AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration
of AAA Case No. 77 190 272 12 JENF

Between

Melissa Merson,

Claimant

and

USA Triathlon,

Respondent

with

Elizabeth Farnan,

Affected Party

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR ("the Arbitrator" or "the Panel"), having been designated in accordance with the Ted Stevens Olympic and Amateur Sports Act and Section 9 of the United States Olympic Committee ("USOC") Bylaws, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and conducted a hearing on September 20 and 21, 2012, by telephone, with all parties in attendance and offering argument and evidence, do hereby, AWARD, as follows:

1.0 THE FACTS AND PROCEDURAL HISTORY

1.1 Melissa Merson ("Claimant" or "Ms. Merson") is contesting the failure of USA Triathlon ("USAT") to adhere to its own practices, procedures, and Bylaws for nominating candidates for the Executive Board of the International Triathlon Union ("ITU Board"), pursuant to which she claims should have been re-nominated by USAT as a candidate.

1.2 While the Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, the

Arbitrator refers in this Award only to the submissions and evidence it considers necessary to explain the reasoning in this decision.

1.3 The following facts were not in dispute, and in fact were largely, though not exclusively, taken from Ms. Merson's hearing brief:

a. Ms. Merson has been involved in the governance of triathlons for more than two decades. She began working in regional governance and then was elected to the Board of Directors for USA Triathlon ("USAT Board") in 2006.

b. In 2007, a resolution was passed creating the USAT International Relations Committee ("USAT IRC"). The goal of USAT IRC was to facilitate the international objectives of USAT by developing international relationships and making recommendations to the USAT Board on appropriate policies, procedures, and candidates for international governing boards. Ms. Merson was appointed the Chair of USAT IRC.

c. In 2008, Ms. Merson was elected to a four-year term as the USA representative to the ITU Board. When elected, she was required by the USAT Board to relinquish her position, becoming an ex-officio member of the USAT Board and was not permitted to attend board meetings.

d. In her capacity as an ITU Board member Ms. Merson participated in international competitions. For example, Ms. Merson evaluated rule changes in advance of international competitions, determined athlete eligibility, and served on Competition Juries, for such competitions as the Olympics, the Pan-American Championships, the ITU Cross-Triathlon World Championships, and the ITU World Triathlon Series Championships, in which capacity, among other things, she reviewed appeals from field of play decisions and addressed issues involving various technical aspects of the events. Members of the ITU Board were expected to serve in these roles at the ITU events they attended, although such service was not mandatory.

e. Among other things, the USAT Bylaws provide in Article VII, Section 4(d)(2) as follows:

"Ex-Officio Members of the Board of Directors.

. . .

USA Triathlon Member elected to the ITU Board of Directors. Any USA Triathlon member who has been elected to the Board of Directors of the International Triathlon Union (ITU) shall be an ex-officio member of USA Triathlon's Board of Directors by virtue of, and for the same term as, his or her ITU Board membership. He or she shall be allowed to attend Board meetings as requested

by the Board, and may speak on matters as requested by the Board. He or she shall not have a vote on any matter. . . ."

This provision is identical to the immediately preceding provision on the ex officio status and participation of the USAT's Past Presidents in terms of USAT Board meeting attendance and participation, all at the option of the Board, for both "ex officio" positions on the USAT Board.

f. In 2009, the USAT Board invited Ms. Merson to return to USAT Board meetings but in accordance with the USAT Bylaw quoted above she was not permitted to vote.

g. Ms. Merson's current term as ITU Board member will conclude at the end of 2012.

h. At the January 2012 meeting of the USAT Board, Ms. Merson asked questions and expressed concerns about the budget of the USAT Women's Committee. But the Committee head was not present to address those concerns. Ms. Merson therefore moved to suspend the Women's Committee's budget until the questions she raised were answered. An amended motion was made to give the Women's Committee time to submit a more detailed report of activities to justify 2011 funding and proposed funding for 2012 before suspending the budget. Prior to the vote, a member of the USAT Board, who had previously served as its President, recused himself because his wife was Chairman of the Women's Committee. The amended motion passed.

i. A resolution was passed in advance of USAT Board's March 2012 meeting to limit the participation of Ms. Merson at future meetings because of her ex-officio status. Henceforth, Ms. Merson would only be permitted to attend a USAT Board meeting if she was invited by the USAT Board.

j. In July 2012, the USAT Board President emailed Board members the ITU's "Call to Congress," explaining the requirements that candidates would have to meet to be considered for nomination by the USAT Board to the ITU Board. The USAT Board's decision for a prior election in nominating candidates for positions on the ITU Board and ITU committees was to endorse the entire slate of candidates recommended for each ITU position by the USAT IRC. After meeting to consider candidate submissions in July 2012, the USAT IRC submitted a slate of recommended candidates to the USAT Board for each open position at the ITU.

k. The USAT IRC had Ms. Merson as its Chair and eight of the nine members of the USAT IRC were on the slate of nominees for ITU positions that had been submitted by the USAT IRC to the USAT Board. The USAT IRC did not consider any alternative candidates for any of the positions beyond those who were nominated. All but one member of the USAT IRC present at the meeting

participated in the vote on their respective nominations choosing to not recuse themselves.

l. In July and early August of 2012, while Ms. Merson was at the Olympic Games in London on behalf of the ITU, one member of the USAT Board began soliciting candidates to run against Melissa so that the Board would be able to nominate "anyone but Melissa." The candidate the Board member convinced to run for the position had not submitted her nomination information to the USAT IRC, as the President of the USAT Board had suggested as a requirement for candidates had to meet, but instead emailed the President directly to notify him of her candidacy.

m. On August 12, 2012, the USAT Board held a special meeting to vote on the USAT nominations for election to positions on the ITU Board and ITU committees. Ms. Merson was not invited to attend the Board meeting. At the special meeting, the USAT Board voted not to endorse the entire slate of candidates recommend by the USAT IRC. This occurred without a hearing, a report from the committee chair, or floor debate. The USAT Board then chose two of the nine open ITU positions, including the position for which Ms. Merson was running, for special discussion and vote. *Id*

n. When the USAT Board discussed Ms. Merson's nomination, athlete-Board members spoke overwhelmingly in her favor. The President of the USAT Board spoke of her huge contributions to USAT and also indicated that ITU Executive Officers had requested that USAT Board re-nominate Ms. Merson to the ITU Executive Board, typically a pre-requisite to winning an international election. The USAT Board President then expressed concern that if the USAT nominated someone other than Ms. Merson, the ITU would not elect the person, and the USAT would have no representation on the ITU Executive Board.

o. A few Board members also spoke against Ms. Merson, claiming she had disrupted a USAT Board meeting. However, no details of the alleged disruption were given.

p. Despite peer endorsements from ITU Executive Board members and recommendations from the USAT IRC, the USAT Board did not vote to re-nominate Ms. Merson to the ITU Board, instead nominating another individual with less international triathlon governance experience and no support from the athlete Board members of USAT. The candidate selected by the USAT Board had not been considered by the USAT IRC.

q. At an August 17, 2012 USAT Board meeting, Board members moved to reconsider the USAT Board's August 12 vote on nominations to the ITU Board. The motion failed, after which athlete Board members presented the Executive Board members with a Section 10 Complaint based on the failure of the USAT Board to nominate candidates for the ITU Board election who reasonably

represented the views of the athlete-Board members, the Athlete Advisory Counsel, and the IRC. After the meeting, a USAT Board member who had received the Complaint threatened to file an ethics complaint against the athlete-Board member who had drafted it. The Executive Board member eventually filed the ethics complaint.

r. In a September 15, 2012 email, the President of USAT Board explained the Board's action to a colleague: "The adverse actions against the ex-officio member earlier this year were more than sufficient. However, the Board felt otherwise and wanted to twist the knife."

s. It was widely acknowledged by all witnesses that Ms. Merson had accomplished a lot for USAT within the ITU and had assisted in bringing an important international event to the US.

1.4 The following additional facts, while not undisputed, are hereby found as having been established by USAT to the satisfaction of the arbitrator:

a. Ms. Merson has on multiple occasions comported herself in a way that could be considered by many to have been embarrassing, unprofessional, or offensive to board members, officials, and those organizations with which she interacted as part of her involvement with USAT. Multiple witnesses testified to an incident in which she was involved in Puerto Vallarta during the most recent Pan American Games where she shouted at USOC and USAT officials because she did not receive US team clothing and a sufficiently prominent credential in connection with the event. On another occasion USAT was in serious negotiations with a prospective sponsor and Ms. Merson learned of this through her involvement with the USAT Board and took it upon herself to approach the representative of the prospective sponsor to ask that person to consider sponsoring an ITU initiative; the sponsor never entered into a relationship with USAT. At other times, witnesses testified that Ms. Merson would yell or speak angrily at individuals because of some perceived slight, including at races (sometimes in front of USAT members, sponsors, and ITU officials), at hotels (while wearing USAT or ITU logo clothing), and with flight attendants (while wearing logo apparel). At other times, in USAT Board meetings, witnesses testified that Ms. Merson made very personal and inappropriate attacks on other USAT Board members. Still other USAT Board members testified that Ms. Merson's participation in USAT Board meetings would lengthen those meetings and make the USAT Board less efficient by focusing the meetings and discussions on issues that sitting Board members did not find necessary or essential to fulfilling their duties as USAT Board members. The above factual statements were testified to by multiple witnesses both within and outside of USAT.

b. In the end, Elizabeth Farnan, the affected individual in this proceeding, was chosen by the USAT Board by a vote of 9 to 2 to be nominated to serve as the US member of the ITU Board. Ms. Farnan's bio demonstrates that

she is a very highly respected professional who has built a stellar business career and testimony showed USAT Board members believe she has a temperament conducive to good international relations.

1.5 On September 1, 2012, Ms. Merson filed her demand for arbitration in this proceeding. On September 18, 2012, a preliminary hearing was held thereon. On September 20, 2012, the Arbitrator heard argument on the motion to dismiss for lack of jurisdiction and conducted the hearing in this matter, spanning September 20 and 21, 2012. On September 22, 2012, in accordance with the request of the parties, the Arbitrator issued an operative decision providing as follows:

> "In accordance with the request of the parties that the Panel issue an operative decision in advance of issuing a reasoned award to accommodate pending time deadlines before the ITU, having considered the arguments of the parties, their briefs, exhibits, and other submissions, and having conducted a multiple day hearing and deliberated thereon, the Panel hereby issues its operative decision as follows:
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> 1. The Panel has jurisdiction to hear this dispute in arbitration; and
> 2. The Claimant's claims and requested relief are denied (in other words, the USA Triathlon Board's decision to nominate only Ms. Farnan for a position on the ITU Executive Board remains in effect).
>
> All matters not specifically addressed herein will be addressed in the reasoned award.
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> A reasoned award will follow in accordance with the requirements of the AAA rules and as agreed by the parties at the hearing."

The parties later agreed that the reasoned award could be filed on or before October 12, 2012, and this reasoned award followed on that calendar.

1.6 I appreciate the very lucid, erudite, and comprehensive submissions of counsel on the important matters addressed in this case on an exceptionally shortened timeline; the quality of these submissions made my job easier as the arbitrator, as did the competent participation of Ms. Farnan on her own behalf at the hearing, not stymied and perhaps assisted by not being a lawyer herself.

2.0 JURISDICTION

2.1 As discussed more fully below, this arbitrator has jurisdiction over this dispute pursuant to the Ted Stevens Olympic and Amateur Sports Act ("Act") 36 U.S.C. §220501, *et seq.*, because this is a controversy involving Claimant's opportunity to participate in national and international competition representing the United States. The Act states that:

"An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete . . . to participate in amateur athletic competition, upon demand of . . . any aggrieved amateur athlete. . ., conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws. . ."[1]

2.2 The Act also provides that a NGB must:

"provide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate".[2]

2.3 Section 9.1 of the USOC Bylaws provides as follows:

"No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in the Olympic Games, the Pan American Games, the Paralympic Games, a World Championship competition, or other such protected competition as defined in Section 1.3 of these Bylaws nor may any member, subsequent to such competition, censure, or otherwise penalize, (i) any such athlete who participates in such competition, or (ii) any organization that the athlete represents. . . ."

2.4 Under USOC Bylaws Section 1.3(u), "protected competition" means:

"1) Any amateur athletic competition between any athlete or athletes officially designated by the appropriate NGB or PSO as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which by its terms, requires that entrants be expressly restricted to members of a specific class or amateur athletes such as those referred to in Section 220526(a) of the Act; and

[1] 36 U.S.C. §220522(a)(4).

[2] 36 U.S.C. §220522(a)(8).

> 2) any domestic amateur athletic competition or event organized and conducted by an NGB [*sic*] or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in 1) above."

2.5 USOC Bylaws Section 9.7 provides that, "If the complaint [under Section 9.1] is not settled to the athlete's satisfaction the athlete may file a claim with the AAA against the respondent for final and binding arbitration."

2.6 Under both Sections 9.7 and 9.9 of the USOC Bylaws, the arbitration proceeding may be expedited, as it was here by agreement of both parties.

2.7 As if the above provisions were not sufficient to confer arbitral jurisdiction for this proceeding, under Article XIII of the USAT Bylaws, the USAT "agrees to submit, upon demand of the United States Olympic Committee, to binding arbitration conducted in accordance with the commercial rules of the American Arbitration Association in any controversy involving its recognition as a national governing body, or involving the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition." While this provision may not give rise to an expedited right to arbitration, and it is not entirely clear whether the USOC has demanded USAT's participation in this arbitration, it seems that arguments to avoid this clause might fail on these bases given the general favoritism shown to arbitration by the courts in the United States since the enactment of the Federal Arbitration Act.

3.0 USAT MOTION TO DISMISS FOR LACK OF JURISDICTION

3.1 USAT moved to dismiss this action based on a claim of lack of arbitration jurisdiction. USAT argued that Ms. Merson was not within the ambit of individuals given a right to arbitration under the Act and Section 9 of the USOC Bylaws. USAT argued that if Ms. Merson was found to have an arbitration right here, then every NGB Board member would have a right to arbitration over their non selection to the Board.

3.2 Ms. Merson opposed the USAT jurisdictional motion by arguing that she was an official who was within the scope of individuals set forth in both the Act and Section 9 of the USOC Bylaws. In support of this position, she referenced the fact that members of the ITU Board would serve as members of the various event juries and in other appeals and policymaking positions related to the determination of participation in and final results of events she attended.

3.3 I view this case as a close one on jurisdiction under Section 9 and the Act. On the one hand, the idea that someone serving in a governance function for an international federation, who incidentally, and not mandatorily, served in a function that affected the field of play, without any requirement of a separate qualification as a referee or official and without it being mandatory, appears to be a stretch of the jurisdictional

penumbra emanating from the express grant of the USOC Bylaws. On the other hand, the USOC Bylaws specifically reference that disputes concerning the participation of any "administrator" or "official", without further definition, in a protected competition give rise to arbitration jurisdiction under Section 9 of the USOC Bylaws. An analysis here that does not adequately consider the line between Section 9 jurisdiction over an official like this might, as is posited by USAT, result in nearly all NGB Board member and official related decisions to give rise to an Article IX claim, and clearly the USOC Bylaws do not contemplate that situation.

3.4 The stretch here comes in establishing the appropriate nexus between the field of play decisions, and qualifications, typical of "officials" and "administrators" in protected competitions and the position selection that the challenging individual is asserting. There could be positions for "officials" and "administrators" that have no nexus to participation in a "protected competition", as defined in the USOC Bylaws, over which an arbitrator might be hard-pressed to assert or find jurisdiction. Unlike athlete cases, often "official" and "administrator" decisions do not have the same immediate effect by which to measure jurisdiction, namely whether the individual involved will otherwise definitely participate in the "protected competition" at issue. Similarly unfortunate, the legislative history of the various enactments of the Act, reviewed by the parties and the arbitrator in this case, does not provide guidance and no USOC legislative history on Section 9 was available for review.

3.5 But the USOC Bylaws could not have been intended to confer a general arbitration right on all governance officials who might tangentially be involved in "protected competitions." If so, they would have said otherwise and have not had the limiting language of "official", "administrator", and "protected competition" in the jurisdictional right. There must be some other requirement, and a nexus between service as an official and participation in the "protected competition" is the only logical rubric under which to analyze these cases.

3.6 Here, like in *Saltzstein v. USA Swimming*, AAA Case No. 77 190 E 00318 10 JENF (July 23, 2010), Ms. Merson was engaged in a process for international nomination by the NGB of which she was a member that could result in her participation as an official in a protected competition. Unfortunately, *Saltzstein* did not analyze, and appeared to assume, the basis for Section 9 jurisdiction. But here there is some nexus, however attenuated, between Ms. Merson's status as an ITU Board member and her participation in a "protected competition". While Ms. Merson's participation in "protected competition" as an official is ancillary to and derives from her service on the ITU Board (and for which no other training or certification requirement exists so long as one serves as a member of the ITU Board), such a nexus is present to allow her to assert a Section 9 arbitration.

3.7 I have determined that here the nexus was sufficient, though barely, to give rise to a right to arbitration under Section 9 of the USOC Bylaws. This is not be extrapolated to give a general arbitration right to individuals serving in governance related positions who might otherwise have a "protected competition" involvement by

virtue of their participation as a member of the appropriate governance body; it requires a fact based analysis on a case by case basis by a duly qualified arbitrator to make these determinations. Here, having reviewed the facts, I believe it would be a mistake of law to deny Ms. Merson a right to arbitration because, in part, it could have denied her any timely basis for relief from her claims, but mainly because there was sufficient nexus between her position on the ITU Board and her officiating in a protected competition.

3.8 Notwithstanding any issues arising under Section 9 of the USOC Bylaws regarding jurisdiction in this proceeding, there is ample basis for arbitral jurisdiction under Section 220522(a)(8) of the Act and under USAT Bylaws Article XIII, both of which are set forth verbatim above.

4.0 STANDARD OF REVIEW/BURDEN OF PROOF

4.1 The applicable standard of review in Section 9 cases is, and long has been, *de novo*. *E.g.*, *Crowell v. US Equestrian Federation* (AAA Case No. 77 190 E 00193 09 JENF, May 3, 2009); *Nadmichettu v. US Table Tennis Ass'n* (AAA Case No. 77 190 169 10 JENF, April 23, 2010); *Craig v. USA Taekwondo* (AAA Case No. 77 190E 00144 11 JENF, August 21, 2011). Section 9 proceedings are not appeals of NGB decisions and there is no requirement for an arbitrator in these proceedings to give deference to any prior decision and in fact it would be incorrect to do so. In a Section 9 proceeding based on a selection decision (in other words, not based on a disciplinary or other issue), it is similarly well established that a claimant has the burden of proving his or her claim by a preponderance of the evidence. *Compare Crowell v. US Equestrian Federation* (AAA Case No. 77 190 E 00193 09 JENF, May 3, 2009) (selection standard) *and Craig v. USA Taekwondo* (AAA Case No. 77 190E 00144 11 JENF, August 21, 2011) (selection standard), *with Nadmichettu v. US Table Tennis Ass'n* (AAA Case No. 77 190 169 10 JENF, April 23, 2010) (disciplinary case standard). This case will not deviate from these well-established principles.

5.0 BASIS FOR ARBITRATOR REVIEW OF SELECTION DECISIONS

5.1 The Arbitrator subscribes to the following formulation from a recent selection case in the United Kingdom decided by a reputable Queens Counsel that the Arbitrator thinks sets forth the issues, and limitations, for arbitrators to review selection cases, be they relating to athletes or officials:

> "The test I have applied is to find that a decision may be open to challenge if, but only if,
>
> (i) It is not in accordance with Selection Policy as published; and / or
> (ii) The policy has been misapplied or applied on no good evidence and / or in circumstances where the application of the policy was unfair (for example, because someone with selectoral authority had given a categorical assurance to an athlete that the policy would not be applied); and / or

> (iii) The decision maker has shown bias or the appearance of bias or the selection process has otherwise been demonstrably unfair;
> (iv) Where the conclusion is one that no reasonable decision maker could have reached.
>
> That last conclusion is one that any Judge or Arbitrator has to approach with the utmost care. As I have already indicated, it is of fundamental importance that we should not substitute our own judgment on the merits for those of the selectors – i.e who would we have selected, or who is the better athlete or has the better performance figures and so forth. So long as selectors apply policy properly, and do so honestly, fairly and reasonably, and take account of relevant facts (they being best judged to decide what is relevant and what is not), then their decisions must be accorded the utmost respect."

Belcher v. British Canoe Union, UK Sport Resolutions (July 5, 2012) (copy provided to AAA and parties separately).

5.2 Reviewing the standards on this side of the Atlantic, the cases arising under USOC Bylaws Section 9, when viewed in their totality, have been clear that an arbitrator sitting on a selection case, particularly in a case involving selection, or more likely non-selection, of an official or administrator, is required to assess the evidence to determine whether, in making its decision, the NGB acted rationally, not arbitrarily or capriciously, and consistent with relevant law. In other words, the arbitrator must determine if the claimant had a fair opportunity to have her nomination considered by the relevant decision-making body.

5.3 In making this assessment, an arbitrator must keep in mind fundamental legal principles that apply in these cases, including the concept that absent a rational basis for a decision, deference must be shown to the NGB and its decision-making process. *See California Trial Lawyers Ass'n v. Superior Court*, 187 Cal.App.3d 575, 579-80 (1986) (stating, "Courts must avoid interfering with an organization's autonomy by substituting a 'judicial judgment' for that of the association's in an areas where the association is more competent."); *accord Beashel & Czislowski v. Australian Yachting Federation Inc.* (CAS Case No. CAS 2000/A/260, February 2, 2000) (Malcolm Holmes, QC); *Chiba v. Japan Amateur Swimming Federation* (CAS Case No. CAS 2000/A/278, October 24, 2000) (Hans Nater). *See also Givens v. Marion Superior Court*, 117 N.E.2d 553, 555 (Ind. 1954) (stating that a voluntary association "may, without direction or interference by the courts, for its government, adopt a constitution, by-laws, rules and regulations which will control as to all questions of discipline, or internal policy and management, and its right to interpret and administer the same is as sacred as the right to make them"); *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 740-41 (Mo. App. 1973) (stating, "In the final analysis, the court must determine if the board's action is so willful and unreasoning, without consideration of the facts and circumstances, and in such disregard of them as to be arbitrary and capricious. ***Where there is room for two opinions on the matter, such action is not 'arbitrary and capricious,' even though it***

may be believed that an erroneous conclusion has been reached.") (emphasis added). All of these cases were cited with approval by the arbitrators in a Section 9 case in *Booth v. United States Rowing Ass'n*, AAA Case No. 30 190 259 07 (March 16, 2008). As aptly summarized by another court, voluntary athletic associations "should be allowed to 'paddle their own canoe' without unwarranted interference from the courts." *National Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001).

5.4 Consistent with these principles, in *Saltzstein v. USA Swimming*, AAA Case No. 77 190 E 00318 10 JENF (July 23, 2010), the arbitrator stated the standard in that official selection case as requiring the claimant to prove "either there is no rational basis for the Respondent's criteria for selecting nominees . . , or that these criteria, if rational, were not followed or were applied arbitrarily and capriciously in violation of the Claimant's legally protected opportunity to participate in international competitions . . . The Arbitrator has authority only to determine whether the Claimant had a fair opportunity to be nominated . . . and whether the Respondent fairly and rationally applied its . . . selection criteria."

5.5 Based on the above principles, a discretionary decision of a NGB may be challenged and set aside under Section 9 of the USOC Bylaws on the following grounds:

1. If the published criteria do not have a rational basis;
2. If the decision is not taken by the duly constituted decision maker or decision making body in accordance with the published selection policy or procedure announced in writing in advance or if the policy or procedure has been misapplied;
3. If the duly constituted decision maker or decision making body has been shown to have been biased or showed bias, or the decision process has been demonstrably unfair as applied;
4. If the decision has been shown to have been taken in retaliation for an action or actions of the party on the receiving end of the decision to their detriment; or
5. If the decision is one that no reasonable decision maker could have made or was arbitrary and capricious (not simply that reasonable minds could differ on the outcome) or was based on fraud, corruption, malice, bad faith, or illegality.

So long as a NGB decision is the product of applying their policy and process as published, fairly and in good faith and without the presence of the disqualifying factors (*e.g.*, fraud, corruption, malice, bad faith, illegality, arbitrariness, or capriciousness), for a proper purpose (no bias or retaliation), then that decision will be accorded utmost respect and an arbitrator could not be in a position to evaluate whether one candidate for a position or spot would be better selected than another on their merits; that is a decision left to the relevant decision makers with expertise in the sport or subject matter who have been duly designated.

5.6 Keeping in mind these principles, which this arbitrator adopts, I turn to the merits of this dispute.

6.0 THE DECISION ON THE MERITS

6.1 Ms. Merson argued that the USAT Board or individuals involved with it retaliated against her for the views she expressed about the operation or management of the Women's Committee at a meeting preceding the USAT Board vote on her ITU nomination. Ms. Merson argued that as a result she was retaliated against by not being invited by the USAT Board to attend Board meetings or to express her views on issues before the USAT Board. Ms. Merson argued that as a result she was not invited to attend or speak at the USAT Board meeting where her candidacy as a nominee to stand for election to a position on the ITU Board was being considered by the USAT Board.

6.2 USAT argued that the Board had authority to determine who among its *ex officio* members could and could not attend and participate in USAT Board meetings in accordance with the USAT Bylaws, that there were substantial and legitimate reasons for the USAT Board to not re-nominate Ms. Merson related to her prior conduct, that the USAT Board followed its procedures and was not obligated to accept without change the recommendations of the USAT IRC, that the USAT IRC process chaired by Ms. Merson was fraught with conflict of interest, and that it did not retaliate or act arbitrarily or capriciously against Ms. Merson as a result of her negative position on the Women's Committee funding or for any other reason.

6.3 Unfortunately for Ms. Merson's position on retaliation and improper procedure, the USAT Bylaws provide that ex officio directors (of which there are two classes, one being USAT Past Presidents and one being USAT members who are also members of the ITU Board) are only permitted to participate in USAT Board meetings to the extent they are invited by the USAT Board. Under the USAT Bylaws, the decision to invite Ms. Merson to participate or to not invite her to participate lies exclusively within the province of the USAT Board. The fact that the USAT Board might have exercised that discretion one way in the past and then changed how it exercised its discretion under this Bylaw provision is irrelevant; the USAT Board retained the exclusive right to make this decision as it saw fit.

6.4 Similarly, the USAT Bylaws provide that for nominations to serve in positions with the ITU, the USAT Board is paramount in its decision-making. There is no requirement that the USAT Board adopt the recommendations of the USAT IRC or any other body. In fact, requiring a board to do so would violate fundamental principles of corporate law and good governance, and would violate the USAT's own bylaws. Furthermore, it would undermine the notion that at no point in the process did Ms. Merson or anyone else challenge the fact that the USAT IRC was being asked to provide "recommendations" to the USAT Board, and to not make final decisions or substitute its own judgment for that of the USAT Board.

6.5 Ms. Merson also argued that the determination by the USAT Board of the US nominees to stand for election to the ITU Board and to other open ITU positions constituted an "election" under USAT Bylaws Article VII(e) thereby giving rise to certain procedural protections or processes under the USAT Bylaws. The Arbitrator rejects this position. That provision of the USAT Bylaws applies, by its terms, exclusively to elections of USAT Board members, not to addressing nominations of US members of the ITU Board and related committees. Accordingly, the only process a decision regarding Ms. Merson's candidacy was subject to was one either expressly adopted by the USAT Board or simply a vote of the USAT Board. Nothing more and nothing less.

6.6 There was no evidence of actual retaliation or bias against Ms. Merson for her actions or views or alteration of the process for the Board to determine its nominees. That the USAT Board exercised its authorized discretion to select a nominee it thought would better serve the interests of USAT based on the USAT Board's and the individual USAT Board members' individual experiences in the past with Ms. Merson is simply not an impermissible basis that would warrant overturning the decision. In fact, this type of decision basis, assessing the individual qualities and experience of candidates and weighing the pros and cons of an individual's traits to reach a decision is exactly within the scope of proper decision making by a board of directors of a NGB to determine its international representatives. Under Ms. Merson's argument, no NGB board of directors could consider important attributes about a candidate in assessing whether to put their name forward for influential international federation positions and that simply cannot be the rule or the paragon of good governance. To the contrary, NGBs are required under the Act and USOC Bylaws to determine for the US the best representation possible, in their reasonable views, in international federations. It simply was not unreasonable for USAT as a NGB to consider the conduct and interpersonal effectiveness of a candidate for nomination to its international federation in determining which of multiple nominees should be awarded the nomination.

6.7 Ms. Merson, or at least one of her witnesses, made the argument that the decision to not select her was in some way violative of Section 10 of the USOC Bylaws or of the Act because the athlete members of the USAT Board, making up 20% of the membership, voted for Ms. Merson but a majority of the USAT Board did not. This is simply without basis in the law. The Act and the USOC Bylaws provide for 20% athlete membership on a NGB board, not a majority, and nowhere do they require that NGBs always do what the 20% athlete NGB board membership wants. In fact, the athlete membership is only 20%, not 51%, and there are other constituent interests reflected on NGB boards that eventually take the total board membership to 100% and it is the interplay between the interests of these groups and board members that forms the basis for NGB governance across the Olympic spectrum in the United States, and internationally. There is ample discussion of this point in the USOC Governance and Ethics Task Force Report from 2003, as well as in the legislative history behind the Act, so I find no basis to consider that simply because a minority group of directors on USAT's Board voted for one candidate over another that that act of consolidated voting

should be given precedence over the vote of the majority. To find otherwise would violate fundamental corporate law principles and basic principles of good governance.

6.8 While it is not directly before me, I question the ethical and governance practices described by some witnesses as existing at USAT or applied by members of its constituent bodies during this process and I feel compelled to note them. Of most concern is that the USAT IRC would self-nominate its members for plum international assignments without considering alternative candidates and without executive sessions or sessions for discussion of individual candidates and alternative candidates without the USAT IRC member candidate being in the room. At least one member of this process, who is also a USAT Board member, described his view that there could be no conflict of interest under the USAT Code of Ethics if no money was changing hands in the transaction; this flies in the face of fundamental principles of conflicts of interest and good governance. If the USAT Code of Ethics or its governance practices are limited to this inquiry on direct pecuniary interests only, then it bears noting that USAT should consider reviewing this issue in light of the facts and procedure followed by the USAT IRC in its nomination process in this case, some of which were raised by USAT's counsel in their submissions herein. It appears that the USAT Bylaws, when they provide in Article XVIII that an individual's "personal interest", when mentioned in distinction to the mentioned "financial, business, property" interests, would give fair notice to committee and Board members that non-financial interests are to be considered in determining whether to recuse and/or disclose regarding any conflict of interest or perceived conflict of interest.

6.9 Accordingly, for all of the reasons set forth above, I find that the USAT Board had the exclusive and express power to determine the attendance and participation of ex officio members at USAT Board meetings and could change its mind at any time for any reason regarding such participation and to select its nominees to the ITU Board and to other ITU positions, that it selected Ms. Farnan properly and for valid reasons in accordance with its Bylaws, that it did not select Ms. Merson for valid reasons and in accordance with its Bylaws, and that Ms. Merson's claim, as presented, did not provide sufficient basis for overturning the discretionary decision of the USAT Board against her nomination to the ITU Board.

6.10 It is understandable that Ms. Merson would be disappointed by the decision of the USAT Board and the fact that her participation in the international governance of her chosen sport might be at risk of ending. Later it might even be shown that the USAT Board made a short-sighted decision or decision that sets back the USAT international efforts. But there was no showing of wrongdoing by the USAT Board in this process and absent that showing there is no basis to overturn the decision. This case demonstrates that it might behoove candidates for election to international sports positions to be sensitive in their relations in their NGB and cognizant of the need to influence their peers to view their candidacies, and their accountability to NGB interests, favorably throughout their term, especially given the wide range of discretion accorded to NGBs for selecting their international representatives. Nonetheless, as fully set forth

above, none of those elements are the inquiry of the Arbitrator in this case and the very different reasons upon which I base my decision and award are set forth in detail herein.

7.0 THE AWARD

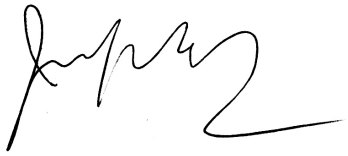
7.1 Therefore, based on the foregoing, I AWARD as follows:

a. Ms. Merson's claim is hereby denied and the USAT Board nomination of Ms. Farnan to stand for election as a member from the United States for the ITU Board remains effective.

b. The administrative filing and case service fees of the AAA, totaling $850.00, shall be borne as incurred.

c. The fees and expenses of the arbitrator(s), totaling $4,180.00, shall be borne as incurred.

d. This Award is in full settlement of all claims submitted to this arbitration. All claims not expressly granted herein are hereby denied.



Dated: October 12, 2012

Jeffrey G. Benz
Arbitrator