UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXX

Field of Membership Appeal

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) as an administrative appeal under 12 C.F.R. Part 746, Subpart B. The appeal concerns the determination by the Director of the Office of Credit Union Resources and Expansion (CURE) to deny, for lack of information, the request by XXXX (Petitioner) to add the XXXX (XXXX), a local chapter of the XXXX (XXXX), to its field of membership (FOM).

Background. Petitioner, chartered in XXXX, with headquarters in XXXX, XXXX and assets of approximately $XXXX, is a multiple common bond credit union serving approximately XXXX members.

The XXXX is a nonprofit membership organization founded in XXXX and dedicated to XXXX.1 The XXXX currently serves the interests and needs of over XXXX XXXX and has approximately XXXX state, regional, and local XXXX affiliates (also known as chapters). In the past few years, the XXXX has made expansive and fairly rapid organizational changes, adding numerous local chapters including the XXXX.

Petitioner submitted its initial request to add the XXXX to its field of membership on January 25, 2019. By letter of April 5, 2019, CURE notified Petitioner that it would be deferring action on the request pending its submission of additional information to demonstrate its request met the requirements of the NCUA’s Chartering and Field of Membership Manual (Chartering Manual).2 CURE’s deferral noted inconsistencies in the information provided in the credit union’s initial request and requested additional information to confirm the XXXX’s existence and to demonstrate that the chapter has a physical location within reasonable proximity of Petitioner’s service facility. By letter of May 6, 2019, Petitioner responded by providing further narrative and documentary support to demonstrate the XXXX’s chapter existence and location. However, following a review of the Petitioner’s resubmission and supplemental information, CURE denied the credit union’s FOM expansion request by letter dated October 28, 2019. The denial letter cited two bases for denying the request. First, the letter “conclude[d] the XXXX chapter does not exist as a separate legal entity and does not operate in accordance with its

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1 XXXX.
2 12 C.F.R. Part 701, Appendix B.
bylaws and other information included with your request.” Second, the letter noted that “[b]ecause the group has over 16,000 members, the group’s letter must demonstrate the group’s inability to form its own credit union . . . [The information provided] was insufficient to substantiate the group’s inability to form its own credit union.” Petitioner is seeking administrative review of both determinations by the Board.

**Issues on Appeal.** The issues on appeal in this case are (1) whether Petitioner’s request was sufficient to demonstrate that the XXXX chapter exists with a verifiable headquarters location and the group meets the Chartering Manual’s reasonable proximity test; and (2) whether Petitioner’s request was sufficient to substantiate the group’s inability to form its own credit union, as required under the Chartering Manual.

**Legal Standards.** Section 109 of the Federal Credit Union (FCU) Act provides for three types of federal credit union charters: (1) Single common bond (occupational or associational); (2) multiple common bond (more than one group, each having a common bond of occupation or association); and (3) community. The FCU Act’s FOM requirements are implemented in the Chartering Manual.

**Associational Common Bond.** A single associational common bond consists of individuals (natural persons) and/or groups (non-natural persons) whose members participate in activities developing common loyalties, mutual benefits, and mutual interests. Eligible individuals and groups are natural and non-natural person members of the association, employees of the association, and the association itself.

The NCUA determines whether a group satisfies the associational common bond requirements by applying a threshold test and a totality of the circumstances test. Under the Chartering Manual, as a threshold matter, when “reviewing an application to include an association in a federal credit union’s field of membership, NCUA will determine if the association has been formed primarily for the purpose of expanding credit union membership.” If so, the analysis ends and the association is denied inclusion in an FCU’s FOM. Otherwise, the NCUA will apply the totality of the circumstances test to determine if the association satisfies the associational common bond requirements. The totality of the circumstances controls over any individual

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4 12 C.F.R. Part 701, Appendix B.
5 Id.
6 Id. (Chapter 2, Section III.A.1.a). The NCUA’s most recent amendment to this part of the Chartering Manual was in 2015. See 80 FR 25924 (May 6, 2015).
7 Id.
8 The totality of circumstances test considers the following factors:
   1. Whether the association provides opportunities for members to participate in the furtherance of the goals of the association;
   2. Whether the association maintains a membership list;
   3. Whether the association sponsors other activities;
   4. Whether the association’s membership eligibility requirements are authoritative;
   5. Whether members pay dues;
   6. Whether the members have voting rights; to meet this requirement, members need not vote directly for an officer, but may vote for a delegate who in turn represents the members’ interests;
   7. The frequency of meetings; and
factor in the test. However, the primary focus is on factors 1 through 4. The Chartering Manual lists certain examples of associations that may or may not qualify as having an associational common bond, and it states that educational groups, student groups, and consumer groups may qualify as having an associational common bond. Additionally, the Chartering Manual specifies twelve types of associational groups that the NCUA automatically approves without further review.

Local Chapters. The associational common bond requirements in the Chartering Manual generally address larger national associations but do not directly address associations organized with local chapters or other divisions. However, the preamble to the 2003 final rule provides that “[i]f a multiple group credit union wishes to add just a chapter of the national association, the office of the chapter must be in reasonable proximity to the credit union.” Thus, the agency’s current procedure is to apply the reasonable proximity test to local chapters of national associations, due to the express mention of the reasonable proximity test to the exclusion of other tests.

Reasonable Proximity. The reasonable proximity test is intended to ensure that the group is within the area of the credit union so members can have adequate access to its services. The FCU Act permits a multiple common bond federal credit union to add a select group to its FOM if the credit union is within reasonable proximity to the location of the group and if, among other factors, the formation of a separate credit union is not practicable. A federal credit union may only add groups that are “within reasonable geographic proximity” of the credit union, defined as “within the service area” of a service facility of the federal credit union. Under the Chartering Manual, a multiple common bond FCU’s service area is the area that can reasonably be served by the service facilities accessible to the groups within its FOM. The service area will most often coincide with that geographic area primarily served by the service facility. Additionally,

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8. Separateness—NCUA reviews if there is corporate separateness between the group and the federal credit union. The group and the federal credit union must operate in a way that demonstrates the separate corporate existence of each entity. Specifically, this means the federal credit union’s and the group’s respective business transactions, accounts, and corporate records are not intermingled.

9. Id.

10. Id.

11. Id. (Chapter 2, Section III.A.1.c).

12. Id. (Chapter 2, Section III.A.1.b). These groups are alumni associations; religious organizations; electric cooperatives; homeowner associations; labor unions; scouting groups; certain parent teacher associations; chamber of commerce groups; certain athletic booster clubs; certain fraternal organizations; organizations having a mission based on preserving or furthering the culture of a particular national or ethnic origin; and organizations promoting social interaction or educational initiatives among persons sharing a common occupational profession.


15. 12 C.F.R. Part 701, Appendix B (Chapter 2.IV.A.1).

16. Id.

17. A service facility for multiple common bond FCUs is defined as a place where shares are accepted for members’ accounts, loan applications are accepted or loans are disbursed. This definition includes a credit union owned branch, a mobile branch, an office operated on a regularly scheduled weekly basis, a credit union owned ATM, or a credit union owned electronic facility that meets, at a minimum, these requirements. A service facility also includes a shared branch or a shared branch network if either: (1) the credit union has an ownership interest in the service facility either directly or through a CUSO or similar organization; or (2) the service facility is local to the credit
the groups served by the FCU must have access to the service facility. The non-availability of other credit union service is a factor to be considered in determining whether the group is within reasonable proximity of an FCU wishing to add the group to its FOM.

The NCUA will consider a select group as a whole to be within a multiple common bond FCU’s service area when:

- A majority of the persons in a select group live, work, or gather regularly within the service area;
- The group’s headquarters is located within the service area; or
- The group’s “paid from” or “supervised from” location is within the service area.

**Documentation Requirements.** A multiple common bond credit union requesting an FOM expansion must submit a formal written request signed by an authorized credit union representative, to the Director of CURE. For requests to add groups of 5,000 or more primary potential members, the credit union’s written request must include a letter (or equivalent) from the group indicating (1) that the group wants to be added to the FCU’s FOM; (2) whether the group presently has other credit union service available; (3) the number of persons currently included within the group to be added and their locations; (4) the group’s proximity to credit union’s nearest service facility; (5) why the formation of a separate credit union for the group is not practical or consistent with safety and soundness standards; (6) if the group is eligible for membership in any other credit union, documentation to support inclusion of the group under the overlap standards (in Chapter 2, IV.E); and (7) for associational groups, the most recent copy of the group’s charter and bylaws (or equivalent).

With respect to item (5) above, the Chartering Manual states that to demonstrate the group’s inability to form a separate credit union, the credit union need not address every item on the following list, but those issues that are relevant to its particular request:

- Member location—whether the membership is widely dispersed or concentrated in a central location.
- Demographics—the employee turnover rate, economic status of the group’s members, and whether the group is more apt to consist of savers and/or borrowers.
- Market competition—the availability of other financial services.
- Desired services and products—the type of services the group desires in comparison to the type of services a new credit union could offer.
- Sponsor subsidies—the availability of operating subsidies.

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18 Id.
19 Id.
20 Id.
21 Written requests for an FOM expansion must use the Application for Field of Membership Amendment (NCUA 4015-EZ, NCUA 4015-A or NCUA 4015).
22 12 C.F.R. Part 701, Appendix B (Chapter 2, IV.B.3).
23 Id.
• The desire of the sponsor—the extent of the sponsor's interest in supporting a credit union charter.
• Employee interest—the extent of the employees’ interest in obtaining a credit union charter.
• Evidence of past failure—whether the group previously had its own credit union or previously filed for a credit union charter.
• Administrative capacity to provide services—will the group have the management expertise to provide the services requested.\(^\text{24}\)

Under the 2003 preamble language cited above, for chapter applications, the agency applies the reasonable proximity test and documentation requirements to a local chapter, as opposed to a national association as a whole.

**Analysis.** On appeal, Petitioner alleges two errors. First, Petitioner argues CURE incorrectly determined that the XXXX chapter does not exist. Second, Petitioner contends CURE erred in concluding that the documentation it submitted was insufficient to substantiate the group’s inability to form its own credit union.

**Chapter Existence.** In support of its appeal, Petitioner provided a copy of the State of XXXX Certificate of Incorporation for the XXXX, dated October 1, 2019,\(^\text{25}\) to substantiate the XXXX’s existence. However, based on the administrative record, it appears CURE did not receive or review a copy of the XXXX’s October 1, 2019 Certificate of Incorporation prior to issuing its denial on October 28, 2019. Rather, Petitioner included in its May 6, 2019 resubmission copies of Certificates of Alternate Name (dated August 31, 2018) evidencing the registration of alternate names for the XXXX chapters of XXXX, including XXXX as an alternate name for XXXX.

Relying on the information it had at the time of its review,\(^\text{26}\) CURE noted that the documentation showed XXXX was registered as a foreign (XXXX) corporation doing business in XXXX and operating under three alternative names: XXXX, XXXX, and XXXX. CURE also noted the documents did not provide the names or addresses of any board members or officers, and listed a P.O. Box in XXXX, XXXX as the entity’s main business address. The documentation available at the time of CURE’s review did not demonstrate that XXXX was a separate chapter of XXXX in the state of XXXX, with a XXXX office or business address. CURE’s April 5 deferral letter also noted inconsistencies with respect to the chapter name and the service areas of the three XXXX XXXX local chapters.\(^\text{27}\) Accordingly, based on the record at that time, CURE

\(^{24}\) Id.

\(^{25}\) The NCUA’s Special Counsel to the General Counsel independently verified through the State of XXXX’s XXXX website that a Certificate of Incorporation was issued for the XXXX (certificate number XXXX) on October 1, 2019 using the XXXX system. As of January 7, 2020, the certificate was active.

\(^{26}\) CURE noted that it independently verified and obtained the certificates from the XXXX’s website. The documentation obtained by CURE included pages not provided by Petitioner.

\(^{27}\) Specifically, CURE’s April 5, 2019 deferral letter states, “[w]e also found that the three aforementioned XXXX chapters (XXXX, XXXX and XXXX), share the same headquarters address at XXXX, serving primarily the exact same geographic area, and each have . . . presumably the same employees.”
reasonably concluded that the XXXX did not exist as an entity separate from XXXX,\(^{28}\) and “[a]lthough the group is within reasonable proximity [11.2 miles from the credit union], it does not legally or physically exist.”\(^{29}\)

CURE also noted deficiencies with respect to Petitioner’s evidence of the chapter’s office location:

CURE previously deferred [Petitioner’s] application because of questions about the validity of the headquarters location. The location is a XXXX shared office facility. CURE contacted the XXXX office and was unable to confirm the XXXX maintained staff at the location. [Petitioner] asserted, without evidence, the location has six staff members but all were out of the office on the day CURE contacted XXXX. [Petitioner] further asserted the XXXX representative answering CURE staff’s inquiry was a temporary employee who lacked knowledge of the XXXX. Because [Petitioner] offered no proof that the office has regular operations, CURE continues to question the validity of this office as headquarters meeting the requirements of the Chartering and Field of Membership Manual.\(^{30}\)

Establishing XXXX’s existence and office location is necessary to determine if the group meets the reasonable proximity test under the Chartering Manual. While use of a shared office facility such as a XXXX\(^{31}\) is not in and of itself disqualifying,\(^{32}\) based on the limited and inconsistent information available at the time of its review about the XXXX’s existence and its XXXX, it was reasonable for CURE to conclude that the administrative record did not establish the group’s reasonable proximity to the credit union’s facilities.

*Ability for Form a Credit Union.* CURE’s initial review noted that the group did not adequately address whether it has the ability to form a credit union. However, CURE’s April 5, 2019 deferral letter failed to note this deficiency and CURE did not request additional documentary support to demonstrate the group’s inability to form a credit union. Nevertheless, CURE’s October 25, 2019 denial letter noted that the information provided was insufficient to meet the documentation requirements and cited, as a basis for its denial, Petitioner’s failure to address the following factors to support the XXXX’s inability to form its own credit union: (1) member

\(^{28}\) CURE’s October 28, 2019 Denial Letter.
\(^{29}\) CURE’s March 28, 2019 GENISIS Worksheet.
\(^{30}\) CURE’s Office Summary.
\(^{31}\) According to the XXXX website, a “XXXX” rental provides the benefit of a business address in a “prime location,” a live receptionist to “take your calls,” mail handling, and the option to customize the rental plan with call answering or “the use of a private office.” See XXXX (last accessed January 22, 2020).
location; (2) member demographics; (3) market competition; (4) desired products and services; (5) interests of the group; and (6) administrative capacity of the group.  

Petitioner included in its appeal a memo dated August 2, 2019 from the XXXX’s board addressing the omitted factors cited by CURE in its denial. However, this information was not included with Petitioner’s initial request and, perhaps because CURE did not request additional evidence in its April 5 deferral, Petitioner also did not provide any additional information to support the group’s inability to form a credit union with its May 6, 2019 resubmission. Given that CURE had already noted this deficiency in its initial review, CURE could reasonably have allowed Petitioner the opportunity to provide additional evidence at the deferral stage. However, based on the limited information available at the time of its review, it was reasonable for CURE to conclude that Petitioner did not meet the Chartering Manual’s documentation requirements to demonstrate the group’s inability to form its own credit union. Moreover, even if CURE had asked for, and received, additional information on deferral and agreed that Petitioner met the Chartering Manual’s documentation requirements, the administrative record still lacks sufficient evidence to establish the XXXX’s existence and reasonable proximity to the credit union’s facilities.

**Conclusion.** Upon review, CURE’s denial of Petitioner’s request to expand its FOM to add the XXXX, a local chapter of the XXXX, was reasonable and appropriate at the time of its determination. Given the conflicting and limited information available at the time of CURE’s review, the administrative record lacked substantial evidence that the XXXX chapter exists with a verifiable headquarters location, and thus, the group did not meet the Chartering Manual’s reasonable proximity text. Accordingly, even if CURE credited the XXXX’s assertion that it was unable to form its own credit union, denial was appropriate.

In its appeal, Petitioner submitted additional evidentiary support and information documenting the XXXX’s existence and inability to form its own credit union that CURE did not have the opportunity to review during either its initial analysis or its resubmission analysis. Thus, while the Board affirms CURE’s decision under these circumstances, the Board emphasizes that this Decision and Order does not preclude Petitioner from submitting a new FOM expansion request to provide additional, updated information for CURE’s consideration.

To provide guidance to CURE, Petitioner, and other potential applicants regarding the Board’s expectations with respect to chapter applications, the Board notes that evidence considered

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33 It should be noted that the Chartering Manual does not require a credit union to address every factor on the list, but rather those issues that are relevant to its particular request. 12 C.F.R. Part 701, Appendix B (Chapter 2, IV.B.3).

34 Courts have remarked that “[a]dministrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful.” James O. Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. Pa. L. Rev. 145 (1966) (citing *ICC v. City of Jersey City*, 322 U.S. 503, 514 (1944)).

35 Where Congress unambiguously vests an agency with general authority to administer an Act, such as the NCUA with respect to the FCU Act, an agency may establish interpretations through both rulemaking and adjudication. See e.g., *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 307 (2013).
supportive of a chapter’s existence for purposes of the reasonable proximity test may include, but is not limited to, the following indicia:

- A mailing address specific to the chapter.
- Invoices in the name of the chapter, for telecommunications services or post office boxes, for example.
- State incorporation or tax records.
- Employee information.
- A chapter-specific email address and/or website.
- Evidence of communications from the chapter to its members, such as newsletters or meeting notices.
- Copies of invoices or rental contracts for office space (including Regus or other shared workspace contracts).
- Any advertising or promotional materials.
- Information about events the chapter sponsors or has attended.

Should Petitioner choose to reapply and submit to CURE additional information to establish a sufficient administrative record to demonstrate that the XXXX exists as a chapter of the XXXX within reasonable proximity of Petitioner’s service facility, to expedite the request, the Board encourages ongoing dialogue with CURE to address the deficiencies discussed in the previous denial.

**Order**

For the reasons set forth above, it is ORDERED as follows:

The Board affirms the decision by the Director of the Office of Credit Union Resources and Expansion, and denies the appeal of XXXX.

The Board’s decision constitutes a final agency determination and is subject to judicial review in accordance with Chapter 7 of Title 5 of the United States Code.

So ORDERED this 21st day of May, 2020, by the National Credit Union Administration Board.

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Gerard Poliquin
Secretary of the Board