevant meaning of Page Avjet is the Board's holding that the power of nonvoting stockholders cannot be considered as "less than substantial" if it concerns "whether the company can continue to exist".

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n11 Order 83-7-5, at 4.

n12 It should be noted that in Page Avjet, the company proposed to subject corporate actions of the nonvoting stockholders to CAB approval in order to overcome that possibility of foreign control. The Board rejected that proposal stating that "restrictions on the exercise of such power does not vitiate the existence of a control relationship" (Id. at 4).
[*21]
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In the instant case, and in light of the Board's numerous pronouncements, it is clear that Unicorn Air does not meet the 75 percent ownership test of section 101(16). Wallis remains the owner of 50 per cent of the shares and of the voting interests deriving from those shares; Mr. Braun, as explicitly stated in the Voting Trust Agreement, accepts the trust obligation" to exercise all shareholder voting rights and powers of all shares held by him as Trustee" (UA-104, p. v.). In return, Braun transferred a Trust Certificate to Wallis stating that "the Trustee may treat said holder [Wallis] as the true owner for all purposes, . . ." (UA-104, p. vii). It is, therefore, evident that Wallis continues to be the beneficial and true owner of the shares, having relinquished in the Voting Trust Agreement merely the exercise of voting rights in the 2,088 shares covered by the Agreement.

Unicorn argues in its brief that the Act speaks only of ownership of the "voting interest" in a carrier, and does not deal with the ownership or control of the entirety of a person's stock interest. However, such a restrictive **[*22]** and literal interpretation of section 101(16) would rob the provision of its clear intent to grant air carrier licenses only to U.S. citizens, and has nowhere been given recognition by the Board. Unicorn Air cites no cases in support of its position, nor did it make any attempt to counter the Board's explicit declaration in Premiere, supra, that a "voting trust cannot be used to meet the 75 percent ownership test of section 101(16)".

The corollary requirement that 75 percent of the voting interest must be controlled by United States citizens must similarly bear in mind the Board's caveat that the statutory definition would not "include a corporation meeting the bare minimum percent of ownership and directorships held by U.S. citizens, where control in fact lies in foreign citizens". n13 The Board's interpretation of section 101(16) has consistently been that the "general intent of the statute is to insure that air carriers . . . seeking certificates of public convenience and necessity . . . shall be citizens of the United States in fact, in purpose, and in management. The shadow of substantial foreign influence may not exist. . .". The Board added, "it may be permissible **[*23]** to look behind the form to the substance of the management of an air carrier to determine whether in fact, as well as in law, it is under the control of citizens of the United States. . ." n14

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n13 **Daetwyler,** supra, at 120.

n14 Uraba, Medellin and Central Airways, Inc., 2 C.A.B. 334, 337 (1940). See, also, Premiere, supra, Order 83-5-11, fn. 5.

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The factual circumstances in the present proceeding suggest that the prospects of successful operations by

Unicorn Air and the financial and pecuniary interests of Mr. Braun in Unicorn are intimately involved with and dependent upon Mr. Wallis. The very fact that Braun and Wallis are co-owners of Unicorn and of AAT, which has sold its rights to the nacelle modification technology to Aeronautical Acoustic Technology International, Ltd. (AATI) for $15 million, evidences a critical interdependency. As co-owners, co-founders, and principal officers of AAT, Braun and Wallis have a joint interest in the $15 million to be received from AATI; as co-owners **[*24]** of Unicorn, Braun and Wallis have a joint interest in the $10 million to be obtained from AAT. Although Unicorn testified that the air transport activities would be viable even if the nacelle modification process were not approved (Tr. 101), the testimony was equally strong that "until the nacelles are prepared, Unicorn can't fly" (Tr. 70).

These circumstances demonstrate that Mr. Wallis commands an equal status signifying control with Mr. Braun in Unicorn, in AAT, and in their primary financial asset. n15 Furthermore, the success of the nacelle technology is of major, if not critical, importance to Unicorn's commencement of operations. The exhibits in the record also strongly suggest that Mr. Wallis will play the central role in completing the development and obtaining the approval of the nacelle system. It is Mr. Wallis, and not Mr. Braun, who is "an aeronautical engineer with extensive experience in aircraft technology" and who will enable AAT to continue to perform engineering and development work for AATI (UA-104, p. xxv.) In its brief at page 20, Unicorn states that "Mr. Wallis, as President of [AAT] has devoted substantially all of his time to . . . . development and implementation **[*25]** of the . . . nacelle quieting process". These facts make it difficult to conclude that Mr. Wallis will not represent a dominant position in Unicorn Air. It is not likely that Mr. Braun would take any significant actions affecting Unicorn Air without the knowledge and consent of Mr. Wallis or would truly have policy and management control of the company. n16. Thus, Unicorn has not met the burden of establishing, as required by the Board in the cases cited above, that, in addition to meeting the literal prescriptions of citizenship mandated by the Act, it be free from control by non-U.S. citizens.

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n Page Avjet, the Board stated, "we have found control to embrace every form of control and to include negative as well as positive influences; we have recognized that a dominating influence may be exercised in ways other than through a vote" (Order 83-7-5, at 3).

n16 As the Board concluded in Page Avjet, "Given the nonvoting shareholders power, it could be expected that the officers, directors, and voting stockholders would follow their wishes" (Order 83-7-5, at 4).

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Two other considerations must be weighed in reaching a finding on the issue of citizenship. First, it should be noted that Mr. Wallis, although a British citizen, has apparently lived in the United States since 1963, has led a consulting firm in California since 1970, and at one time applied in Virginia for U.S. citizenship (UA-104, p. xxi; Exhibit 104 of original Application; UA response of March 18, 1983). However, in its updated exhibits, Unicorn stated that it was not relying in any way on the status of Mr. Wallis's citizenship application, and that Mr. Wallis "does not presently plan to pursue application for citizenship" (UA-104, p. i). Second, the Board has in a number of cases in which citizenship was a critical issue, granted a certificate containing conditions to ensure that the air carrier would continue to remain free of foreign control, (e.g. Premiere Airlines, Inc., Fitness Investigation, Order 82-5-11). However, in the present case, Unicorn has not yet demonstrated that it presently satisfies the Act's minimal citizenship requirements, and has not indicated its consent to the imposition of any conditions. **[*27]**

Accordingly, it is found that Unicorn Air has not established that it meets the citizenship provisions of section 101(16) of the Act.

B. Public Convenience and Necessity

Section 401(d)(1) of the Federal Aviation Act, as amended, provides that the Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application if it finds, inter alia, "that such transportation is consistent with the public convenience and necessity". In Order 83-2-89, instituting this proceeding, the Board stated that no finding of consistency with the public convenience and necessity was

required for granting Unicorn's request for a certificate authorizing interstate and overseas air transportation of persons, property and mail, but that with respect to the foreign air transportation proposed by Unicorn a finding of consistency with the public convenience and necessity was required under section 401(d)(1) of the Act. Citing its findings in Orders 79-10-16 and 80-2-37, regarding the granting of unrestricted authority in the Benelux and U.S.-Germany markets, the Board stated that if Unicorn met the citizenship and fitness requirements of the Act, **[*28]** it would receive the certificate authority requested in those markets, as well as for domestic service.

Inasmuch as Order 83-2-89 dismissed Unicorn's request for authority to provide scheduled service between the United States and the United Kingdom, the Board made no finding with respect to public convenience and necessity in that market. However, in the Former Large Irregular Air Service Investigation, Order 78-7-106, the Board found that there is a continuing demand and need for additional charter air carriers and that noncomparative selection criteria should be utilized for new applicants. Since Unicorn has amended its application, and now proposes only charter services to the United Kingdom, the Board's broad position on the public convenience and necessity of charter services in the Former Large Irregular case would appear to extend to Unicorn's modified proposal.

In view of the above, no further findings or conclusions need be made in this decision with respect to public convenience and necessity.

C. Environmental and Energy Concerns

Part 312 of the Board's Procedural Regulations, governing implementation of the National Environmental Policy Act in the Board's **[*29]** decision making process, was revised to eliminate the requirement earlier imposed that applicants file environmental evaluations with their applications for new authority. n17 In its amended text, section 312.10 lists certain actions that have the potential to significantly affect the environment and that normally require preparation of an environmental impact statement or an environmental assessment, as follows: (1) actions that involve first-time service by air carriers to an airport; (2) actions that involve first-time service to an airport by jet, SST, helicopter or V/STOL aircraft or (3) actions which would substantially increase the scope of operations at an airport, such as an increase in total daily operations by more than 25 percent. In addition, section 312.11 lists certain actions not normally requiring preparation of an environmental impact statement or an environmental assessment except where the Board official responsible for that action determines that such action does have the potential to significantly affect the environment.

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n17 PR-218, 45 FR 16136, March 12, 1980.

- - - - - **[*30]** - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In an attachment to its application, Unicorn Air declared that its proposed scheduled and charter operations would have none of the effects set forth in section 312.10(a)-(c) of the Board's Procedural Regulations (UA-501). No evidence of record appears which would lead to a contrary finding that Unicorn's operations would constitute any of the actions having the potential to significantly affect the environment as set forth in section 312.10. With respect to the actions listed in section 312.11, referred to above, the Board staff officials alluded to in the regulations have not determined that any action here under consideration would have the potential to significantly affect the environment. The Bureau stated in its brief that Unicorn's application did not reveal any information that would require the conclusion that this authority will have a significant environmental impact.

Part 313 of the Board's Procedural Regulations, concerning the implementation of the Energy Policy and Conservation Act, prescribed that any recommended decision or any final order of the Board is a major regulatory action requiring **[*31]** an energy statement if it may cause a near-term net annual change in aircraft fuel consumption of 10 million gallons or more, or is specifically so designated by the Board because of its precedential value, or other unusual circumstances. n18 Unicorn Air has estimated that its fuel consumption for the first normal year of operations, including domestic and foreign scheduled and charter

services, will be 23,884,150 gallons (UA-204). This fuel forecast, based on a 100 percent completion factor, including 479,375 gallons for non-revenue movements, substantially exceeds the 10 million gallon benchmark prescribed in the Energy Act. However, Unicorn's proposed operations would provide substantial public benefits through increased service and competition in the markets in question. Also, as pointed out by the Bureau in its brief, the Board has stated that the burden of fuel conservation should not be discriminatorily used to inhibit new services, but should be borne by existing services as well. The public interest considerations that are evident in the Board's findings of public convenience and necessity and in authorizing the entry into the market of a new competition outweigh the **[*32]** detriments of exceeding the 10 million gallon level. Moreover, the operations of Unicorn Air have not been specifically designated by the Board to require an energy statement. Although the Bureau concludes in its brief that a certificate award to Unicorn would be consistent with the Energy Act, it reiterates that such an award should not be made at this time because of the failure to meet citizenship requirements.

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n18 Section 313.4 of the Board's Procedural Regulations (14 C.F.R. 313.4).

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In light of the above, it is found that Unicorn Air's proposed operations will not constitute a major regulatory action within the meaning of the National Environmental Policy Act and of the Energy Policy and Conservation Act.

D. Fitness Standards

The Federal Aviation Act of 1958, as amended, prescribes in section 401(d)(1) that the Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application if it finds that the applicant is "fit, willing and able to perform such transportation **[*33]** properly and to conform to the provisions of this Act and the rules, regulations and requirements of the Board hereunder. . ." The investigations held by the Board over the last four years to determine whether applicants for certificate authority are fit, willing and able as required by section 401 developed four standards of fitness, or areas of inquiry, which must be explored to determine whether an applicant for a certificate of public convenience and necessity is fit, willing and able to perform the air transportation for which it is seeking authority. The standards were set forth in the Transcontinental case in the following terms:

". . . an applicant can qualify for a certificate, if it can demonstrate that it: (1) will have the necessary managerial skills and technical ability, before beginning service, to operate safely; (2) if not internally financed, has a plan for financing that, if carried out, will generate resources sufficient to commence operations without undue risk to consumers; (3) has a proposed operation reasonably suited to meeting a part of the demand for service in the city-pair markets covered by its application; and (4) will comply with the Act and regulations **[*34]** imposed by Federal and State regulatory agencies." n19

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n19 Transcontinental Law-Fare Route Proceeding, Order 79-1-75, p. 25, decided January 11, 1979

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The test concerning the proposed operation was subsequently substantially absorbed into the financial plan standard. Thus, in the New York Air, Fitness Investigation, Order 80-12-57, December 11, 1980, the Board applied a three-part test, considering that the applicant's operating proposal is to be viewed as an element in the larger context of its financial planning. In the Sun Pacific Airlines, Fitness Investigation, Order 81-6-126, June 18, 1981, the Board similarly examined the applicant's fitness by considering the applicant's managerial

expertise, financing and operating proposal, and its compliance qualification. In further clarification of this point, the Board specified in the Northeast Sunrise Airlines, Inc., Fitness Investigation, Order 83-5-90, May 19, 1983, that the financial capability aspect of the Board's fitness review consists of two **[*35]** distinct elements, an operating proposal and a financial plan. These precedents establish that whether dealt with as r three standards, the substantive elements of fitness have not changed in principle. This decision will dingly review Unicorn Air's qualifications in terms of its managerial expertise, its financial and operations plan, and its compliance disposition.

IV. Management Qualifications

Unicorn's brief asserts that its key personnel have the ability to operate an airline competently and safely. Its exhibits have identified five individuals who are to serve as the senior company officials when it commences operations. These five include the president, managing director, chief financial officer, vice president for flight operations, and vice president for engineering and maintenance. As noted above, Unicorn requested that the names and resumes of the individuals recruited to fill the flight operations and the engineering and maintenance positions be withheld from public disclosure pursuant to Rule 39 of the Board's Rules of Practice, and its request was granted. The professional qualifications of the individuals for whom confidentiality was requested **[*36]** are examined with reference to the positions they are to assume with the applicant.

Mr. Peter C.M.S. v. Braun, co-founder and president of Unicorn Air, will also serve as its chief executive officer, and will be primarily responsible for finance, marketing, corporate strategy and general management. Mr. Braun has a distinguished educational background, with an undergraduate degree from Yale University and a doctorate in philosophy from the West German University of Cologne; he was a Fulbright Scholar during 1964 to 1966 and lectured at the Harvard Business School in 1974. With an equally distinguished professional career, Mr. Braun from 1966 to 1977 was a principal officer of the New York consulting firm of McKinsey and Company, serving an international clientele of multinational financial, industrial and service corporations, and from 1979 to 1980 was president and chief of the International Development Department of the Order of St. John in London, England. He is currently a founding partner of the Greenwich firm of Leyton Associates, with nsibility for all phases of the company's international operations in financial, marketing and production n20 His testimony **[*37]** at the hearing demonstrated his ready familiarity with business organization a nanagement and reflected his senior executive experience and talents (UA-104, pp. i and xix-xx).

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n20 A supplement to Mr. Braun's resume, submitted by Motion of Unicorn Air on March 18, 1983 requesting that it be withheld from public disclosure under Rule 39 of the Board's Rules of Practice listed the clients he served with McKinsey and Company and with Leyton Associates. The clients include companies in financial, insurance and transportation fields.

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Mr. Kenneth B. Wallis, managing director, co-owner and co-founder of Unicorn Air, is to provide the applicant with expertise for its flight operations, engineering, maintenance and noise-abatement programs. The holder of an engineering degree from the University of Nottingham, England, Mr. Wallis has had aeronautical engineering experience with Vickers Armstrong, Ltd., from 1954 to 1957 and with Douglas Aircraft at Long Beach from 1963 to 1966. In addition to a number of other projects **[*38]** in the engineering field that he has conducted in the past 25 years, Mr. Wallis's principal activities in the past 12 years has been the management of a consulting firm, Wallis and Associates, in Long Beach, California, which he founded in 1970. Wallis and Associates, under his supervision, has specialized in air and marine transportation projects, including feasibility and policy studies of major international and domestic systems and techniques. n21 Mr. Wallis did not participate in the hearing (UA-104, pp. i and xxi-xxii).

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n21 A supplement to Mr. Wallis's resume, submitted by Motion of Unicorn Air of March 18, 1983, requesting that it be withheld from public disclosure under Rule 39 of the Board's Rules of Practice, lists some of the companies for which Mr. Wallis has performed consulting services. The companies there identified include transportation, labor and governmental entities.

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Mr. Richard W. Wheeler, Unicorn's chief financial officer, will have supervisory responsibility over the applicant's department **[*39]** personnel and over the company's government relations. Mr. Wheeler is also a member of Unicorn's three-member board of directors, together with Mr. Braun and Mr. Wallis. With educational credentials from Williams College and the Harvard Business School, Mr. Wheeler has served with Citibank of New York for thirty years. During that period he served as Senior Vice President in charge of the Asia Pacific Division (1969-1975), as Deputy to the Group Executive Vice President (1975-1977), and in the Office of the Vice Chairman (1977-1982). His duties increased in scope and importance including supervision of basic operations of more than 900 branches and affiliates in 100 countries and representing Citibank at the highest level with U.S. and foreign governments and with intergovernmental organizations. Mr. Wheeler's demeanor and testimony at the hearing made evident his senior financial and banking experience and competence (UA-104, pp. i and xxiii-xxiv).

The two officials recruited to serve as vice president for flight operations and as vice president for engineering and maintenance, and whose identity has been granted confidentiality under Rule 39 of the Board's Rules of Practice, **[*40]** have both had extensive senior experience at the managerial level with major U.S. air carriers. Their respective resumes fully substantiate that they have the competence by training and experience to fill the positions in Unicorn for which they have been selected. Both individuals are U.S. citizens.

Unicorn indicated that other qualified personnel with appropriate experience would be recruited to serve as senior executives in flight operations, maintenance and engineering, finance and administration, marketing sales, and flight services (UA-104, p. xviii). At the hearing, Mr. Braun stated that because the company such an early development stage, it would be premature to select or designate any other senior officials at this time (Tr. 87-88). Therefore, Unicorn's senior management is not fully formed and cannot be fully evaluated at this time.

Despite the evident superior credentials of Messrs. Braun, Wallis and Wheeler in their respective fields, there are nonetheless deficiencies in Unicorn's management qualifications. Although Mr. Braun and Mr. Wallis have engaged in consulting activities involving aviation and aeronautics, they have not claimed to have any experience **[*41]** in running an airline. Moreover, it isn't established to what extent they will devote their primary time and attention to day-to-day management of Unicorn. Mr. Braun testified that he planned to devote most of his time to Unicorn's initial operations but would then withdraw to some extent (Tr. 63-64, 87). n22 There is not indication on the record that Mr. Wallis would leave his apparently successful and active consulting firm to organize and manage a fledgling airline. Unicorn's brief, at page 20, states, "Mr. Wallis will make himself available to Unicorn Air on an as-needed basis for such engineering consulting work as is required". Although the two individuals presently designated to serve as vice presidents for flight operations and maintenance, respectively, appear highly qualified for these positions, they would not have overall policy or direction responsibility or authority. Moreover, there is no basis in the record for assurance that they will still be available if Unicorn is not to begin its operations until sometime in 1985. A finding that Unicorn meets the Board's management standard would have to be based on the assumption that men of the caliber of Mr. Braun and **[*42]** Mr. Wallis would undoubtedly recruit a talented management team. It would be unwise for the Board's determination to be founded on such a basis. The Bureau concludes in its brief, that Unicorn Air possesses managerial and technical ability to operate safely, but notes Mr. Braun's lack of extensive experience in the aviation field.

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n22 Mr. Braun stated: "I don't foresee myself running the airline ten years from now. I foresee myself leading it through the period of launch and start-up and solidation (sic), and then retiring from those activities, because I think there are other people who are far better qualified to -- and personally structured to run

things on an operating basis over the long haul" (Tr. 87).

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[illegible]nt of the above, it is found that the founders and present principals of Unicorn have demonstrated superior professional qualifications in their respective fields, but it is recommended that further evidence should be presented, at such time as the applicant is ready to recruit a more complete management **[*43]** cadre, in order to reach a definitive finding that Unicorn meets the Board's traditional management qualifications for commencing and operating an air carrier. Inasmuch as Unicorn does not meet the threshold citizenship requirement, this finding of itself will not delay or block Unicorn's operations, which are in any case not scheduled to begin before sometime in 1985.

V. Operating and Financial Plan

A. Plan of Operations

The essence of Unicorn's concept of operations is that it proposes to compete for the first class air travel market by offering high-quality, low-cost, long-haul scheduled air transportation. The applicant plans to inaugurate service in the New York-Los Angeles market and to later extend the services to Frankfurt and, on a charter basis, to London. The high quality of the services would consist of more spacious aircraft accommodations, customer personalized attention made possible by high staff to passenger ratios, on-board air humidifiers and air-to-ground telephones, free limousine and customized baggage service, and superior food, beverage and other on-board amenities. The low-cost would be provided by offering "standard industry fares". The **[*44]** one-way fare proposed for New York-Los Angeles would be $680, for New York-Frankfurt $1,360, and for New York-London $1,741 (UA-101; UA-302).

To operate these services, Unicorn plans to acquire six used DC-8 aircraft, which it would buy, "fold them into [illegible]sing partnership and lease them back" to itself (Tr. 49). The proposed aircraft, normally seating 200 [illegible]ngers, would be reconfigured to seat 72 persons (Tr. 80), and seven cabin attendants would be sc[illegible]duled for each flight (UA-403.6). No funds have been committed to aircraft, nor has any written or oral commitment been made by Unicorn as of now on specific aircraft or on whether to lease or purchase aircraft (Tr. 47-40. n23 Unicorn stated at the hearing that its DC-8 aircraft would be equipped with the nacelle quieting technology it sold to AAT and would be "fully conformed with FAR 36" (Tr. 60-61).

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n23 Unicorn testified that Union Transport Aerien in Paris had three DC-8-63 aircraft that they are considering for sale in December for an inclusive asking price of $4.1 million, including "D" check on all three aircraft and complete engine overhaul. In addition, Swiss Air was said to have sold four DC-8-62's in October to Aviation Facilities of Munich, Germany, presently undergoing major overhaul and available at $1.1 million each (Tr. 48).

[*45]

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The applicant has designed its proposal to appeal to the international corporate executive and business traveler. For this purpose it has scheduled its daily services to operate only during daylight hours. For example, the Frankfurt service would provide a 9:00 a.m. daily departure from New York to arrive in Frankfurt at 8:18 p.m., and a 6:00 p.m. departure from Frankfurt arriving in New York at 8:22 p.m. n24 Unicorn testified at the hearing that incumbent carriers on the Frankfurt route, with $100 million B-747 aircraft requiring high aircraft utilization, could not offer the daylight service that Unicorn could provide because of its lo[illegible]apital investment in aircraft (UA-101; UA-202; Tr. 37, 44-46). Unicorn's schedules at New York are not [illegible]ed to offer the West Coast passenger through service to Europe, nor through West-bound connections. [illegible], its proposal is constructed on a point-to-point basis, and its marketing does not anticipate on-line connecting or interline connecting traffic (UA-202, p. iv).

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n24 Unicorn's scheduled 8:18 p.m. arrival in Frankfurt and its 6:00 p.m. departure for return flight to New would require its aircraft to sit idle on the ground in Frankfurt for approximately 22 hours between s, thus greatly reducing its utilization rate and significantly increasing its operating costs.
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Unicorn's New York-London proposal, as revised, differs substantially from its Frankfurt and Los Angeles services. With its original application, Unicorn requested authority for scheduled London flights from a number of U.S. points, although it stated that initially London would be served by charters "until appropriate bilateral accommodations can be made". However, since Order 83-2-89 dismissed Unicorn's request for United States-United Kingdom scheduled service authority, the applicant converted its London proposal to daily New York-London charter services. Its charter service, in the hope of winning British consent, will incorporate advance purchase, minimum stay, and ground arrangement requirements imposed on charters, but will, in terms of amenities and other attributes, adhere closely to its original scheduled proposal. n25

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n25 Unicorn stated that it believed it would be able to obtain operating authority from the United Kingdon for its planned daily charter services, in part, because the first class, limited seating relatively high-priced service it would offer is not considered to be serious competition to the regular operations of the national carrier (UA-202, p. iii). In its brief, footnote 2, the Bureau stated that it had no reason to believe that the United Kingdom would not permit the proposed operations by Unicorn Air.
[*47]

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rn has forecast that it will generate $110.4 million in revenue during its first normal operating year, will incur $72.7 million in operating expenses and will show an operating profit of $37.7 million, and a pre-tax income of $29.2 million. The applicant's estimated revenues are based on the carriage of 87,600 passengers during the first normal year of operations (UA-403). In testimony under cross-examination, Unicorn claimed that its traffic forecast was formulated after extensive interviews with major traffic sources and was based on customer lists (not introduced in evidence) of specific travel-related organizations and key executives in those organizations to arrive at a tabulation of the interested companies, their passengers per day, and their destination (Tr. 76-79). On the basis of that precise traffic methodology, Unicorn arrived at the conclusion that it would carry exactly 29,200 passengers in each of the three markets (UA-403.1). In its brief, the Bureau stated that it was unable to assign a reliable statistical value to Unicorn's traffic data and methodology in order to forecast **[*48]** traffic volume.

The Bureau's rebuttal exhibits were directed primarily at the applicants traffic forecast, which it contrasted with the Bureau's own forecast. The Bureaus's estimate was based on traditional methodology, using historical traffic and growth rates, existing first class service in the markets and stimulation factors derived from the application of the Quality of Service Index (QSI) method. Application of the Bureau's method results in significantly lower traffic and revenues data as the following chart shows:

TRAFFIC/REVENUE FORECAST COMPARISON

Market	Traffic Forecast		Revenue Forecast (000)	
	Unicorn	BIA	Unicorn	BIA
N.Y.-Los Angeles	29,200	23,496	$19,856	$15,977
Frankfurt	29,200	19,908	39,712	27,075
London	29,200	13,324	50,837	23,197
Total	87,600	56,728	$110,405	$66,249

Source: UA-305; BIA-R-400.

In its brief at pages 14-16, the Bureau stated that its traffic forecast for Unicorn was quite conservative, and that Unicorn's knowledge and experience with the business community could result in Unicorn's exceeding the [illegible]u's traffic forecast in the New York-Los Angles and New York-Frankfurt markets. With **[*49]** respect to [illegible]ew York-London service, the Bureau questioned whether Unicorn could reach the high load-factor norm for charter operations. Nethertheless, the Bureau concluded that Unicorn had presented a viable reasonable operating plan for the long run, notwithstanding the fact that the company could show a loss in the first year of operations.

B. Financial Plan

Unicorn estimates its total capital requirement at $27.5 million; $16.2 million for aircraft and equipment, $5.4 for start-up losses, $5.6 for reserves and $.3 million for material and supplies. The company plans to finance $10.3 million of the total through the sale of equity and $17.2 million through debt (UA-107, p. i). Central to Unicorn's $10.3 million equity financing plan, is a $10 million item shown on the company's September 15, 1983 Balance Sheet as "Notes due from AAT, Inc." in the asset section and as stockholders' contribution in the liabilities section (UA-105, p. i). These entries, Unicorn states, result from its sale of the nacelle modification technology for DC-8-62s and 63s, to AAT, which was subsequently transferred to AATI for $15 million (Tr. 55).

The transactions involving the sale of the **[*50]** technology have not resulted in the transfer of any funds to date. AATI owes AAT $15 million and AAT in turn owes Unicorn $10 million (UA-105, p. i; UA-107, p. vii). These debts are unsecured except to the extent of the value of the technology. If AATI defaults on its obligations, then transfer of that technology is null and void, and goes back to AAT (Tr. 56-57). Under the terms of the original agreement, Unicorn was scheduled to receive from AAT $5 million on January 1, 1984, $2 1/2 million (plus interest) on January 1, 1985 and $2 1/2 million (plus interest) on January 1, 1986. Unicorn's witness testified that the payment schedule was subsequently amended to tie payments to the [illegible]cessful development, production and sale of the technology. As amended, payment would be "at the rate [illegible]0,000 per ship set" (Tr. 24). n26 Production would follow FAA certification of the flight demonstration [illegible]i is expected to take place in the third quarter of 1984 (Tr. 59) n27 If the FAA does not approve the nacelle quieting process, the company believes that its equity financing could be handled through the investment banking community on either private placement or public offering (Tr. **[*51]** 101).

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n26 Applicant agreed at the hearings to submit written copies of the amendment for the record (Tr. 24) but the post-hearing exhibits submitted (UA-107, pp. vi A, vi B, vi C) contain no mention of the change concerning the $400,000 per ship set.

n27 Unicorn's witness testified that although the technology has been sold to AATI, AAT retains the system, and has 30 engineers on its staff who are providing engineering services to further develop it (Tr. 62).

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Unicorn states that it will rely on investment and commercial banks for the major portion of its financing, that negotiations along these lines have commenced, and that the company believes that its efforts will be successful (UA-101, p. ii). As evidence of its contacts with lending institutions, the applicant submitted a letter dated May 12, 1983 from the London subsidiary of a U.S. bank which states in part that the bank would require "a further review of the financial details of both AAT and Unicorn and will need to become directly involved in the negotiation **[*52]** of contracts by AAT" before they could make any significant financial [illegible]itment (UA-107, p. x and xi). Except for a November, 1983 meeting by two officials of Unicorn with the [illegible]. people in London when they showed interest "in going ahead with the financing" there have been no further contacts with the Bank (Tr. 52).

In summary, Unicorn's plan of operations and financing plan are in a very early state of development, will not

be substantially advanced until the nacelle modification process is completed and certificated, and are contingent upon the technical and marketing success of the nacelle project. The concept of operations is daring, ambitious, and attractive. The financial plan is rational. The Bureau in its brief concludes that Unicorn's financial plan is reasonable and comports with the Board's fitness standard. However, the applicant ...ntly considers that it would be premature, until such time as the engineering and approval of the nacelle ...tic technology is more advanced, to give its operations and financial plan more definition and detail, or to begin making the more definitive contacts and initial commitments with suppliers, airports, market elements, government **[*53]** entities, and financial institutions that will make it possible to ascertain whether the proposal will be put into effect.

The Board's standard for a proposed operation, as stated in Transcontinental, supra, is that it be "reasonably suited to meeting a part of the demand for service", and its guideline for a financial plan is "that, if carried out, [it] will generate resources sufficient to commence operations". Although the minimal demands of these tests are met, it cannot be ignored that Unicorn's operating and financial plans are in a conceptual stage and in a contingent status.

VI. Compliance Disposition

With its application, Unicorn Air filed an exhibit stating that there were no outstanding actions or judgements pending against it, any relevant corporation, or its key personnel, that no formal complaints regarding compliance, no orders regarding infractions of the Federal Aviation Act or the Board's regulations or requirements, and no charges of unfair, deceptive or anticompetitive practices or violations had ever been brought against Unicorn, any relevant corporation or its key personnel. It further stated that since the applicant has not previously conducted **[*54]** any air service or any other activity, no consumer complaint record exists with regard to it (UA-106).

In its updated exhibits of September 15, 1983, the applicant enclosed letters from public utilities and consumer protection offices of Connecticut, California, Deleware, Massachusetts and New York indicating that ...complaints were on record regarding Unicorn Air, Mr. Braun, or Mr. Wallis (UA-106, pp. i to ix).

...its brief, the Bureau attached a letter of August 10, 1983, from the Federal Aviation Administration, in response to the Bureau's request for a safety and compliance evaluation, stating that the FAA knows of no reason why the Board should act unfavorably on Unicorn's application. The Bureau recommends that Unicorn be found to have demonstrated adequate disposition to comply with the Act and with regulations imposed by federal and state regulatory agencies. The record in this proceeding and the demeanor of Unicorn's witnesses at the hearing support the Bureau's recommendation that the applicant meets the Board's compliance disposition standard, and it is so found.

VII. Control and Interlockiong Relationships

Order 83-2-89 directed that this proceeding should **[*55]** consider whether the Board should approve, exempt or disclaim jurisdiction over any control or interlocking relationships under sections 408 or 409 of the Act which may exist in the circumstances of this case. In its exhibits, Unicorn stated that none of the key personnel employed or to be employed by the applicant held officerships, directorships, five percent or more of total voting stock outstanding, or any other interests in any air carrier, foreign air carrier, common carrier, or in any person substantially engaged in the business of aeronautics except as indicated with respect to Messrs. Braun and Wallis (UA-104, p. xxv).

As documented in the exhibits, Braun and Wallis each own 50 percent of the stock in Unicorn and each owns 50 percent of the stock of AAT. In addition, Mr. Braun is President of Unicorn and Chairman and Treasurer of AAT; Mr. Wallis, in turn, is Managing Director of Unicorn and President and Secretary of AAT. Inasmuch as AAT is principally, if not solely, engaged in developing the nacelle modification process for DC-8-60 series aircraft, it can be said to be substantially engaged in the business of aeronautics. Mr. Braun and Mr. Wallis are also senior officials **[*56]** in Leyton Associates and Wallis and Associates, respectively. However, the fact ...he latter two consulting firms in the course of their activities serve air carriers or other aviation interests ...d not bring them within the provisions of sections 408 and 409.

In its brief, Unicorn submits that no control or interlocking relationships exist between Unicorn Air and AATI, and that none of Unicorn's key personnel is a shareholder, officer of director of AATI. With respect to AAT,

Unicorn points out that once AAT's work on the quiet nacelle technology is completed, its principals expect to dissolve AAT (Tr. 64-66), and submits that it is unlikely that AAT will still be in existence by the end of 1985. It, therefore, argues that there are no control or interlocking relationships in existence which require Board action under sections 408 or 409 of the Act. Nevertheless, Unicorn suggests that since AAT is currently an [illegible]e corporation which may be in the business of aeronautics, it may be prudent to approve or exempt [illegible]s relationship with Unicorn Air or with its principals.

The Bureau takes the position in its brief that there is a presumption of control by Messrs. Braun and **[*57]** Wallis of Unicorn Air under section 408(f) of the Act, and that their continued control of AAT would be unlawful unless approved or exempted. Noting that the record contains no evidence to suggest that any anticompetitive effects or other concerns adverse to the public interest are posed by those relationships, the Bureau recommends that the relationship between Unicorn Air, Braun and Wallis, and AAT should be exempted under section 416(b) of the Act from section 408(a). With respect to section 409 of the Act, the Bureau recommends that the interlocking relationships among Messrs. Braun and Wallis, Unicorn Air and AAT should be approved, since they raise no anticompetitive concerns and have no serious potential to lessen competition or restrain trade.

There is no allegation nor any evidence in the record of this proceeding to indicate that the control and interlocking relationships involving Unicorn Air, Messrs. Braun and Wallis, and AAT are adverse to the public interest or likely to cause a substantial reduction of competition, if at all. In view of these circumstances, the control and interlocking relationships that might be deemed to exist cannot be found to have any significant **[*58]** anti-competitive effects, nor to be inconsistent with or adverse to the public interest. The Bureau's recommendation is, accordingly, adopted. However, in view of the finding that Unicorn Air does not meet the citizenship requirements of the Act, this decision will not recommend that the Board take any action at this time with respect to the control and interlocking relationships.

VIII Conclusions and Recommendations

[illegible] evidence received in this proceeding and the pleadings of the parties lead to the inevitable conclusion that [illegible]esently constituted Unicorn Air does not meet the test of United States citizenship as defined in section [illegible]16) of the Federal Aviation Act and as consistently and amply applied by the Board in its determinations. Failure to satisfy this prerequisite of certification renders final conclusions on other prescribed conditions of fitness and public interest unnecessary and meaningless. However, as directed by the instituting order, the proceeding has examined whether other elements of the applicant's presentations would otherwise conform to statutory and policy requirements.

The record demonstrates that Unicorn Air is presently in a very early **[*59]** stage of development, which precludes a full evaluation of its fitness. The applicant has made evident that it is premature at this time to recruit key senior members of its management cadre, that commencement of its operations are to a substantial degree contingent upon the development and success of another venture, and that further steps to complete its organization and operating plan must to a significant extent be held in suspense. Thus, Unicorn Air's proposal for air transportation is embryonic, abeyant and speculative, and the applicant contemplates that its proposal would not be implemented before 1985 at the earliest. These circumstances do not support a conclusion that Unicorn Air has established that it is presently fit, willing and able to perform properly the air services described in its application, as amended.

Accordingly, on the basis of the entire record of this proceeding it is concluded and recommended:

1. That Unicorn Air, Ltd., has not established that it is a citizen of the United States as defined by section 101 (16) of the Federal Aviation Act;

2. That Unicorn Air, Ltd., has not established that it is fit, willing and able to perform the interstate, **[*60]** overseas and foreign air transportation of persons, property and mail described in its application, as amended, and to comply with the Act and the Board's rules, regulations and requirements;

[illegible]hat the application of Unicorn Air Ltd., raises no environmental or energy issues which should preclude the grant of a certificate of public convenience and necessity;

4. That the control and interlocking relationships under sections 408 and 409 present in this case would not

have any anticompetitive effects or be adverse to the public interest, and should be approved or exempted if a certificate is granted;

5. That Unicorn Air, Ltd.'s application for a certificate of public convenience and necessity should be denied.

ed this 29th day of December, 1983.

Appendix A

SERVICE LIST

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