

Suk

NOT DESIGNATED FOR PUBLICATION

No. 87,084

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KANSAS MUNICIPAL ENERGY AGENCY; CITY OF BALDWIN CITY, KANSAS;
CITY OF FREDONIA, KANSAS; CITY OF MULVANE, KANSAS; CITY OF
NEODESHA, KANSAS; CITY OF OSAWATOMIE, KANSAS; CITY OF OTTAWA,
KANSAS; and CITY OF WINFIELD, KANSAS,
Appellants/Cross-Appellees,

v.

BOARD OF PUBLIC UTILITIES OF KANSAS CITY, KANSAS,
and CITY OF KANSAS CITY, KANSAS,
Appellees/Cross-Appellants.

MEMORANDUM OPINION

Appeal from Franklin District Court; JAMES J. SMITH, judge. Opinion filed
December 6, 2002. Reversed and remanded.

C. Edward Peterson, of Finnegan, Conrad and Peterson, L.C., of Kansas City,
Missouri, and *Robert L. Bezek, Jr.*, of Bezek, Lowry & Hendrix, of Ottawa, for
appellants/cross-appellees.

Robert L. Bezek, Jr., of Bezek, Lowry, & Hendrix, of Ottawa, for appellants/cross-
appellees City of Ottawa and City of Baldwin City.

Michael T. Jilka, of Shook, Hardy & Bacon, L.L.P., of Overland Park, and *Kelley D. Sears*, of Shook, Hardy & Bacon, L.L.P., of Kansas City, Missouri, for appellees/cross-appellants.

Before BEIER, P.J., ELLIOTT and KNUDSON, JJ.

BEIER, J.: Plaintiffs Kansas Municipal Energy Agency (KMEA) and member cities Fredonia, Mulvane, Neodesha, Osawatamie, Baldwin City, Ottawa, and Winfield appeal the district court's directed verdict in favor of defendants Board of Public Utilities (BPU) and City of Kansas City in this breach of contract action. Defendants cross-appeal the denial of their motion to dismiss the cities' action.

BPU is an administrative agency organized pursuant to K.S.A. 13-1220 *et seq.* to manage, operate, maintain, and control the electric plant of the City of Kansas City. KMEA is a municipal energy agency organized under K.S.A. 12-885 *et seq.* for the purpose of securing an adequate, economical, and reliable supply of electricity and other energy for its member cities.

In 1982, BPU and KMEA entered into a Participation Power Sales Agreement (Agreement) under which BPU agreed to sell KMEA up to 15.96% of the electricity

generated at Nearman Creek Power Station No. 1 (Nearman). KMEA in turn entered into individual Nearman Power Sales Contracts with its member cities under which KMEA sold the electricity it purchased from BPU to the cities.

Under these complementary agreements, KMEA would prepare a weekly schedule of requested power for four of the cities and submit it to BPU for delivery in the Western Resources service area. The remaining three cities would present their weekly schedules to Kansas City Power & Light (KCP&L), and KCP&L would pass that information on to BPU. The schedules presented to BPU did not contain a breakdown for each city's needs but stated only the total amount of electricity to be delivered to Western Resources or KCP&L. BPU would then deliver the appropriate amounts. KMEA would pay BPU for all of the electricity supplied, and then KMEA would bill each city for its component of the total.

The Agreement was amended in 1995, after which Section 19 provided:

"(a) The BPU may temporarily interrupt or reduce delivery of energy from Nearman No. 1, if the BPU determines that the interruption or reduction is necessary in case of emergency affecting the ability of the BPU to produce or deliver energy from Nearman No. 1, and in order to install equipment, make repairs and replacements, or make

investigations and inspections related to any such emergency. The BPU shall immediately notify the Agency of any such emergency."

"(b) In the event of a temporary interruption or reduction specified in Section 19(a), the BPU shall provide Emergency Energy to the Agency from other BPU resources or through purchases, pursuant to Revised Schedule A to this Agreement, for a period of 8 hours, unless notified by the Agency to curtail this Emergency Energy Service. After the 8-hour period expires, or as otherwise agreed to by and between the parties' respective Authorized Operating Representatives, the BPU shall, to the extent energy is available from the BPU's generation or off-system purchases, provide Replacement Energy pursuant to Revised Schedule B to this Agreement."

The referenced Revised Schedule A provided:

"Emergency Energy means electrical energy not generated by Nearman No. 1 that is supplied by the BPU to the Agency during the first eight (8) hours succeeding a partial or complete curtailment of Nearman No. 1 output.

"The Agency shall reimburse the BPU for Emergency Energy *at a price equal to either BPU's incremental generation cost or incremental off-system purchase cost,*

whichever is less, multiplied by the product of 1.10 and the sum of 1 and the payment-in-lieu-of tax rate, i.e., $(1.10 (1 + \text{rate}))$. BPU's generation cost and off-system purchase cost includes operating and maintenance expense and startup cost as reasonably determined allocable by the BPU to its cost of generating or purchasing such Emergency Energy for the Agency." (Emphasis added.)

The Revised Schedule B mentioned in Section 19 provided:

"Replacement Energy means electrical energy not generated by Nearman No. 1 that is scheduled by the Agency as replacement energy when Nearman No. 1 output is curtailed partially or completely.

"The Agency shall reimburse the BPU for Replacement Energy *at a price equal to either BPU's incremental generation cost or incremental off-system purchase cost, whichever is less*, multiplied by the product of 1.10 and the sum of 1 and the payment-in-lieu-of-tax rate, i.e., $(1.10 (1 + \text{rate}))$. BPU's generation cost and off-system purchase cost includes operating and maintenance expense and startup cost as reasonably determined by the BPU as allocable to its cost of generating or purchasing such Replacement Energy for the Agency." (Emphasis added.)

Section 50 of the Agreement provided:

"Parties in Interest. The parties hereto shall be the only parties in interest to this Agreement. This Agreement is not intended to, and shall not, grant rights of any character whatsoever in favor of any other person, corporation, association, power supplier or entity other than the parties hereto, and the obligations herein assumed by such parties are solely for their use and benefit. Nothing herein contained shall be construed as permitting or vesting, or attempting to permit or vest, in any person, corporation, association, power supplier or entity other than the parties hereto, any rights hereunder or in any of the electric facilities owned by the parties or the use thereof."

The parties were forced to perform under Section 19 and Schedules A and B when a fire at Nearman disrupted its operations on July 21, 1999. It was partially shut down until July 23 and completely shut down from July 23 until August 17, 1999. During this period, BPU's remaining generating capacity was insufficient to meet customer demand, and it had to purchase power off-system to fulfill its obligations.

BPU supplied both Emergency and Replacement Energy to KMEA, and thus its member cities, charging the incremental off-system purchase rate described in the Agreement and its schedules. And therein lay the rub. KMEA and the cities sued for

breach of the Agreement, arguing they should have been charged the lower incremental generation cost for the Emergency and Replacement Energy BPU provided during the Nearman disruption.

BPU filed a motion to dismiss the cities' action, asserting they were neither parties to nor third-party beneficiaries of the Agreement. After a hearing, the district court denied the motion, ruling Section 50's reference to "the parties hereto" included the cities. The court relied in part on earlier language in the Agreement's "Whereas" clauses. That language acknowledged the parties' mutual understanding of KMEA as "a municipal energy agency. . . consisting of member cities located in the State of Kansas" and of the KMEA's role in providing electric power to the cities.

At trial, the parties were subject to Rule 18 of District Judge James J. Smith's "Ground Rules for Trials":

"A witness may use contemporaneous prepared notes to refresh memory. He may testify as to refreshed memory but if memory is not refreshed he may not read the notes. In such case, the notes may be marked and proposed as exhibits subject to objections by the opposing counsel. After an exhibit is admitted, the witness will normally . . . not be

allowed to read it to the finder of fact. In unusual circumstances, I may grant permission if requested."

On several occasions the district court prohibited witnesses from reading from various highly detailed exhibits and from testifying about their contents because they had no independent recollection of the contents. Plaintiffs raised no objection to the application of the judge's "Ground Rules" at trial.

James Widener, general manager of KMEA, testified for plaintiffs. Before working at KMEA, Widener had been employed by BPU for 26 years, and he was involved with negotiation of the original Agreement. He did not participate in negotiation on its subsequent amendment.

Widener said he could tell from BPU's July and August 1999 bills that it was charging the higher incremental off-system purchase cost rather than the lower incremental generation cost. Although KMEA paid the bills in full, he sent a letter disputing the amounts as noncompliant with the Agreement.

Widener also was asked about the Agreement's distinction between Emergency and Replacement Energy. Defense counsel objected, and the following exchange ensued:

'MR. SEARS: I have not been objecting to these questions about the contract, but the contract does speak for itself and what the purpose of the contract is is in violation of the Court's evidence rule, I believe. And it's my objection that his understanding of the purpose is not relevant to this case and it's in violation of the evidence rule.

'MR. PETERSON: Your honor, he's not testifying to actual words in the contract. He's not reading from the contract. The purpose of the question is simply to explain his understanding of the parties respective obligations.

'THE COURT: Well, as I understand your statements, that uh, there's certain terms within the contract. We're going to have evidence outside of the contract to uh, determine their meaning, particularly when you're talking about the incremental generation cost and you're saying that there's an industry standard relative to the fact that native load comes first.

"This gentleman obviously is in the industry. I believe that we are going to have to go beyond the four corners of the agreement to get to the answers to this case. I therefore deny the motion. I deny his objection and he'll be allowed to testify. Thank you."

On direct examination, Widener testified how incremental generation cost is determined for a utility:

"Large utilities like BPU, they have a dispatch computer that has all the characteristics put into – inside the computer. There's cost of fuel inside the computer. The computer typically calculates it. It's called a System Lambda and it's a Greek letter. There's Lambda that represents incremental generation cost and incremental fuel cost. It's recalculated every few minutes normally. That's how you do it."

Widener also explained that "System Lambda is the incremental generating cost when the units are operating at the most efficient point." He admitted that, for purposes of Schedules A and B, operating, maintenance, and start-up costs must be added to Lambda to equal incremental generation cost. He said these additional costs were very small and "pretty much impossible to determine."

Widener further testified that 90-plus percent of the incremental generation cost was composed of fuel cost, which was represented by Lambda. He explained that the percentage depended on a variety of factors, including whether start-up costs had to be included, and he did not know the amounts of the additional costs during the time period in issue.

Widener agreed that the incremental generation cost "means the additional cost that would be incurred by producing the next available unit of electrical energy above current base cost." One would have to know base cost in order to determine incremental cost, he said, and base cost would be BPU's generation cost without adding KMEA's demand to it.

Widener defined "native load" as "the residential, commercial and industrial customers inside the utilities["] jurisdiction." On cross-examination, Widener was asked whether it was the industry standard for a public utility to serve its native load first, and he admitted that one of the goals of a utility was to provide residential customers, commercial customers, and industrial customers in its hometown the lowest rates possible. He also admitted that incremental generation cost could not be determined precisely from System Operator Worksheets, which provide only Lambda calculations.

Nevertheless, Widener instructed KMEA's expert witness to substitute Lambda for incremental generation cost when calculating comparisons between generation cost and off-system purchase cost for July and August 1999. He explained that he instructed the expert in this manner because BPU had not provided KMEA with the relevant amounts for operating, maintenance, and start-up costs.

Larry Adair was employed as manager of electric supply at BPU, and he testified that he was BPU's primary negotiator in arriving at the amendment to the Agreement. During his testimony, plaintiffs' counsel moved to admit Exhibit 5, which was a proposal BPU provided to KMEA that led to the 1995 amendment. Defense counsel objected on relevance. Plaintiffs argued, among other things, that the exhibit showed BPU drafted the amendment. The district court sustained the relevance objection and shortly thereafter prohibited a question about whether the language contained in Revised Schedules A and B was proposed initially by BPU.

Adair defined incremental generation cost as "the total cost of producing the next available unit of energy . . . above the base cost that already exists." In order to determine the incremental generation cost, he said, he would need to know available capacity, load levels, fuel costs, and operating and maintenance expenses. He admitted, however, that BPU did not have access to this information when it determined price.

Adair testified that, in July and August 1999, BPU's native load almost always exceeded its generating capacity. Thus BPU had to purchase energy off-system. He admitted that a contract other than the Agreement at issue here had listed KMEA as part of BPU's native load.

BPU employee Robert Adam testified he was responsible for billing under the Agreement. During most of the time period in issue, he billed KMEA at off-system purchase cost because he reasoned that no generation cost existed for comparison. All of BPU's generating capacity was devoted to serving its native load.

During the few hours when BPU-generated electricity was available to serve KMEA, Adam admitted he used Lambda to calculate incremental generation cost. He said he realized later he was incorrect in doing so because Lambda did not include cost factors other than fuel.

BPU employee Leon Burtnett, director of electric system control, testified that his department reviewed the costs calculated by Adam under the Agreement. Burtnett also testified that the Lambda figure taken from System Operator Worksheets included only the fuel cost component necessary to determine incremental generation cost. Burtnett admitted that BPU had not calculated start-up costs in billing in the past.

Gregory Wilson, a certified public accountant and former accountant for KMEA, testified as plaintiffs' expert witness. He reviewed the billings for Emergency and Replacement Energy between January 1995 and May 1999, and BPU had billed KMEA the lower of the off-system purchase cost and Lambda. In July and August 1999,

however, BPU had billed KMEA at the higher off-system purchase cost. He summarized the resulting overcharges, concluding KMEA paid \$890,988.50 too much for July and August 1999.

BPU's motion for directed verdict at the close of plaintiffs' case argued that plaintiffs failed to present evidence on all of the components of incremental generation cost, that no incremental generation cost existed because plaintiffs did not demonstrate that BPU generating capacity beyond that required to serve native load was available, and that KMEA had not sustained any damages because it was paid in full by the cities.

The district judge ruled:

"The definition urged of incremental generation cost by defendants is additional cost that would be incurred by producing the next available unit of electric energy above current base cost. That definition was not disputed by the – by Mr. Widener, whatever his title is with the KMEA, but he is director of some sort. The Court adopts that definition.

"With that definition in place, the Lambda of what has been purchased, is not the bases of the next available unit of electrical energy. The testimony was clear that the current base production of BPU for native load, which parties agree

was an industry standard, which was the primary obligation of BPU, was not proven to this Court or to the jury.

"What it would have cost BPU to produce another unit of electricity was never proved, only the cost of producing what it was producing has been proved to the Court.

"The plaintiff had the burden of proof to prove it's more probably true than not true that the incremental generation cost is less than the incremental off-system purchase cost.

"Having failed to do so, the Court finds as a matter of law from interpreting the contract, that the incremental off-system purchase cost which is the purchases that have been proved, is the only cost that has been proved and therefore was the appropriate cost to be applied to the units of electricity being furnished."

Standard of Review

"A trial court is required on motions for summary judgment and directed verdict to resolve all facts and inferences to be drawn from the evidence in favor of the party against whom the ruling is sought. Where reasonable minds could reach different conclusions based on the evidence, the motions must be denied. The same rule is applied on review."

Reynolds v. Kansas Dept. of Transportation, 273 Kan. ___, ___,
43 P.3d 799 (2002).

"The question is not whether there is no evidence supporting the party opposing the motion. Instead, the court must determine whether there is evidence upon which a jury could find a verdict for that party. Even when the facts are undisputed, there could be conflicting inferences from those facts. When no evidence is presented or when the evidence is undisputed and reasonable minds may not draw differing inferences and arrive at opposing conclusions, the matter becomes a question of law for the court." *Stover v. Superior Industries Int'l., Inc.*, 29 Kan. App. 2d 235, 237-38, 29 P.3d 967, rev. denied 270 Kan. ___ (2000).

In a breach of contract action, the burden of proof is on plaintiff to show: (1) execution and existence of the contract alleged in the petition; (2) sufficient consideration to support the contract; (3) performance or willingness to perform in compliance with the contract alleged; (4) defendant's breach of the contract, and (5) damages. PIK Civ. 3d 124.01-A; *Commercial Credit Corporation v. Harris*, 212 Kan. 310, 313, 510 P.2d 1322 (1973). By granting a directed verdict in this case, Judge Smith essentially found plaintiffs had failed to prove the amount of incremental generation cost was lower than the incremental off-system purchase cost.

District Court's Adoption of Trade Usage Definition

The district court's decision hinged upon its definition of "incremental generation cost" under the Agreement. Because this phrase was not explicitly defined in the Agreement, the judge admitted both evidence of trade usage of that phrase, see K.S.A. 84-1-205(2), and evidence of the parties' definition through course of performance, see K.S.A. 84-2-208. He ultimately adopted the trade usage definition.

This was erroneous on two counts.

First, Plaintiffs had produced evidence from which reasonable minds could differ as to whether the definition of incremental generation cost as used in the Agreement should come from trade usage or course of performance. Although the judge was correct in noting that there appeared to be no dispute between the parties on the trade usage definition, he failed to recognize that there also was ample evidence both sides acknowledged their course of performance had deviated from the trade usage definition. BPU had used Lambda as incremental generation cost in KMEA bills. Burnett conceded BPU had not added in start-up costs in the past. Adams admitted to using Lambda as generation cost during the time period in issue, although he characterized this use as mistaken. Finally, Adair admitted BPU lacked the information necessary to calculate

generation cost as defined by trade usage. Where reasonable minds could reach different conclusions based on the same evidence, a directed verdict is not proper.

The second reason the district court erred can be found in K.S.A. 84-2-208(2):

"(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (84-1-205)."

Pursuant to this statute, course of performance evidence controls over trade usage evidence. Thus the district judge also erred in adopting the trade usage definition as a matter of law over the definition arising out of the parties' course of performance. Had he correctly viewed the evidence in the light most favorable to plaintiffs, he would have had to conclude that there was adequate testimony from which a properly instructed jury could conclude that generation cost was equal to Lambda.

Necessity of Generating Capacity Beyond Native Load

In arriving at the directed verdict, the district judge also adopted BPU's argument that incremental generation cost could exist as a matter of law only if BPU's generating capacity contemporaneously exceeded that necessary to carry its native load. This too was error.

"[T]he interpretation and legal effect of written instruments are matters of law, and an appellate court exercises unlimited review. Regardless of the construction given a written contract by the trial court, an appellate court may construe a written contract and determine its legal effect. [Citation omitted.]" *Alexander v. Everhart*, 27 Kan. App. 2d 897, 901, 7 P.3d 1282, *rev. denied* 270 Kan. ____ (2000).

This district court's interpretation is not supported by the language of the Agreement. The Agreement provides that BPU will provide Emergency and Replacement Energy "to the extent energy is available from the BPU's generation or off-system purchases" and that the energy will be billed "at a price equal to either BPU's incremental generation cost or incremental off-system purchase cost, whichever is less." The Agreement does not designate a price based on the source of the electricity actually supplied; rather, it merely states that the cost of the electricity supplied under Schedules A and B will be the lower of the incremental generation cost and the incremental off-system purchase cost incurred by BPU at any given time. Had BPU wanted the cost of the

electricity to be tied to its source, or to whether its native load exhausted the supply of electricity it generated, it should have drafted the Agreement accordingly. It did not. The district court erred by finding plaintiffs had to show that generation capacity exceeded that necessary to serve BPU's native load at the time the Emergency and Replacement Energy were required by KMEA and the cities.

Because this case must be reversed and remanded for new trial, we will briefly address three other issues that may resurface.

Admissibility of Exhibit 5

The admissibility of evidence lies within the sound discretion of the district court. *State v. Kirby*, 273 Kan. __, __, 39 P.3d 1 (2002).

Plaintiffs argue the district court abused its discretion by excluding Exhibit 5, BPU's proposal for the 1995 amendment. Plaintiffs contend the proposal was relevant to the definition of incremental generation cost and to show the Agreement's language was drafted by BPU.

BPU argues the district court properly excluded the proposal because it was not relevant. BPU says the proposal was never incorporated into the Agreement, did not show the amount or methodology for determining incremental generation cost or the base cost for generating electricity in July and August 1999, and did not illustrate whether BPU had generating capacity available to generate electricity for KMEA beyond that amount necessary to meet BPU's load.

Because the district court had admitted parol evidence regarding incremental generation cost, this proposal was relevant because it contained a schedule demonstrating how estimated prices for Emergency and Replacement Energy were calculated. Further, the proposal was relevant to show that BPU had drafted the language in the Agreement, as a contract is construed strictly against the writer when controversy arises over its terms. See *Dillard Dept. Stores, Inc. v. State Dept. of Human Resources*, 28 Kan. App. 2d 229, Syl. ¶ 5, 13 P.3d 358 (2000). The district court also should have permitted testimony indicating who was responsible for drafting the Agreement language.

"Ground Rules"

Plaintiffs briefly argue that the district court's "Ground Rules" violated the rules of evidence. The district judge's Rule 18 restricted the witnesses' ability to testify about

various complex power schedules at issue in the case because they were unable to remember the voluminous data contained on these schedules independently.

This issue is not properly before this court for several reasons. First, plaintiffs did not raise this issue below, and "[a]n issue not presented to the trial court will not be considered for the first time on appeal. [Citation omitted.]" *State v. Smith*, 268 Kan. 222, 243, 993 P.2d 1213 (1999). Second, the plaintiffs have failed to include the rule in the record on appeal, and material included as an appendix to an appellate brief is not a substitute for the record on appeal. *Zeferjohn v. Shawnee County Sheriff's Dept.*, 26 Kan. App. 2d 379, 383, 988 P.2d 263 (1999). Finally, plaintiffs failed to provide specific instances of how this rule was applied, and an issue not properly briefed is deemed abandoned. *Bergstrom v. Noah*, 266 Kan. 847, 873, 974 P.2d 531 (1999).

It is important to note, however, that Kansas Supreme Court Rule 105 (2001 Kan. Ct. R. Annot. 152) provides that local rules promulgated by the district courts "shall be effective upon filing with the Clerk of the Supreme Court." See *State v. McGraw*, 19 Kan. App. 2d 1001, 1002-03, 879 P.2d 1147 (1994) (finding unfiled local rule regarding filing notice of appeal before judgment ineffective). Judge Smith's "Ground Rules for Trials" have not been filed with the Clerk of the Supreme Court. In addition, in our view,

the judge's Rule 18 is incorrect as a matter of law, and parties and witnesses should not be subjected to it.

Cities as Parties

On its cross-appeal, BPU argues the district court should have dismissed the cities' claims because they did not have a contract with BPU and were not third-party beneficiaries of the Agreement. In support of this argument, BPU points out that the cities did not participate in the negotiation of the Agreement or sign it. Further, according to BPU, Section 50 unambiguously expresses that KMEA and BPU were the only parties intended to have rights under the Agreement.

Plaintiffs counter that KMEA was acting as an agent on behalf of the cities or that, in the alternative, the cities were third-party beneficiaries of the Agreement.

The district court never found that KMEA was acting as the cities' agent. Near the end of trial, the district judge mentioned that he had found the cities were third-party beneficiaries, but the record does not reflect this rationale. Rather, the judge relied heavily on the relationship between the cities and KMEA, as set forth in K.S.A. 12-885 *et seq.*, and on the Agreement's "Whereas" clauses.

K.S.A. 12-885 discusses the purpose and the formation of organizations such as

KMEA:

"[A]ny two or more cities may create a municipal energy agency . . . for the purpose of securing an adequate, economical and reliable supply of electricity and other energy and transmitting the same for distribution through the distribution systems of such cities. Any municipal energy agency created under the provisions of this act shall be a quasi-municipal corporation"

K.S.A. 12-888(a) provides: "Any city in which the resolution of the governing body thereof providing for the creation of a municipal energy agency has become effective may become a member of such municipal energy agency, with all the rights, powers and duties pertaining thereto, by executing an agreement creating the municipal energy agency." K.S.A. 12-888(a). The parties draft an agency agreement, which includes "a statement that the cities which are members of the municipal energy agency are not liable for the obligations of the agency." K.S.A. 12-888(a)(7). The municipal energy agency may not sell electricity to any person other than a member city of the agency, a marketer of electricity, a broker of electricity, an electric public utility, a municipal energy agency, a federal power marketing administration, or an investor-owned electric utility. K.S.A. 12-897.

We agree with the district judge that the language of the "[w]hereas" clauses resolves this issue. Although the first such clause recites that the Agreement is between BPU and KMEA, several of the subsequent clauses make clear that KMEA consists of its member cities, that it is authorized to secure energy for them, and that KMEA and its members will enter into Nearman Power sales contracts.

From this language, we can safely conclude the parties understood the interrelationship of KMEA and the cities. Section 50 does not undercut this interpretation -- it does not name KMEA and BPU as the only parties to the Agreement; rather, it states that the "parties hereto" shall be the only parties in interest. The "parties hereto" included the cities, and the district judge properly denied BPU's motion to eliminate the cities' claim from this lawsuit.

Reversed and remanded for new trial.