

**CITY OF BURIEN
AGENDA BILL**

Agenda Subject: Motion to Approve Settlement Agreement Regarding New Cingular Wireless Utility Tax Refund Claim		Meeting Date: July 1, 2013
Departments: Legal and Finance	Attachment: proposed settlement agreement	Fund Source: General Fund Activity Cost: \$21,909.87 Amount Budgeted: Unencumbered Budget Authority: \$0
Contact: Craig Knutson/Kim Krause		
Telephone: (206) 248-5535		
Adopted Work Plan Priority: Yes No <input checked="" type="checkbox"/> X	Work Plan Item Description:	
PURPOSE/REQUIRED ACTION:		
The purpose of this agenda item is for the Council to consider an agreement settling the claim of New Cingular Wireless for a utility tax refund.		
BACKGROUND (Include prior Council action & discussion):		
In November, 2010, New Cingular Wireless filed a claim against the City of Burien for a utility tax refund of \$73,441.30. The refund claim was for taxes paid to the City based on charges collected by the company from cell phone users for Internet data services between November 1, 2005 and September 20, 2010. The refund claim was based on a national class action case decision in Federal District Court in Illinois, which held that taxes on Internet data services violate federal statute and required New Cingular Wireless to obtain refunds of such taxes on behalf of its customers. As a result, New Cingular Wireless filed tax refund claims against most cities in the State of Washington as well as in other states.		
Subsequently, New Cingular Wireless filed a lawsuit against Burien and other cities that hadn't yet settled the claims against them. Burien has been coordinating the defense of this lawsuit with the remaining cities, many of which have by now settled. Of over 245 cities that received the refund claims, about 2/3 have settled to date. Currently, the lawsuit has reached the point where New Cingular Wireless has made its lowest and last settlement offers before the litigation process intensifies. The last settlement offer to Burien was for \$24,439.03, which City staff has been able to reduce to \$21,909.87. The company is willing to take this amount as a credit against future tax payments, as is provided in the proposed settlement agreement. The settlement agreement also provides for a release of the City from any further liability regarding the refund claim.		
OPTIONS (Including fiscal impacts):		
1. Approve the settlement agreement (\$21,909.87). 2. Do not approve the settlement agreement (will continue the ongoing New Cingular Wireless litigation).		
Administrative Recommendation: Approve the proposed settlement agreement.		
Committee Recommendation: N/A		
Advisory Board Recommendation: N/A		
Suggested Motion: I move approval of the New Cingular Wireless settlement agreement and authorize the City Manager to sign the agreement.		
Submitted by: Craig Knutson 		City Manager
Administration		File Code: R:\CC\Agenda Bill.New Cingular Wireless settlement agreement.doc
Today's Date: July 1, 2013		

**AGREEMENT OF SETTLEMENT & RELEASE BETWEEN
NEW CINGULAR WIRELESS PCS LLC
AND THE CITY OF BURIEN, WASHINGTON**

New Cingular Wireless PCS LLC (“Claimant”), the Settlement Class as described below, and the City of Burien (“City”), enter into the following Agreement of Settlement and Release (“Agreement”) with regard to the Claim described and defined below.

WHEREAS, the Claimant and Settlement Class submitted to City a claim dated November 1, 2010, subsequently modified by letter dated June 15, 2012, seeking the refund of \$73,441.30 in Local Utility Tax (“Tax”), which Tax had previously been collected by the Claimant from its customers on charges for data services providing Internet access between November 1, 2005 and September 30, 2010, and which Tax previously was remitted by the Claimant to City (the “Claim”); and

WHEREAS, City has asserted various defenses to the Claim, including but not limited to an assertion that certain portions of the Claim are outside the ^{one} ~~two~~ year ^{of} ~~limitations~~ period for which a refund of Taxes is available under the City’s municipal code; and

WHEREAS, the Claimant is a party-defendant to the Global Class Action Settlement Agreement approved by the United States District Court for the Northern District of Illinois in Case No. 10-CV-02278, pursuant to which the rights of the customers included in the Settlement Class (the “Settlement Class”) have been established; and

WHEREAS, the Settlement Class includes but is not limited to customers from whom the Tax was collected, which Tax is sought in the Claim; and

WHEREAS, the Claimant filed suit in King County Superior Court against City and others under Cause No. 12-2-15031-1 SEA (the “Lawsuit”); and

WHEREAS, the City was subsequently dropped as a defendant in the Lawsuit by order pursuant to a motion for misjoinder, and the Claimant has not yet appealed the order dropping the City nor filed a new suit against the City; and

WHEREAS, the Claimant and City desire to promptly settle the Claim and dismiss allegations against the City in the Lawsuit, and as a result resolve this matter fully and finally as between the Claimant and City.

NOW, THEREFORE, the parties hereto mutually agree:

FIRST, the Claimant, Settlement Class and City agree that this Agreement shall be final with regard to any liability for Tax sought in the Claim.

SECOND, City agrees to grant Claimant a dollar for dollar credit against future Local Utility User Surcharge in the amount of \$21,909.87 (“Settlement Amount”) in full satisfaction of any and all obligations with respect to the Claim. That is, the City’s payment of the Settlement Amount would be made by Claimant keeping, rather than forwarding to the City, the monthly Tax remittance from the properly imposed Tax until the full Settlement Amount is paid. In exchange for this payment, the Claimant and Settlement Class agree to release City from any further liability with regard to the Claim, and further agree not to appeal the order dropping the City from the Lawsuit, not to file a new suit, and not to take any other legal action with respect to the Claim.

THIRD, City shall issue a letter reflecting such credit to Claimant, which shall include the following language: “This confirms that New Cingular may take as a credit \$21,909.87 against future UUT.” The City shall mail such letter within 15 days after the final execution of this Agreement to John Brophy, ARPC, 1220 19th Street, NW, Suite 700, Washington, DC 20036. A copy of that letter shall simultaneously be mailed to Thomas Giltner, Esq., AT&T, 208

S. Akard St. Suite 3015, Dallas, Texas 75202. A copy of that letter shall simultaneously be mailed to James P. Frickleton, Bartimus, Frickleton, Robertson & Gorny, P.C., 11150 Overbrook Road, Suite 200, Leawood, KS 66211; Margaret C. Wilson, Reeder Wilson LLP, 231 Altamont Place, Somerville, NJ 08876; and Michael R. Scott, Hillis Clark Martin & Peterson, 1221 Second Avenue, Suite 500, Seattle, WA 98101.

FOURTH, this Agreement sets forth the entire understanding between the Claimant, Settlement Class and City with respect to the subject matter hereof and supersedes any prior negotiations, agreements, understandings or arrangements between them.

FIFTH, Claimant and City hereby authorize their respective legal counsel to execute a dismissal with prejudice and without the award of costs or attorneys' fees to any party of all allegations and claims of Claimant against City in the Lawsuit.

SIXTH, this Agreement shall be binding upon and inure to the benefit of the Claimant, Settlement Class, and all of their respective former and current officers, employees and directors, and respective successors and assigns.

SEVENTH, each of the undersigned represents and warrants that he or she is fully authorized to execute and deliver this Agreement on behalf of the party and in the capacity identified below.

EIGHTH, this Agreement may be signed in one or more counterparts.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the dates shown below.

NEW CINGULAR WIRELESS PCS LLC

Date

By _____
Name

Title

CITY OF BURIEN, WASHINGTON

Date

By _____
Name _____
Title _____

ACKNOWLEDGMENT OF CONSENT TO AGREEMENT:

THE SETTLEMENT CLASS, BY AND
THROUGH SETTLEMENT CLASS COUNSEL

Date

By _____
Name _____
Title _____

