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Submission on the Draft Review of Designated and Specified  
Services under the Telecommunications Act 2001

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## 1. EXECUTIVE SUMMARY

- 1.1 Two Degrees Mobile Limited (**2degrees**) welcomes the opportunity to comment on the Draft Review of Designated and Specified Services released by the Commerce Commission on 14 July 2011 (**Draft Review**).
- 1.2 The Commission's preliminary view is that there are no reasonable grounds on which to commence an investigation into the de-regulation of any of the designated or specified services discussed in the Draft Review.
- 1.3 2degrees strongly supports the Commission's preliminary view.
- 1.4 The Commission recently concluded that the state of competition in the New Zealand market, while improved following the entry of 2degrees in mid 2009 remained poor, lacking effective competition and on some measures (such as the very high levels of traffic terminating on-net) had in fact deteriorated following new entry.
- 1.5 In these circumstances it seems plain that there is no basis to review the regulatory status of any of the regulated services set out in the Appendix to the Draft Review which relate to the mobile market and which are intended to encourage investment and promote competition.
- 1.6 The national roaming, co-location and number portability services are critical to encouraging investment and stimulating increasing levels of competition in the mobile market and should remain regulated services.
- 1.7 The reliance of Vodafone's winning RBI bid on the mobile co-location service for the provision of non-discriminatory access to industry and public funded infrastructure, together with the competitive advantage achieved by Vodafone through increased mobile network coverage funded at least in part by the industry, further strengthens the case for national roaming and mobile co-location services to remain regulated, and to do so for the effective life of the RBI Infrastructure.
- 1.8 Accordingly we submit that the national roaming, co-location and number portability services should remain regulated.

## 2. INTRODUCTION

- 2.1 2degrees launched commercial services to the public in August 2009 and is New Zealand's 3<sup>rd</sup> mobile operator, providing customers with nationwide 2G and 3G mobile services via its own network and through commercial roaming arrangements.
- 2.2 Our shareholders include US, European and Maori interests who have together invested more than NZD300 million in mobile network infrastructure in New Zealand. In February this year we announced a further NZD100 million investment to extend the 2degrees network beyond the existing main centres of Auckland, Wellington, Christchurch and Queenstown and into smaller cities and towns. As a result of this ongoing investment 2degrees' network infrastructure replaced commercial roaming arrangements in Hamilton earlier this month. Construction of further regional infrastructure is underway.
- 2.3 As noted by the Telecommunications Commissioner in a recent presentation to the TUANZ Telecommunications Day in May 2011, regulation has a critical role to play in promoting competition and stimulating investment;
- "...regulatory settings matter...competition stimulates investment, and regulation which promotes competition leads to greater, not less investment..."<sup>1</sup>*
- 2.4 We agree that regulatory settings matter. The substantial infrastructure investment by 2degrees' shareholders is made possible by the current regulatory regime and the certainty it provides to investors that they will be able to gain access to the market and compete for customers on a level playing field. In New Zealand, the regulatory regime includes (amongst other things) the regulated national roaming, co-location, number portability and mobile termination access services. These services are, and will remain for a considerable period of time, critical to encouraging continued investment and ensuring the long-term viability of competition in the New Zealand mobile market.

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<sup>1</sup> <http://www.comcom.govt.nz/tuanz-telecommunications-day-2011/>

- 2.5 While material first steps towards a competitive market have been made following the entry of 2degrees, competition remains in its infancy. Amongst its OECD peers New Zealand was one of the latest markets to benefit from a third mobile operator, with 2degrees entering the market more than 15 years after BellSouth launched commercial services as the second mobile operator in 1993. 2degrees entered a duopoly market characterised by some of the highest prices and lowest usage in the world. There was a near complete absence of cross-network traffic and penetration was above 100%.
- 2.6 The Commission recently completed a review of the state of the New Zealand market 18 months after the entry of 2degrees and as part of the MTAS standard terms determination process. The Commission concluded there remained a lack of effective competition, citing the following features of the market in support of that conclusion:
- a high level of concentration;
  - significant on-net/off-net price differentials;
  - very little cross-net traffic;
  - regional variances in market share;
  - high churn rates;
  - high prices relative to other OECD countries (particularly for prepay customers); and
  - low mobile voice usage compared to other countries.<sup>2</sup>
- 2.7 The Commission also noted that while 2degrees had been in operation for more than 18 months and had captured more than 8% of mobile subscribers in New Zealand, its share of the market based on both revenues and traffic volumes was significantly less than this.<sup>3</sup>
- 2.8 While New Zealand consumers have benefited from increased competition following 2degrees' market entry, the mobile market continues to suffer from a lack of competition. Significant barriers to entry and expansion remain and 2degrees is yet to fully deploy its network or enter all segments of the market. In these circumstances it is self evident that the Commission is correct to conclude that there are no grounds to consider omitting any of the regulated services which are required to stimulate investment and competition in the mobile market from Schedule 1 of the Act. To do so would severely prejudice the interests of 2degrees, undermine current and future investment in the mobile market and jeopardise the future of mobile competition to the detriment of end-users.

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<sup>2</sup> Commerce Commission, Decision 724 (paragraph 42)

<sup>3</sup> As above (paragraph 54)

- 2.9 We comment further on the following regulated specific services in the remainder of this submission;
- National roaming
  - Co-location on cellular transmission sites
  - Number portability service
- 2.10 We also note that while outside the scope of the current review, investment and competition are best encouraged by a regulatory regime which addresses both access and behaviour issues. In February 2009 the Commission announced a review of the effectiveness of the enforcement framework for addressing allegations under the Commerce Act that a firm has taken advantage of its market power. The review was subsequently put on hold; we understand pending the outcome of the 0867 case. That case has now concluded, and highlighted the ineffectiveness of the current behaviour regime in addressing allegations of abuse of market power. We urge the Commission to complement its review of the current regulated services under the Telecommunications Act by revisiting the proposed review of s36 of the Commerce Act.
- 2.11 We are available to discuss any of the points raised in this submission at the convenience of the Commission.

### 3. NATIONAL ROAMING

3.1 We agree with the view expressed by the Commission that the roaming service remains important as 2degrees is dependent on roaming in areas where it has yet to deploy its own network coverage.

3.2 Coverage is often cited as the most important reason for selecting a network provider by subscribers. For example, it has been a constant feature of Telecom's regulatory submission that:

*"...competition in New Zealand [has been] predominantly focused on coverage and network features..."<sup>4</sup>*

3.3 When there are material differences in the coverage provided by networks, the operator with the lesser coverage will be at a very significant disadvantage, to the extent that it may be unable to compete for, or retain subscribers. The national roaming service is critical to the ability of 2degrees to compete and to encouraging further investment in network infrastructure that will itself stimulate greater competition for the benefit of end-users.

3.4 The Commission refers in the Draft Review to the finite nature of the commercial arrangements which deliver the current roaming arrangements acquired by 2degrees. It is important to emphasise that in addition to being finite, the current commercial arrangements were concluded only with the threat of potential regulatory intervention by the Commission should an agreement fail to be reached. The regulatory threat provided by the national roaming service regulation is a necessary and proven incentive on access providers to conclude commercial arrangements as well as a critical backstop in the event parties are unable to do so.

3.5 Regulation also offers a critical backstop should commercial arrangements be terminated or otherwise break down.

3.6 The award of the Governments Rural Broadband Initiative (**RBI**) to Vodafone (in relation to the community objectives to be delivered over an extended Vodafone wireless network) further increases the importance of the roaming service.

3.7 As one of the winning RBI bidders Vodafone will receive a publically funded competitive uplift as a result of the indirect benefits that come from being a network provider with increased national coverage. Having increased coverage in rural areas means that Vodafone will enjoy a competitive advantage both in those rural areas but also in urban areas where national coverage is a key acquisition tool. Increased rural coverage appeals to those who live in rural areas, but also to those who do not. Coverage is strongly valued by consumers even if they actually make little use of it.

3.8 It is only reasonable that other telecommunications operators should be able to share in the indirect benefits of increased network coverage that they are helping to contribute to, the RBI being majority funded by the industry levy rather than the public purse.

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<sup>4</sup> Telecom, *Submission on the Commerce Commission's Draft Standard Terms Determination on Mobile Termination and Access Services*, 7 February 2011, paragraph 48.

- 3.9 We **enclose** with this submission a report prepared by Frontier Economics and commissioned by 2degrees commenting on the proposed RBI related provisions of the (then) Telecommunications Amendment Bill in March 2011 and which discusses the benefits that come from being a network provider with increased national coverage.
- 3.10 We submit that the national roaming service should remain in place for the duration of the effective life of the publically funded RBI Infrastructure.

**4. COLOCATION ON CELLULAR TRANSMISSION SITES**

- 4.1 We agree with the Commission that co-location facilitates efficient entry and expansion in the mobile market and should remain a regulated service.
- 4.2 As alluded to by the Commission, the RBI agreement between MED and Vodafone requires Vodafone to supply the co-location service on RBI funded towers on the terms of the current co-location STD. The mobile co-location service is therefore a key component of the RBI initiative and it is important that the service remain regulated and the STD remains in force for the effective life of the RBI infrastructure.
- 4.3 The Commission notes that there is currently very little mobile co-location within the industry. As noted above, in February this year 2degrees announced a further NZD100million investment to extend the 2degrees network. There is a clear commercial incentive for 2degrees to deploy this capital efficiently and take maximum advantage of the mobile co-location service where it presents economic efficiencies over the development of incremental base stations. 2degrees is also committed to rolling out the network with the minimal disruption to communities and having regard to environmental impacts and in doing so to reduce the number of incremental new towers where it is reasonably practicable to do so. We therefore anticipate far greater mobile co-location within the current 2degrees build programme and consider co-location to be an important enabler of competition.
- 4.4 This commitment is evident from our current build, with more than 25% of sites deployed in Hamilton utilising the mobile co-location service.

## **5. NUMBER PORTABILITY SERVICES**

- 5.1 We agree with the Commission that number portability is important to ensure competition.
- 5.2 Number portability is a fundamental enabler of telecommunications competition and allows customers to switch provider with relative ease. If consumers had to change number when they changed provider it would present a very significant barrier to switching and so prevent many consumers from enjoying the benefits of competition.
- 5.3 The unique situation in New Zealand where mobile numbers are often used to identify the network of the call recipient, which facilitates closed-network pricing and raises barriers to competition, increases the importance of number portability to stimulating long-term competition. While some progress has been made with increased porting figures reported following the launch of 2degrees, retaining number portability as a regulated service is especially important in New Zealand if large incumbent networks are to be opened up to competition over the long-term.
- 5.4 We note that number portability is considered an important regulated service in a number of mature and far more competitive markets than New Zealand. For example, the European Commission Universal Services Directive sets out minimum standards for number portability in developed EU markets. The number portability service should be considered a 'business as usual' requirement that is required to maintain competition over the long-term and ensure barriers to switching are both removed and that they do not re-emerge.
- 5.5 We consider the number portability service should remain a regulated service to maintain competition over the long-term.