legislation will go a great distance to prevent the kind of thing that happened in the Founders system; that fundamentally it will prevent or put under supervision—and that is the only place where you can actually prevent it—the possible breaches of fiduciary relations; that the great fault in Founders was the transactions between companies; and that they will be substantially averted by putting them under regulation.

There is another point, too, about regulation that nothing else can accomplish, and that is the fact that although restrictions fail one after another—and you have seen how easy it is to avoid restrictions—the flexibility of the administrative process is such that a commission charged with the general duty of preventing violations of the fiduciary relation can chart and follow the various forms in which these violations might otherwise occur.

Senator WAGNER. Is it your opinion, as I read in various editorials, that the legislation, when one considers the abuses that have been disclosed, is very mild?

Mr. STERN. I think, Senator, in certain places it might have been heavier. For instance, the very officers of the corporation said that there should be no such thing as a wholly owned distributing company. The legislation does not go that far.

Others have said that there should be no such thing as a banker control of companies.

Senator FRAZIER. Can you tell us how Great Britain cleaned up the situation over there that Dr. Robinson described in his book?

Mr. STERN. I should like to do that, but I do not really think I can, because I do not know. I had nothing to do with that part of it, and my knowledge is so skimpy on that point that I would hate to try to tell you about it.

Senator WAGNER. Perhaps Judge Healy can tell us.

Mr. HEALY. We will have someone who knows about the subject speak about that.

I would like to call attention with respect to something Mr. Stern mentioned. I would like to call attention to the fact that this bill sets up accounting controls, and this kind of accounting for these pseudo, make-believe profits, that were not profits at all, could not happen under any rational system of accounting control by any regulatory body or by classification of accounts.

I think that the accounting control that is provided for in this bill would be very effective to prevent the repetition of a thing like the Founders.

May I say one other word?

Senator WAGNER. Certainly.

Mr. HEALY. I have here—I do not offer it for the record necessarily—a copy of the Commission's opinion in the matter of H. M. Byllesby & Co., where the Commission denied Byllesby's application for an exemption as a holding company as a result of what happened with regard to the Standard Gas & Electric.

I call attention to it because if any of the committee is interested in getting the further history of the relationships between the investment bankers and the companies in the Standard group, they can get from this opinion—that is, I think it goes a long way toward demonstrating that the interest of the investment bankers in combining with the United Founders and the United States Electric Power Corporation to get a strong position in Standard Gas & Electric was actuated by

a desire to get the underwriting business of the Standard Gas & Electric subsidiary companies.

There was a company of about a billion dollars—a consolidated balance sheet—and these investment bankers, after this situation that Mr. Stern described, had divided up the banking business in percentages that were actually established in a written contract that is described in this opinion.

Senator WAGNER. I think perhaps the entire opinion ought to go into the record.

Mr. HEALY. Very well.

(The document referred to is as follows:)

[For Immediate Release Monday, January 15, 1940.]

Securities and Exchange Commission, Washington. In the Matter of H. M. Byllesby & Co. and The Byllesby Corporation, File Nos. 31-379 and 31-420. Findings and Opinion of the Commission

[Public Utility Holding Company Act of 1935, sections 2 (a) (7), 3 (a) (3), and 3 (a) (5)]

Appearances.—Gerhard A. Gesell and Sanford L. Schamus, for the Public Utilities Division of the Commission; Herbert H. Thomas, for H. M. Byllesby & Co. and the Byllesby Corporation.

H. M. Byllesby & Co. and the Byllesby Corporation have filed separate applications under section 2 (a) (7) of the Public Utility Holding Company Act of 1935 (hereinafter referred to as the "act") for orders declaring that each is not a holding company under clause (A) of that subsection. In the alternative, the applicants have requested that the Commission should find that they are exempted from the provisions of the act under sections 3 (a) (3) and 3 (a) (5) thereof.

Section 2 (a) (7) (A) defines the term "holding company" for purposes of the act to mean—

"any company which directly or indirectly owns, controls, or holds with power to vote 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; * * *."

Section 2 (a) (7) further provides:

"The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies." [1]

H. M. Byllesby & Co. (hereafter called "Byllesby") is a Delaware corporation with principal offices in Chicago, Ill.; and branch offices in New York City, Philadelphia, Pittsburgh, and Minneapolis. Its primary business is the underwriting and distribution of security issues. Since 1930, Byllesby has owned 330,000 shares [2] of common stock, series B, out of a total of 440,000 shares, of Standard Power & Light Corporation (hereafter sometimes referred to as "Standard Power"), a holding company which is registered under the act. Standard Power, in turn, holds the majority of the common stock of Standard Gas & Electric Co. (hereafter sometimes referred to as "Standard Gas"), another regis-

[1] The section likewise provides that the filing of an application thereunder in good faith shall exempt the applicant from any obligation, duty, or liability as a holding company until the Commission has acted upon the application. It is also provided in this section that as a condition to the entry of an order granting any such application, the Commission may require the applicant to apply periodically for a renewal of such order and do or refrain from doing various specified acts in order to insure that the conditions of clauses (i), (ii), and (iii) of the quoted paragraph are satisfied.

[2] Since November 9, 1936, Byllesby's ownership has consisted of a voting trust certificate representing said shares issued pursuant to a voting trust agreement hereinafter described.

tered holding company, and the dominant company in one of the largest electric utility systems in the United States.[3]

The Byllesby Corporation is the parent of Byllesby. It holds 217,622 shares out of the 398,592 outstanding shares of class B common stock of Byllesby, or approximately 55 percent of the total voting stock.[4] The Byllesby Corporation is a "shell" holding company; its sole function is to hold a majority of the voting securities issued by Byllesby, and thereby perpetuate the control of the latter company by its officers, directors, and persons closely affiliated with them.[5] Since the Byllesby Corporation admittedly controls Byllesby, disposition of its application turns upon our determination of whether Byllesby is a holding company within the meaning of section 2 (a) (7). If Byllesby is a holding company it is clear that the Byllesby Corporation is likewise a holding company under the statutory definition.

It is obviously impossible to comprehend the present relation of Byllesby to Standard Power and Standard Gas unless we undertake to examine the relationships previously existing between those companies. Accordingly, we briefly consider some of the relevant historical facts.

The predecessor to Byllesby, carrying same name, organized the Standard Gas & Electric Co. under the laws of Delaware in 1910. In return for the transfer to Standard Gas of utility properties previously acquired by Byllesby's predecessor company, Standard Gas transferred to it a majority of the voting stock of the company. From that time until 1930, Byllesby's predecessor and Byllesby, through ownership of voting securities, interlocking directors and officers, and otherwise, completely dominated Standard Gas and its subsidiaries.

Control of Standard Gas enabled Byllesby to guide the financial policies of Standard Gas and its subsidiaries and to obtain for itself primary participation in the underwritings of their securities. Byllesby's investment banking functions greatly expanded during this period; the growth of this phase of its business was largely commensurate with the increase in number and amount of security issues by Standard Gas and its subsidiaries.

Throughout this period, Byllesby, by virtue of its denomination of Standard Gas, caused Standard Gas and its subsidiaries to enter into transactions involving the purchase and sale of utility properties and securities, which netted Byllesby large profits. Through affiliated management corporations Byllesby likewise profited from charges for engineering, construction, legal and similar services to Standard system companies. The evidence taken before the Federal Trade Commission in its comprehensive study of the utility industry sets forth in detail a large number of these transactions.[6] Illustrative of these transactions is the acquisition by Standard Gas of a controlling interest in the Philadelphia Co. and affiliated corporations. For negotiating this transaction, Byllesby and Ladenburg, Thalmann & Co., a banking concern which previously controlled the Philadelphia Co., obtained a profit of over $16,000,000.[7] Of this sum, Byllesby received over $4,000,000. Apparently, Ladenburg, Thalmann & Co.'s enormous profit represented the price paid for surrendering partial control of the Philadelphia Co. system to the Byllesby and Standard Gas interests.[8]

By September 1929, other interests including a number of investment bankers had accumulated substantial quantities of the common stock of Standard Gas, with the purpose of obtaining a voice in the management of that company. These interests included United Founders Corporation, American Founders Corporation, Hydro-Electric Securities Corporation, Harris Forbes & Co., W. E. Langley & Co., A. C. Allyn & Co., Inc., Victor Emanuel, Thomas A. O'Hara, J. Henry Schroder Banking Corporation, and the Seaboard National Corporation Thereupon, these interests pooled their stock in the United States Electric Power Corporation, a Delaware corporation (hereinafter sometimes referred to as U. S. E. P.), which they organized. There ensued what the lare R. J. Graf, formerly president of Byllesby, described as "a real fight for control" between Byllesby and the interest for which U. S. E. P. spoke, which endangered the banking position theretofore enjoyed by Byllesby. By the end of 1929, U. S. E. P.

[3] It was conceded that the applicants, Standard Power, Standard Gas, and their subsidiaries make use of the United States mails in the conduct of their daily business, and that certain of the subsidiaries of Standard Gas transmit electric current across State lines.

[4] Byllesby has issued and outstanding 60,012 shares of preferred stock, 458,380 shares of class A common stock, and 398,592 shares of class B common stock. The class B stock alone carries full voting rights.

[5] The stock of the Byllesby Corporation is closely held. Its management stock, the only class having full voting power, is owned entirely by 7 individual stockholders. The common stock is held by about 30 individual stockholders.

[6] The facts set forth on pp. 261 to 663, inclusive, of p. 36 of the Federal Trade Commission Report (S. Doc 92, 70th Cong., 1st sess., (1931)) were introduced into the record without objection.

[7] Federal Trade Commission Report, supra, p. 36, p. 432.

[8] See Examiner Thomas W. Mitchell's report, in Federal Trade Commission Report, supra, p. 36, p. 433.

was in possession of 580,000 shares of Standard Gas common stock accumulated by its sponsors and itself at costs ranging from $60 to $245 per share. A pending suit brought by the sponsors of U. S. E. P. threatened Byllesby with cancelation of substantially all of the voting securities of Standard Gas held by Byllesby. The result of the fight for control was an agreement between the conflicting interests, involving among other things, a recapitalization of Standard Power and Standard Gas and the allocation among the parties of specified percentages in future underwritings of securities in Standard Power, Standard Gas, and their subsidiaries.[9]

As a result of the agreement, Standard Power, which had previously been a subsidiary of Standard Gas, was transformed into the parent of Standard Gas, holding a majority of its voting securities.[10] Standard Power thereby replaced Standard Gas as the top holding company in the Standard system. The certificate of incorporation of Standard Power was amended to reclassify its common stock into two classes of stock: Common stock, and common stock, series B. The common stock, series B, was empowered to elect a minority of the board of directors of Standard Power, but these minority directors, designated class B directors, were authorized to vote the common stock of Standard Gas held by Standard Power to elect a majority of the directors of Standard Gas. On the other hand, the common stock of Standard Power was authorized to elect a majority of the board of directors of Standard Power, which directors in turn could vote the common voting stock of Standard Gas to elect only a minority of the latter's directors. Byllesby emerged from the readjustment with 330,000 shares out of 440,000 outstanding shares of common stock, series B. Accordingly, as a result of this complicated arrangement, Byllesby retained the power to elect a majority of the board of directors of Standard Gas.[11]

As a part of the general settlement resulting in the foregoing readjustments, Byllesby and U. S. E. P. entered into an understanding [12] which was reduced to a detailed formal memorandum, relative to the extent and character of each party's participation in future financing of the Standard system companies. In general, the memorandum (hereafter called the bankers' agreement) provided that future financing by Standard system companies should be allocated as to interest and liability on the basis of 25 percent to Byllesby and 75 percent to U. S. E. P.[13] In the main, this apportionment corresponded with the relative stock interests of Byllesby and U. S. E. P. in Standard Power. Provision was made that if other banking houses were invited to participate in the underwriting of securities of Standard system companies, the amount permitted to the outsiders would, with certain designated exceptions, be deducted proportionately out of the 75 percent interest of U. S. E. P. and the 25 percent interest of Byllesby. The memorandum likewise contained detailed provisions concerning position and leadership in the underwriting of securities issued by the various companies in the Standard system.

The stockholdings of U. S. E. P. and Byllesby remained constant from the time the foregoing understanding was reached until June 1, 1936. During that period, 23 issues of securities were distributed by Standard system companies. In each instance, the underwriting was in accordance with the terms of the bankers' agreement. Thus, in each of the 10 issues distributed during that period in the underwriting of which no outside bankers were invited to participate, Byllesby received 25 percent of the underwriting and the U. S. E. P. bankers received 75 percent. Where outside bankers were permitted to participate, deductions from the amounts allotted to Byllesby and U. S. E. P. generally followed the terms of the bankers' agreement. Similarly, there was complete adherence to the provisions of the bankers' agreement with respect to position and leadership in each underwriting.

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[9] Standard Power, Standard Gas, and their subsidiaries when considered as a group, are sometimes referred to hereafter as Standard system companies.

[10] As a result of the readjustment, Standard Power held 1,160,000 shares out of 2,162,607 shares of Standard Gas common stock, the sole voting stock.

[11] After the readjustment, U. S. E. P. held 1,210,000 shares out of 1,320,000 outstanding shares of common stock of Standard Power. This enabled U. S. E. P. to elect a majority of the board of directors of Standard Power and a minority of the board of directors of Standard Gas.

[12] A third party to this understanding was Ladenburg, Thalmann & Co., which as stated above, had previously exercised joint control with Byllesby over the Philadelphia Co. and its subsidiaries. The Philadelphia system had been acquired by Standard Power prior to 1929 under an understanding by which Byllesby and Ladenburg, Thalmann & Co. exercised joint control through Standard Power. Ladenburg, Thalmann & Co. had participated with Byllesby in underwritings of the Philadelphia Co. and subsidiaries. Under the bankers' agreement, Ladenburg, Thalmann & Co. retained certain rights to participate in underwritings of the Philadelphia Co. system.

[13] The percentages differed in the case of underwritings of securities of the Philadelphia Co. and its subsidiaries in order to enable Ladenburg, Thalmann & Co. to continue to participate in underwriting the securities of those companies.

The common stock of Standard Power owned by U. S. E. P. was sold in June 1936; the major portion was acquired by a group of investment bankers which included many of the bankers who had been connected with the management of U. S. E. P.[14] As of the last record date for the determination of stockholders entitled to vote at annual stockholders' meetings of the corporation, there had been no change in the holdings of Standard Power stock by these investment bankers.

It is clear that as of November 9, 1936, Byllesby by virtue of the direct ownership of 330,000 shares of common stock, series B, of Standard Power, which enabled it to elect a majority of the board of directors of Standard Gas, effectively controlled the latter company and all of its subsidiaries. The ownership of such stock also enabled it, in conjunction with the bankers, to control Standard Power. Under these circumstances, the act required that Byllesby register as a holding company. To obviate that requirement, and to avoid the duties which the Act imposes upon registered holding companies, Byllesby sought to alter its relationship with the Standard system companies.[15] To that end, it caused officers and directors of Byllesby and The Byllesby Corporation who held positions in any of the Standard system companies to resign from their conflicting positions, and on November 9, 1936, it entered into a voting trust agreement with three voting trustees concerning the Standard Power common stock, series B. In accordance therewith, Byllesby transferred its 330,000 shares of common stock, series B, of Standard Power to the voting trustees, and received in return a voting trust certificate.

In most respects the voting trust agreement is not novel. It is, however, unusual in that, while it purports on its face to be an agreement between the voting trustees and all holders of the common stock, series B, of Standard Power, it provides that no holder can deposit his shares thereunder without the prior permission of Byllesby. The power to bar the entry of outside stockholders renders the voting trust virtually a closed trust between Byllesby and the voting trustees. The life of the voting trust is fixed at 10 years "unless sooner terminated in accordance with law."

The initial voting trustees were Bernard W. Lynch, Henry C. Cummins, and Matthew A. Morrison. These persons had been closely connected with Byllesby and the Byllesby Corporation for many years prior to their selection. Cummins had served as a director of Byllesby from 1919 to 1931 and of the Byllesby Corporation from 1925 to September 14, 1938. Morrison had intermittently served as vice president, treasurer, and member of the executive committee of Byllesby from 1914 to October 27, 1936; he likewise served as secretary and treasurer of the Byllesby Corporation from 1925 to 1936. Lynch joined the Byllesby organization in 1905, and at various times until September 1936 served as vice president and director of Byllesby and vice president and director of the Byllseby Corporation. Prior to becoming voting trustees, those persons resigned from their various positions in Byllesby and the Byllesby Corporation and surrendered their management stock in the latter. All of them, however, retained substantial interests in the common stock of the Byllesby Corporation.[16] The long business association of these trustees with Byllesby and their evident interest in the affairs of Byllesby were factors which unquestionably prompted their selections. It was stated at the hearing that the voting trustees accepted their positions as an accomodation to Byllesby.

In September of 1935 Standard Gas filed a voluntary petition for reorganization under section 77B of the Bankruptcy Act in the United States District Court in Delaware. By order of the court the debtor was permitted to continue in possession. Thus the pendency of the reorganization proceeding did not materially alter the management of that company. Oh March 5, 1938, the court confirmed a plan of reorganization [17] of Standard Gas, which involved, among other things, a diminution in the voting power of the company's common stock. Therefter, the common stock could elect only four out of nine directors; the holders of the prior preferred stock and the $4 cumulative preferred stock were empowered to elect two directors each, and the registered holders of outstanding notes and debentures were authorized to elect one director.

[14] J. Henry Schroder Banking Corporation, Emanuel & Co., W. C. Langley & Co., and A. C. Allyn & Co., Inc., all of whom had been among the bankers connected with the management of U. S. E. P. retained, by direct purchases, interests in Standard Power which they had previously held through U. S. E. P. Bancamerica Blair Corporation, which had not been previously interested in U. S. E. P., took a large interest in Standard Power, and Granberry, Safford & Co., also new to the picture, took a smaller interest.

[15] Byllesby further stated that it desired to alter its relationship with the Standard system in order that it might not be prejudiced in obtaining participation in the underwriting of issues of other utility companies

[16] Lynch held of record 9,850 shares of the Byllesby Corporation common stock; Morrison, 14,993 shares and Cummins, 2,000 shares. In addition, Morrison and Cummins owned small amounts of Byllesby stock.

[17] Technically it was a reorganization; actually it made very few changes of importance.

The record discloses that there has been one election of directors of Standard Gas since confirmation of the plan of reorganization. At that time, Standard Power, as owner of a majority of the common stock of Standard Gas, elected the four directors to which common stock as a class is entitled. Standard Power was, of course, merely speaking for the interests which controlled it, the investment bankers who held its common stock and the voting trustees for the common stock, series B, owned by Byllesby. In addition, it appears that a fifth director, John K. McGowan, was in effect the nominee of these bankers; McGowan, a close associate of Emanuel & Co., was elected pursuant to the nomination of a $4 preferred stock committee which was under the influence of those bankers.[18]

Mr. Cummins resigned as one of the voting trustees on June 10, 1938, 5 days prior to the commencement of the hearings before the trial examiner.[19] Messrs. Lynch and Morrison continued as voting trustees until the hearings were concluded on July 20. On August 1, 1938, Mr. Morrison resigned. On September 8, 1938, Mr. Lynch, the sole remaining trustee, appointed George F. Doriot and Henry E. Triede, both of whom are asserted to have had no previous connections with Byllesby, to fill the vacancies caused by the resignations of Cummins and Morrison.

Although the hearings before the trial examiner had been closed in July, the Commission, pursuant to request of the parties, ordered that the hearing be reopened on October 5, 1938. Mr. Lynch resigned on October 1, 1938, just before the reopened hearing. The vacancy caused by his resignation had not been filled at the time the record was finally completed.

The evidence at the reopened hearing was directed to the question of the independence of the new trustees. Both of the new trustees testified that because of their short period of service, they had performed no duties as voting trustees. Accordingly, the sole evidence that could be introduced on the issue of independence related to their method of appointment and their conception of a trustee's duties.

Thus, with the exception of the scanty evidence relating to the independence of the new trustees, the whole case was heard before the trial examiner on the facts as they existed prior to, and during the tenure of office of the original voting trustees.

Upon the basis of facts contained in the record, it appears that the interposition of the voting trust has in no way adversely affected Byllesby's participation in the underwriting of securities of Standard system companies. Four issues have been offered to the public since the creation of the voting trust on November 9, 1936. Byllesby has substantially participated in the underwriting of each of these issues. Other members of the original banking group who had purchased the Standard Power common stock from U. S. E. P. likewise participated in the underwriting of these security issues. In addition, Bancamerica Blair Corporation,[20] which was not a party to the original bankers' agreement, but which had purchased a substantial block of Standard Power common stock from U. S. E. P., ascended to a primary position in the financing of the Standard system companies, even though previous to its purchase of Standard Power stock

[18] Control over protective committees by management and bankers is not unusual. The manifold types of such control, the ways in which it is and has been exercised, and some of the abuses resulting therefrom are described in pt. I of our Report on the Study and Investigation of the Work, Activities, Personnel, and Functions of Protective and Reorganization Committees (1937) made pursuant to sec. 211 of the Securities Exchange Act. That the desire of Byllesby and its affiliated banking interests to perpetuate their control through domination of committees is not unusual is shown by the following quotations from this report (p. 873):

"Inside groups, seeking control over the reorganization process, move quickly to gain control over protective committees. Such control is important mainly in that it enables the inside group to obtain the apparent support of security-holders behind its program. The management and bankers of the debtor company are thus able to remain in the background, exerting their influence through protective committees which ostensibly represent the various classes of securities and other claims involved in reorganization. Control over committees facilitates control of legal proceedings, whether such proceedings take the form of receivership or bankruptcy. It also insures to the inside group control over the negotiation of the reorganization plan, control over committee patronage, and a certain amount of control over investigations and litigation concerning the past conduct of the management and the bankers.

"The formation of protective committees has long been regarded a prerogative of the inside group."

And on pp. 875-876:

"Many examples of banker-management selection of committees appear in the various parts of our report. Even the absence of such affiliations by no means precludes the possibility that committee members have been selected by and represent the inside group. Nor need the latter lack influence though few or none of its representatives are on the committee. Inside groups may exert control over committees by financing their operations as well as by selecting their members. Committees dependent upon the debtor company or its bankers for their financial support are not likely to take action adverse to those interests. In sum, the prevailing pattern of reorganization is that the bankers and management have dominated the selection, and by and large, the policies, of protective committees."

[19] Mr. Cummins assigned as the reason for his resignation the fact that he and his brother had in May 1938, inherited additional holdings in common stock of the Byllesby Corporation amounting to approximately 20,000 shares, and suggested that his continued service as a voting trustee might result in serious personal embarrassment.

[20] Since the filing of the application herein, the name of this firm has been changed to Blair & Co., Inc.

it had never actively participated in such financing. Bancamerica Blair Corporation's sudden participation in Standard financing is illustrative of the exertion of stockholder control to the end of distributing the underwriting among the stockholders in approximate proportion to their holdings.

Against this background, we turn to a consideration of the question whether Byllesby is entitled to a declaration that it is not a holding company within the meaning of section 2 (a) (7) (A) of the act.

At the oral argument before the commission, counsel for the applicants argued that Byllesby was not even prima facie a holding company under section 2 (a) (7) (A), for the reason that while it was the beneficial owner of the 330,000 shares of common stock, series B, which it had deposited with the voting trustees, it did not own those securities "with power to vote." It was urged that the language of Section 2 (a) (7) (A)—"holding company means any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public utility company or of * * * a holding company"—embraces only situations where a company directly or indirectly owns with power to vote. controls with power to vote, or holds with power to vote, 10 percent or more of the designated securities.

Regardless of the appropriateness of considering, on an application of this character, whether Byllesby is prima facie a holding company, we are convinced that the construction of section 2 (a) (7) (A) for which counsel for the applicants contends, is untenable. The punctuation of that subsection makes it clear that the phrase "with power to vote" qualifies only the word "holds," and not the words "owns" or "controls." While commas appear after the words "owns" and "controls," the word "holds" which immediately precedes the phrase, "with power to vote," is not separated from that phrase by a comma. The punctuation, we believe, merely gives expression to the congressional purpose of preventing easy avoidance of the statutory definition by model arrangements which do not materially alter the status of companies owning or controlling voting securities of a public utility or holding company.

Section 2 (a) (17) which defines the term "voting security" points to the same conclusion. That section provides in part:

" 'Voting security' means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company, or any security issued under or pursuant to any trust, agreement, or arrangement whereby a trustee or trustees or agent or agents for the owner or holder of such security are presently entitled to vote in the direction or management of the affairs of a company * * *."

Under this statutory definition, it is clear that ownership of voting trust certificates constitutes ownership of "voting securities" within the meaning of the act. Accordingly, the beneficial ownership of 330,000 shares of common stock, series B, of Standard Power, a registered holding company, which comprises more than 10 percent of the outstanding voting securities of the latter company, renders Byllesby prima facie a holding company under section 2 (a) (7) (A).

It is clear, therefore, that Byllesby is a holding company within the definitions of the act, unless we are able to find, in accordance with section 2 (a) (7), that it "(i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies." All three conditions, it will be noted, must exist before we may enter an order declaring a company not to be a holding company under clause (A).

In our opinion, the applications under section 2 (a) (7) cannot be granted for want of a showing that condition (iii) has been satisfied. Since our inability to find that the latter condition has been met precludes our declaring, on the facts now before us, that applicants are not holding companies under clause (A), we deem it unnecessary to decide whether the first two of the quoted conditions have been met.

The term "controlling influence" which is employed in section 2 (a) (7) is not defined in the act. We must, therefore, interpret the term in its statutory context and in the light of its legislative history and decisions of the courts dealing with somewhat analogous provisions.[21]

It seems clear that Congress meant by the term "controlling influence" something less in the form of influence over the management or policies of a company, than "control" of a company. For, while the existence of "control" constitutes an absolute bar under clause (i) of section 2 (a) (7) to the entry of an order declaring a company not to be a holding company under clause (A), the existence of a "controlling influence" precludes such an order only if it is "such a controlling influence * * * as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies."

We deem it equally plain that the form in which a "controlling influence" is exercised is unimportant; it is the fact of "controlling influence" rather than the device employed to achieve that end that is important. Thus it is stated in the House of Representatives Committee Report (74th Cong., 1st sess., 1935, H. R. Rep. No. 1318, p. 9), that flexibility

"* * * is necessary in order that title I can meet the varied and subtle forms which corporate interrelationships have in the past and will in the future take."

Moreover, the existence of a "controlling influence" is not dependent upon the possession of a majority of the voting stock of a company. In *United States* v. *Union Paicfic R. R. Co.* (226 U. S. 1 (1912)), it was held that possession by the Union Pacific Railroad Co. of about 48 percent of the stock of the Southern Pacific Railroad Co. assured the former company "control" over the latter, and subjected it to the Sherman Act. The following language from the opinion is apposite:

"But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction percent which was afterward somewhat increased and diminished until about 46 percent of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46 percent is ample to control the operations of the corporation" (p. 95).

More recently in *Natural Gas Company* v. *Slattery* (302 U. S. 300 (1937)), the Supreme Court, in sustaining an inquiry by the Illinois Commerce Commission into the contractual relationships between affiliated companies, pointed out that "control" may exist under circumstances other than the ownership of a majority of voting stock. In that case it was contended that the Illinois Public Utility Act was unconstitutional in that it authorized investigation of, and required reports from, "affiliated interests" without definite proof of actual control or want of arm's-length bargaining. The Supreme Court rejected this contention and sustained the Illinois statute. On the particular question of control, the Court said at pages 307–308:

"We have not said, nor do we perceive any ground for saying, that the Constitution requires such an inquiry to be limited to those cases where common control of the two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, as the statute recognizes, there are other methods of control of a corporation than through such ownership. Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry."

In its recent decision in *Rochester Telephone Corporation* v. *United States* (307 U. S. 125, 59 S. Ct. 754 (1939)), the Supreme Court swept aside all rigid or artificial tests of control. In answer to the contention that actual control could not be exerted through the ownership of only one-third of the common stock, the Supreme Court said (pp. 145–146):

"The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining 'control' of

[21] Cf. *New York Central Securities Corp.* v. *United States* (287 U. S. 12); *Federal Radio Commission* v. *Nelson Bros. Co.* (289 U. S. 266).