



Telecom New Zealand Limited

Response to 2^o Application to the Commerce Commission
for a determination for the designated access service of
"Interconnection with Telecom's fixed PSTN"

Public Version

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Executive Summary

1. Two Degrees (2°) have made an application to the Commerce Commission (the **Commission**) seeking a determination for the designated access service "Interconnection with Telecom's fixed PSTN".
2. Telecom is, and has always been, willing to agree appropriate termination arrangements with 2°, which will enable them to provide local services on their mobile network. We already have one commercial interconnection agreement with a mobile carrier []TNZRI. We have offered exactly the same terms to 2°, which have been refused on the basis that they incorporate additional terms to those set out in the Commerce Commission's – *Final Determination on the Application for Determination for Interconnection with Telecom's fixed PSTN (the Vodafone Local Service Determination)* .
3. 2° have built up the Vodafone Local Service Determination as the sole answer for the launch of their local service, and the only terms which need apply to interconnection between 2° and Telecom in respect of local numbers operating on the 2° network. This ignores the numbering and number portability issues which the parties also need to resolve within any interconnection agreement.
4. A decision to investigate at this stage is premature because 2° have not engaged in a meaningful way on these issues and, despite the comments in their application, are yet to make a reasonable attempt to negotiate the terms of the of supply of this service as required by section 22(c) of the Telecommunications Act (**Act**).

Local interconnection in New Zealand

5. In the New Zealand context, local interconnection has several key elements - the local call construct, numbering principles, local number portability, local calling areas and payment between carriers based on end user services. Current industry arrangements are built on these principles, including existing commercial agreements between carriers, number management, Commission Determinations and regulatory arrangements such as the TSO.
6. All of our current interconnection arrangements with other carriers in New Zealand recognise each of these elements, and address them. The Vodafone Local Service Determination did not consider or address many of them, including numbering requirements or number portability requirements because the Commission did not consider that determination was the appropriate mechanism for addressing those issues.
7. That does not mean the issues do not need to be addressed in commercial arrangements, and we did not interpret the Commission as intimating that was the case. 2°'s request for an interconnection arrangement which reflects only that determination therefore amounts to a proposal to fundamentally alter the existing local interconnection framework in New Zealand. While we recognise that industry interconnection arrangements will change over time, we cannot simply agree to ignore whole elements of the interconnection structure.

Residual local interconnection issues can be resolved by the parties

8. On the basis of the dialogue that has occurred since 2° applied for a Commission Determination, we remain confident that the parties can reach agreement on local interconnect arrangements. Further, having regard to the basic elements of local interconnection in New Zealand as set out above, we consider the terms that have been put to 2° represent a more than reasonable commercial interconnection arrangement.
9. In particular, we consider that an appropriate Homezone is important to ensure that local numbers retain a semblance of geography to distinguish them from non-geographic number ranges to which different commercial arrangements apply. Our proposals to 2° have simply sought to ensure the continued application of our LICA structure, consistent with the terms of the Vodafone Local Service Determination. The absence of a geographically bounded Homezone would mean that a call to a Telecom local number, regardless of the LICA in which it originates could if handed over in the destination LICA be charged as bill and keep.
10. We do not think that the “Home Zone” issues that have been identified by 2° are insurmountable, [] TNZRI.

2° is seeking to limit retail pricing

11. 2° has raised non-discrimination of Telecom’s retail pricing as an issue. Our view is that because of the Commerce Act, it is not clear whether we can enter into discussions aimed at agreeing retail pricing. What we have confirmed to 2° is that we have not implemented differential pricing between local calls made by a Telecom fixed customer to Vodafone’s local service or to any other carrier’s local numbers.
12. While Telecom maintains its previously expressed view that the non discrimination clause in the Vodafone Local Service Determination amounts to retail regulation and is outside the scope of the Act, even if that were not the case, it is not clear that Telecom and 2° would be able to commercially agree such a provision that goes to retail pricing.
13. We remain committed to pursuing commercial resolution with 2°. Even so, if 2° seeks replication of the Commission’s previous determined clause, that clause alone may have to be referred for determination. If the Commission has suggestions for facilitating resolution of this issue commercially this would be welcome.

The way forward

14. It is essential that the Commission gives the parties time to make a reasonable attempt to resolve these issues commercially.
15. Telecom is ready and willing to engage on these issues. We remain confident of a commercial resolution to all issues, bar the retail non-discrimination issue, which for the legal reasons outlined above is unlikely to be capable of commercial agreement between the parties.
16. We recommend that the Commission refer the matter back to the parties for further negotiation.

Introduction

17. On 25 May 2009, 2° made an application to the Commission seeking a determination for the designated access service "Interconnection with Telecom's fixed PSTN." We appreciate the opportunity to respond to the application because we do not consider that a determination is necessary to deal with the "remaining issues" that 2° have identified in their application.
18. As a matter of principle it is always better for the parties to be left to negotiate issues rather than the Commission intervening. The Commission should only step in where parties have exhausted all possible commercial options. At this stage, we believe it would be premature for the Commission to intervene and make a determination:
 - It is highly likely that local interconnection arrangements can still be agreed. [] TNZRI and we are confident we can also reach a commercial resolution with 2°. When you consider that most of the information we have about 2°'s commercial offer has not been provided by them to us, but has been taken from their determination application, it is clear that there is room for further commercial discussions and we question whether the requirements to make a reasonable attempt to negotiate terms of supply in section 22(1)(c) of the Telecommunications Act have been met;
 - We are certainly not trying to obstruct 2° from launching a local service over its mobile network. We are trying to agree the fundamental terms that underpin the interconnection agreements relating to their local service (which extend beyond just the Vodafone Local Service Determination), as we have done with all other parties. To date 2° have not engaged on these matters and have instead chosen to focus on the discrete points they have raised with the Commission. [] TNZRI when developing a local service, in addition to the terms in the Local Service Determination, parties need to take into account:
 - The Number Administration Deed (**NAD**);
 - Number portability requirements;
 - Technical and operational requirements and other commercial terms;
 - If what 2° are seeking are arrangements that amount to a material re-definition of local interconnection as it is currently understood by the industry today, then negotiation over these different arrangements have not been initiated.
19. We acknowledge that 2° have concerns about Telecom discriminating in the way it prices calls made by Telecom fixed line retail customers to 2° local numbers as compared with an equivalent call to other carriers local numbers. What we have confirmed to 2° is that we have not implemented differential pricing between local calls made by a Telecom fixed customer to Vodafone's local service or to any other carrier's local numbers.
20. For completeness we note that we have not responded to 2° discussion of 22(1)(a) and (b) of the Act because these provisions of the Act have been repealed.

Should the Commission intervene at this stage?

21. The Telecommunications Act acknowledges that the Commission should not become involved until parties have made reasonable attempts to negotiate the terms of supply.¹ We do not believe 2° has met this standard. 2° provided more details in its application for a determination than they had disclosed to us during our discussions on their local service. Now that we have been provided with this information it will enable the parties to have more meaningful discussions. Regulatory intervention before we have had an opportunity to have an informed discussion is premature.
22. There is general recognition that industry led or bilaterally negotiated solutions tend to be more flexible and less costly for business and consumers than regulatory intervention. The parties have the right incentives to address issues efficiently and in a timely manner.
23. [] TNZRI we are confident we can also reach a commercial resolution with 2°. The Commission should only step in where parties have exhausted all possible options and that point has not been reached.

2° thinking has developed over time

24. In their application 2° state that it has been two years since they first commenced negotiations to reach agreement on the service they are requesting, and notes that “the delay in reaching a commercial outcome is despite 2° repeated best efforts to reach a commercial outcome over that period.” Telecom refutes that assertion, below is a summary of discussions with 2° over the service.
25. We note that there were discussions about a local/geographic service in the course of negotiations over an interconnection agreement during a period of some months in mid 2007. Telecom offered to provide interconnection terms to cover a local service offering by 2°, but 2° agreed at that time that it was not a priority for them as they had not defined what their retail service might look like and preferred to concentrate on resolving the primary issues in the interconnection agreement to meet their timetable to have an executed agreement.
26. The next request from 2° came as an email dated 27 November 2008, which sought to clarify whether the current interconnection agreement contained terms for local interconnection. We advised them that their interconnection agreement specifically excluded a local service over a mobile network but we were happy to discuss their proposal. We met with 2° on 11 December 2008 to discuss their request, at which time they set out at a high level their proposal for a local service on their mobile network, clarifying their request in a follow-up email of 12 December 2008.
27. In February 2009 Telecom offered a series of workshops to discuss 2°’s requirements for a local interconnect service, which 2° declined to accept.
28. On 5 April 2009, Telecom provided 2° with a brief document setting out the proposed changes to the interconnection agreement which would allow 2° to launch a geographic/local service. We believed that these proposed changes reflected 2° requirements.

¹ Telecommunications Act 2001, section 22(1)(c).

29. There were several meetings and discussions during May 2009, where we attempted to establish the key principles around the 2° Homezone concept. 2° imposed a number of deadlines on Telecom throughout May against the backdrop of bringing an application for a Commerce Commission determination. One of these deadlines was 25 May 2009, which was the date 2° filed its determination application with the Commission. We were surprised to find that the 2° application contained material information that was not shared during the negotiations despite the application clearly being prepared in parallel.
30. It is clear that 2° thinking and priorities has developed over the course of the negotiations and this has hampered our ability to resolve key issues.

Further negotiation is necessary

31. Our belief is that our negotiations with 2° have not had the time or the depth of engagement required to run their natural course as evidenced by the relatively short period of meaningful engagement on the issues before they were referred to the Commission.
32. We believe that the rejection of our offer to hold workshops, the withholding of material information about the nature of the service it proposed and 2° shifting priorities hampered our ability to reach agreement, and undermines any claim by 2° that they have made a reasonable attempt to negotiate the terms of supply of this service.
33. We continue to try and work through the outstanding issues with 2° and are hopeful that we will be able to achieve a commercial outcome with them that will not only deal with issues that are raised in their application for a determination but also the residual regulatory technical and commercial issues that need to be resolved to enable them to launch a local service.

Negotiating Local interconnection

34. Telecom does not want to constrain 2°'s ability to offer a local service. However, the interconnect arrangements need to reflect the commercial and regulatory environment within which they operate.

Local interconnection in New Zealand

35. Local interconnect in New Zealand has a number of key principles - local calls, local numbers and carrier arrangements that reflect end user billing arrangements - and these are supported by a system of interlocking and mutually supporting rights, obligations, commercial and regulatory constructs and technical arrangements. This system produces a set of expected commercial outcomes, both for end users and operators of all kinds.
36. [] TNZRI The key additional elements being:
- The NAD requirements – and associated rules relating to numbering;
 - Number portability requirements - 2° have said they want number portability, but by not giving us details of their service they make it hard to ascertain how this request would be accommodated;
 - Other commercial terms – these include: a service description; the types of calls that are included in the service (e.g. how are free phone 0800 calls

to be handled); how calls are to be exchanged by the parties; contract term and termination provisions, and the treatment of calls inside and outside the home zone; and

- Technical requirements – for example arising from the fact that mobile networks may not necessarily respect LICA boundaries.

Commercial arrangements between carriers must support the agreed characteristics of local interconnection

37. While interconnection arrangements will change over time, it is important that conscious decisions are made and that we avoid ad hoc changes to accommodate a single party or call type which undermine the wider framework. While ad hoc changes of the type requested by 2° can benefit one party, there are implications for the wider industry that need to be considered. In particular, 2°'s proposed arrangements will undermine the geographic and service related meaning of a local number.
38. New Zealand's interconnection regime and industry rely on numbers to distinguish various characteristics of a service – for example, location, who pays, the level and structure of charges. Numbering has been used to distinguish:
- geographic from non-geographic and nationwide number services;
 - service provider prefixes from numbers used to designate network end-points;
 - value-added and premium-rate services from standard services; and
 - 'toll-free' (receiving party pays) services from calling party pays services.
39. In each of these services the distinctions are real, and do not merely relate to the appearance from the numbering used. All providers rely on numbers having meaning and Telecom's local service agreements support this construct.
40. In the Vodafone Local Service Determination the Commission acknowledged that it was not the appropriate party, and the determination was not the appropriate place, to deal with numbering issues and that the appropriate person to deal with these issues was the Number Administrator.² The Number Administrator has provided rules for parties to comply with and the industry, including 2°, has signed up to these.³
41. To date, 2° has focused on its interpretation of the Vodafone Local Service Determination and, accordingly, we have not addressed the potential numbering issues and the effect that the local service solution they have requested might have on the interconnection system as a whole.

The impact of undermining numbering

² Commerce Commission – Final Determination on the application for determination for 'Interconnection with Telecom's fixed PSTN' – at paragraph 53 it was noted "*The Number Administrator governs the assignment and use of local numbers, whereas the Commission is responsible for setting the terms for the interconnection of local calls between Vodafone's network and Telecom's fixed PSTN.*"

³ .Telecommunications Numbering Plan/Number Allocation Rules – 15 Oct 2008.

42. From a numbering perspective, the 2° approach would undermine the numbering regime distinction between intra-LICA calls and inter-LICA calls. Intra-LICA calls are subject to the bill and keep regime, while inter-LICA calls are subject to a FLCB regime (forward-looking cost-based).
43. The information we have on the 2° local service that it is based on mobile phones and an indeterminate Homezone, this could undermine the numbering rules. For example, if 2° let their customers call from their Wellington number when they are in Auckland the local number would have no geographic structure as agreed under the Number Administration Rules. If this occurred it would mean the service that was being offered by 2° and the interconnection charges that were payable for that service would be different to those associated with the local service offered to customers of [Vodafone, Telstraclear and any] TNZRI other operators in the market. This type of behaviour was not contemplated or expected by the industry when the Number Administration Rules and interconnection charging principles were developed.
44. This could have commercial benefits for 2° as the limited scope of bill and keep would be extended. It is important to note that bill and keep was adopted in relation to Intra-LICA Calls (as then understood) as a limited exception to deal with the specific problem of internet callsinks, and was never intended to be applied in the manner proposed by 2°.

Other industry arrangements are also based on numbering

45. The use of numbering information to make distinctions between call types is not a new concept. From the early 1990s interconnection arrangements reflected the different commercial models possible at the retail level. For example, charging for local calls is based on the originating party paying for calls and, therefore, a requirement that the carrier that receives the call revenue should pay the parties who provide the inputs that make that service possible.
46. This numbering based information is still in use today and a number of industry arrangements are based on that construct, for example:
- In the case of a toll bypass operator and access network providers, to support their different business models;
 - In the Commerce Commission Decision 477, they have also chosen to rely on numbering information for nationwide number services and premium rate services;
 - The commercial arrangements for national call carriage services; and
 - The designated local telephone number portability service which references local telephone numbers and network services.
47. The 2° approach would undermine these arrangements. In light of the importance of these numbering issues to the industry we have been trying to engage with 2° on these, but to date without success.
48. If 2° is seeking a different form of interconnection that isn't, for example, based on current numbering arrangements, we are willing to discuss

alternative interconnect arrangements with 2°, but they have not initiated those discussions at this stage.

Residual local interconnect issues can be resolved by the parties

49. [] TNZRI

50. 2° raises similar issues in their determination application:

- (a) The geographic size of any “Homezone” to which the Intra-LICA call definition will apply has defined geographic boundaries; and
- (b) The interconnection service should be defined with reference to the service offered to end users.

51. We believe we can reach agreement with 2° on these issues. We discuss why these issues are important []TNZRI below.

Geographic size of the Homezone

52. As discussed, the local number having a geographic fixed point is important because geography underpins the commercial arrangements in the industry’s interconnection agreements. While the Vodafone Local Service Determination is silent on this matter, it is still an aspect of the wider interconnection framework that must be addressed.⁴

53. From an interconnection perspective the issue can be simply dealt with through a commitment to a defined Homezone and ensuring that 2° local service customers are only able to call from within that Homezone. To date 2° have been unwilling to provide any information on what their Homezone is likely to be or how the use of local numbers will be appropriately constrained.

54. We have highlighted that if 2°’s local service customers are can make calls using their local number outside of a fixed geographic area it would undermine the numbering regime and the broader interconnection framework.

55. [] TNZRI

Reference to end user services

56. 2° have also questioned the need for interconnection service to reference the service being offered to end users.

57. As set out above, this is important to Telecom because if this is not the case it would allow operators to “game” the system where the geography and numbering concepts are manipulated to meet a carriers commercial aims rather than accurately capture the relevant call types. Telecom has been subjected to this type of behaviour in the past and wants to ensure that this service does not inadvertently facilitate and encourage the exploitation of “gaming” opportunities that could arise.

58. The absence of a tightly defined Homezone would mean that all calls from the 2° customer could be made using the “local number”, which would mean that

⁴ Vodafone Local Service Determination, paragraph 53 stated: *the Number Administrator governs the assignment and use of local numbers, whereas the Commission is responsible for setting the terms for the interconnection of local calls between Vodafone’s network and Telecom’s fixed PSTN.*

all calls to the Telecom fixed PSTN could be handed over for no charge, irrespective of the physical location of the calling party. From an industry perspective parties should be very concerned if that were able to occur – Telecom is not the only operator who would be expected to terminate calls originating from the 2° network.

59. These concerns can be dealt with through a defined Homezone and agreement on when the numbers fall inside and outside of that zone. [] TNZRI

Addressing Number portability requirements

60. In addition to the matters specifically raised by 2°, their application highlights some other interconnection issues that will need to be resolved in order for them to be able to offer a local service. In 2° application they state that *“Local number portability significantly increases the customer appeal of our local service products”*.
61. Services must have a geographic component to be characterised as a “fixed” service to be subject to the Number Portability Determination (Decision 554).
62. The definition of “local telephone number portability” services in the Telecommunications Act is defined as follows:

A service that enables an end-user of a fixed telephone network service to change providers of that service but to retain the same telephone number within a local calling area.

63. The Commission’s Number Portability Determination provides some analysis of the term “local telephone number portability service”. The Commission took the view that the term “fixed” was intended so that the local telephone number portability service would only apply to services that are offered via a connection between the local switch or equivalent facility and the end user’s building or premises. A connection is a circuit between the local switch and the telephone device located in or on a building with which the user has some form of relationship of occupancy or use. According to the Number Portability Determination, the telephone device is not required to be physically attached to the building but should normally be located on the end-user’s premises.⁵ Provided this condition is satisfied, the connection may be provided using any type of wired or wireless network technology (including cellular technology).
64. This issue was not raised in the negotiations. However, while we have yet to discuss this with 2°, one advantage of the defined Homezone construct is that it could assist any application made by 2° to be an Access Seeker for local number portability. We would welcome the opportunity to discuss this with 2° through further negotiations.

Non discrimination of retail pricing

65. 2°’s determination application notes that *“it is of the view that Telecom should not be allowed to impose any charge on its retail customers that would discriminate between calls to Telecom local numbers and call to Two degrees local numbers”*. They also note that despite repeated requests, Telecom has not formally responded to this request for non-discrimination of retail pricing.

⁵ Number Portability Determination, see page 36.

66. What we have confirmed to 2° is that we have not implemented differential pricing between local calls made by a Telecom fixed customer to Vodafone's local service or to any other carriers local numbers have, in spite of the fact there is currently no determination in place.
67. While Telecom maintains its previously expressed view that the non discrimination clause in the Vodafone Local Service Determination amounts to retail regulation and is outside the scope of the Act, even if that were not the case, the Commerce Act means it is not clear that Telecom and 2° would be able to commercially agree such a provision that goes to retail pricing.
68. We remain committed to pursuing commercial resolution with 2°. Even so, if 2° seeks replication of the Commission's previous determined clause, that clause alone may have to be referred for determination. If the Commission has suggestions for facilitating resolution of this issue commercially this would be welcome.

The Way Forward

69. It is essential that the Commission gives the parties the time to make a reasonable attempt to resolve these issues commercially. Telecom is ready and willing to engage on these issues and it considers that leaving it to the parties to deal with dealing with these matters would be more efficient than imposing a regulatory solution, [] TNZRI
70. If the Commission has any queries in regard to any of the matters raised in the submission please do not hesitate to contact us.