AGENDA ITEM

TO: Mayor and City Council

FROM: David Watson, City Manager

DATE: August 12, 2010

RE: **Ordinance approving settlement agreement with Cricket Communications**

The City is part of an ongoing independent negotiation group of 25 cities through MML relating to telephone tax litigation against various telephone companies. Similar to the previous settlements with wireless carriers, we have now reached a settlement with Cricket for nonpayment of taxes on certain revenue of Cricket. The back tax payment to the City is estimated to be $1.90 and the current gross receipts amount is $141.03.

In addition to the class action settlement agreement terms, Cricket signed a separate binding unilateral agreement ("BUA") with the City (as part of our group of 25 cities) that (1) accepts the City's claim without the possibility of rejection provided the City submit the attached approval ordinance, (2) payment of an additional $1,800.00 to the City in cost reimbursements above the settlement amount owed, (3) a commitment that Cricket has already reviewed the City's ordinance and will not assert exclusions or exemptions, (4) a commitment to future tax payments without assertion of exclusions or exemptions, and (5) a commitment to initiate a "meet and confer" meeting and provide a "final estimate" of the amounts the City will receive.

Although the final payment is subject to adjustment, given the separate promises to our group of cities and the unexpected revenue this generates for the City, we recommend approval of this settlement with Cricket. Pursuant to the terms of the settlement agreement and BUA, the City needs to pass the Settlement Ordinance and send the fully approved Ordinance to Cricket no later than September 14, 2010.

RECOMMENDATION:
Staff recommends that Council adopt the attached Ordinance as a reasonable collection settlement of taxes owed to the City. We ask that three reading be held because of deadlines beyond your next scheduled Council meeting of September 20, 2010.

BILL 2010-44 **ORDINANCE _____**

AN ORDINANCE APPROVING A SETTLEMENT AGREEMENT AND BINDING UNILATERAL AGREEMENT WITH CRICKET COMMUNICATIONS, INC., AND RELATED ENTITIES RELATING TO PAYMENT OF BUSINESS LICENSE TAXES

WHEREAS, Cricket Communications, Inc., and Leap Wireless International, Inc., (collectively, "Cricket"), have entered into, subject to final court approval, a Settlement Agreement (hereinafter "Settlement Agreement," and also on file with the City Clerk) in *City of University City, Missouri, et al., v. AT&T Wireless Services, Inc., et al.*, Cause No. 01-CC-004454, pending in the Circuit Court of St. Louis County, Missouri ("Class Action Suit"); and

WHEREAS, Cricket has further executed a Binding Unilateral Agreement dated as of January 21, 2010 (attached hereto and incorporated herein) making certain commitments in addition to those contained in the Settlement Agreement in consideration of settlement of the Class Action Suit, of which the City would be considered a Class Member; and

WHEREAS, Cricket provides wireless telephone service within the City subject to the City's business license tax ordinances; and

WHEREAS, the City desires to accept the Settlement Agreement as a mutually binding and enforceable Agreement by acceptance of all terms and conditions thereof, and to further accept the commitments made by Cricket in the Binding Unilateral Agreement as part of such approval and as relied upon by the City and accept the Past Tax Payment in such final amount as to be established by the terms of the Settlement Agreement and Binding Unilateral Agreement, provided that such acceptance preserves and shall not be deemed to waive any rights as an interested party in participation in any court determinations finalizing such Settlement Agreement or Past Tax Payment amounts;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF CAMERON, CLINTON AND DeKALB COUNTIES, MISSOURI AS FOLLOWS:

Section 1. In continued reliance on the Binding Unilateral Agreement, and in accepting the promises and commitments made by Cricket thereunder, the City does hereby approve and accept all terms and conditions of the Settlement Agreement as a mutually enforceable and binding Agreement between Cricket and the City, subject only to final court approval in the Class Action Suit. Pursuant to the Settlement Agreement and Binding Unilateral Agreement, Past Tax Payments as required thereunder and all inquiries regarding the City's Business License Tax shall be directed to the City through its authorized representative:

Barbara J. O'Connor, City Clerk
City of Cameron
205 North Main Street
Cameron, MO 64429
(816) 632-2177

Section 2. The City Clerk shall forward a copy of this Ordinance to:

Property Tax Supervisor
Cricket Communications, Inc.
5887 Copley Drive
Building 1, 5th Floor, TAX DEPT.
San Diego, CA 92111

The City Clerk and other designated officials are hereby authorized to take such other actions as may be necessary to implement and effect the purposes of this Ordinance.

Section 3. This Ordinance approves a settlement as to claims by or relating to a single taxpayer and nothing in this Ordinance shall be deemed to amend or implement any tax applicable to any taxpayer.

Section 4. This Ordinance shall be in full force and effect from and after its passage and approval.

Read two times, passed and approved this 16th day of August 2010.

_____
Mayor Dennis Clark

ATTEST:

_____
City Clerk

BINDING UNILATERAL AGREEMENT

This Binding Unilateral Agreement ("Agreement") is made by Cricket Communications, Inc. and Leap Wireless International, Inc. (collectively, "**Defendants**" or "**CRICKET**") (such terms, as well as all other capitalized terms used in this Agreement but not defined herein shall have the meanings ascribed thereto in the below-referenced Settlement Agreement) as of January 21, 2010.

WHEREAS, CRICKET has entered into, subject to court approval, a class action Settlement Agreement (the "Settlement Agreement") in *City of University City, Missouri, et al. v. AT&T Wireless Services, Inc., et al.*, No. 01-CC-004454, pending in the Circuit Court of the County of St. Louis, Missouri;

WHEREAS, Cunningham, Vogel & Rost, P.C. ("CVR") is City Attorney or special legal counsel for the Municipalities listed on Exhibit A (collectively the "CVR Cities" and each a "CVR City") relating to the Action; and

WHEREAS, the CVR Cities have incurred attorneys fees, as well as other costs and expenses, in responding to settlement proposals, representation relating to the Action, and in taking other measures relating thereto;

NOW THEREFORE, CRICKET hereby makes the following representations, warranties, and covenants on behalf of CRICKET, with the intention that the CVR Cities and their legal counsel may rely upon such representations, warranties, and covenants as set forth herein and that such representations, warranties, and covenants, shall constitute a binding and enforceable contract to induce the actions of the CVR Cities and their counsel:

1. Membership in Settlement Class. CRICKET agrees that each CVR City that does not opt out of the Settlement Class will be in the Settlement Class.

2. Deemed submission of valid Claim Form. Based on CRICKET's previously completed review of each CVR City's Business License Tax ordinance, CRICKET agrees that each CVR City shall be deemed to have complied with Section IV.E of the Settlement Agreement, and shall therefore be deemed for all purposes of the Settlement Agreement to have submitted a valid Claim Form to CRICKET for all purposes of the Settlement Agreement, if such CVR City furnishes CRICKET, postmarked on or before the deadline provided in the Settlement Agreement for the submission of Claim Forms, with:

a. a copy of an ordinance adopted by such CVR City accepting all terms and provisions of the Settlement Agreement as a mutually binding and enforceable Agreement between such CVR City and CRICKET in accordance with applicable Missouri and local law, or, if the Municipality chooses to effect its acceptance of all terms and conditions of the Settlement Agreement by another accepted, legally binding method, copies of an acknowledgment that the Municipality agrees to be bound by the terms of the Settlement Agreement if approved by the Court, which acknowledgment shall describe the method used to accept the Settlement Agreement and shall be accompanied by an opinion of counsel, addressed to CRICKET, that the Settlement Agreement, if approved by the Court, is a binding obligation of the Municipality;

b. the name and address to which the CVR City's payment of Total Past Tax Consideration should be made and mailed; and

c. the name, address, and telephone number of the CVR City's duly authorized representative(s), to whom all inquiries regarding the CVR City's Business License Tax may be directed. Such items shall be sent by the CVR City to:

Property Tax Supervisor
Cricket Communications, Inc.
5887 Copley Drive
Building 1, 5th Floor, TAX DEPT
San Diego, CA 92111

3. Entitlement to Total Past Tax Consideration. Upon the deemed submission of a Claim Form by a CVR City as provided in paragraph 2 of this Agreement, CRICKET agrees that it shall be deemed to have accepted such form as valid for all purposes of the Settlement Agreement, and the CVR City shall be entitled to Total Past Tax Consideration as set forth with respect to such CVR City in Exhibit E to the Settlement Agreement, including the release of Protested Tax to such CVR City and the payment of Past Tax Payment by CRICKET to such CVR City, which Total Past Tax Consideration shall be paid by CRICKET to such CVR City at the times provided in the Settlement Agreement. Such CVR City shall also be entitled to the payment of future Business License Taxes as set forth in Section II.A.2 of the Settlement Agreement and as represented in Paragraph 4 herein. CRICKET hereby represents and agrees that the version of Exhibit E attached to this Agreement shall be deemed to constitute Exhibit E for purposes of the Settlement Agreement and of this Agreement with respect to the CVR Cities.

4. Representation and agreement with respect to Business License Taxes. Based on CRICKET's previously completed review of each CVR City's Business License Tax ordinance, CRICKET agrees that no exclusions contained in any such ordinance apply to the computation of Business License Taxes payable by CRICKET. Accordingly, (i) for each CVR City, CRICKET represents that the tax amount on Exhibit E was computed without regard to any exclusion provided in the Business License Tax ordinance of such city, meaning that no such exclusion was asserted or applied by CRICKET in computing any such tax amount and (ii) CRICKET further agrees that, with respect to future Business License Taxes that CRICKET is obligated to

pay to a CVR City pursuant to Section II.A.2 of the Settlement Agreement, CRICKET will pay such taxes without applying, or claiming application of, any exclusion that exists in the Business License Tax ordinance of such city as of the date of this Agreement, unless instructed by the city to apply such exclusion. The word "exclusion" as used herein shall not be interpreted to prevent CRICKET from adjusting gross receipts for any CVR City for uncollected gross receipts ("disconnects") that were previously included in reported gross receipts according to GAAP (Generally Accepted Accounting Principles).

5. Cost payment. CRICKET shall also pay an additional Eighteen Hundred Dollars ($1,800.00) to each CVR City that complies with the terms of Paragraph 2 above, in partial compensation for the efforts and attorneys fees expenses incurred by such CVR City in connection with responding to settlement proposals and other measures related to the Action and settlement thereof. This amount shall be in addition to any amount owed pursuant to the Settlement Agreement and shall not be considered to be part of the compensation or attorneys fees paid as part of the class settlement under the Settlement Agreement. This payment shall be made to each such CVR City at the time of payment of the Past Tax Payment as established in the Settlement Agreement.

6. Inapplicability of Agreement. This Agreement shall not apply to any CVR City that either files a formal objection or opts out of the Settlement Class, or files a claim in any form pursuant to the Settlement Agreement seeking payment of Past Tax Payment in an amount greater than shown for such city on Exhibit E of the Settlement Agreement.

7. No MFN effect. CRICKET agrees that nothing in this Agreement shall be considered in evaluating compliance with any most favored nation clause within the Settlement Agreement.

8. Termination of Agreement. This Agreement shall remain outstanding and shall not be revoked with respect to any CVR City until the earlier of (i) the postmark deadline for filing Claim Forms under the Settlement Agreement (and except as provided in subsections (ii) and (iii) of this paragraph not thereafter for any CVR City that has complied with Paragraph 2 of this Agreement); (ii) the termination of the Settlement Agreement occurs by its terms or upon disapproval thereof by the Court; or (iii) the Court rejects this Agreement or the Court refuses or expresses an intention to refuse to grant either preliminary or final approval to the Settlement Agreement in its current form due in any way to the existence of this Agreement, in which case CRICKET shall have the right unilaterally to revoke this Agreement and proceed with the Settlement Agreement on its existing terms. All payment and other obligations of CRICKET pursuant to this Agreement are subject to Court approval of the Settlement Agreement. CRICKET warrants that the CVR Cities and their legal counsel may rely on this Agreement in taking future actions and foregoing objections to the Settlement Agreement or foregoing opting out of the Settlement Class and other immediate reliance, and as such CRICKET agrees that this Agreement shall therefore be binding and enforceable from and after the date hereof and subject to the conditions hereof.

9. Miscellaneous. The undersigned represents that it is fully authorized to make this Agreement on behalf of CRICKET. Construction and interpretation of this Agreement shall be determined in accordance with the laws of the State of Missouri, irrespective of the State of Missouri's choice of law principles. Paragraph captions are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or any provision hereof.

IN WITNESS WHEREOF, CRICKET has executed this Agreement on this 21th day of January, 2010.

Cricket Communications, Inc.

By: _____

Name: Jeffrey E. Naehbor

Title: SVP, Fin OPS & CAO

SUBSCRIBED AND SWORN TO BEFORE ME ~~THIS~~

_____day of _____ 2010

_____

Notary Public

My commission expires _____

SEE ATTACHED

IN WITNESS WHEREOF, LEAP WIRELESS has executed this Agreement on this 21th day of January, 2010.

Leap Wireless International, Inc.

By: _____

Name: Jeffrey E. Naehbor

Title: SVP, Fin OPS & CAO

SUBSCRIBED AND SWORN TO BEFORE ME ~~THIS~~

_____day of _____ 2010

_____

Notary Public

My commission expires _____

SEE ATTACHED

CALIFORNIA JURAT WITH AFFIANT STATEMENT

☑ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–5 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California

County of San Diego

Subscribed and sworn to (or affirmed) before me on this 21th day of January, 20 10, by

(1) Jeffrey E. Nachbor,

Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

(and

(2) _____,

Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature Abby Chow

Signature of Notary Public

ABBY CHOW
Commission # 1853352
Notary Public - California
San Diego County
My Comm. Expires Jun 9, 2013

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Binding Unilateral Agreement – Cricket (2)

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

RIGHT THUMBPRINT OF SIGNER #1	RIGHT THUMBPRINT OF SIGNER #2
Top of thumb here	Top of thumb here

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CALIFORNIA JURAT WITH AFFIANT STATEMENT

☑ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–5 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California

County of San Diego

Subscribed and sworn to (or affirmed) before me on this 21th day of January, 2010, by

(1) Jeffrey E. Nachbor,

Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

(and

(2) _____,

Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature _____

Signature of Notary Public

ABBY CHOW
Commission # 1853352
Notary Public - California
San Diego County
My Comm. Expires Jun 9, 2013

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Binding Unilateral Agreement - Leap (2)

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

RIGHT THUMBPRINT OF SIGNER #1	RIGHT THUMBPRINT OF SIGNER #2
Top of thumb here	Top of thumb here

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EXHIBIT A

1. Adrian
2. Aurora
3. Buckner
4. Butler
5. Cameron
6. Green Park
7. Harrisonville
8. Joplin
9. Lee's Summit
10. Liberty
11. Malden
12. Monett
13. Neosho
14. Oak Grove
15. Oakland
16. Overland
17. Pacific
18. Platte City
19. Raytown
20. Webster Groves
21. Woodson Terrace
22. Cape Girardeau
23. St. Joseph
24. Warson Woods
25. Wentzville
26. Webb City

Exhibit E

CRICKET									
	% Based Tax		Flat Tax						Total
	Tax on Gross Receipts		Not Antenna Tax			Antenna Tax		Protested and	Past Tax
Municipality	Rate	Amount *	Rate	Amount	Rate	Tower Count	Amount	Other Tax Paid	Consideration
ADRIAN	7.00%	78.94							$1.49
AURORA	6.00%	331.60							$5.37
BUCKNER	0.00%	4,967.37	50.00	50.00	50.00				$31.25
BUTLER	5.00%	309.08							$8.91
CAMERON	5.00%	141.03							$1.90
CAPE GIRARDEAU	5.00% up to $27,500.00	293.53							$3.96
GREEN PARK	5.00%	0.00							--
HARRISONVILLE	5.00%	115,790.86							$2,098.54
JOPLIN	6.00%*	1,834.57	*Minimum $10,000 See § 30-148						$6,250.00
LEES SUMMIT	7.00%	749,137.67							$19,289.68
LIBERTY	6.00%	358,538.02							$10,076.02
MALDEN	7.00%	0.00							--
MONETT	5.00%	0.00							--
NEOSHO	5.00%	663.03							$12.42
OAK GROVE	5.00%	16,131.29							$395.71
OAKLAND	4.00%	0.00							--
OVERLAND	6.00%	195.54					$2,000 per antenna array		$3.17
PACIFIC	8.00%	0.00							--
PLATTE CITY	5.00%	40,461.47							$756.32
RAYTOWN	7.00%	1,089,612.86							$27,801.43
SAINT JOSEPH	7.00%	1,651.96							$33.96
WARSON WOODS	9.00%	0.00					$1,000 per antenna		--
WEBB CITY	5.00%	0.00							--
WEBSTER GROVES	7.00%	52.48							$1.04

WENTZVILLE	5.00%	0.00							--
WOODSON TERRACE	5.00%	0.00					$1,000 per antenna		--