

Attorney/Client Privileged

To: Billg and Steveb  
Fr: Tonya  
Re: IBM Issues for Meeting on August 20th  
Da: August 17, 1991  
Cc: Billp

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**A. Meeting Agenda**

**B. Issues Analysis**

**1. Process for Source Code Access**

(a) **Method of access.** With respect to the OS/2 1.X agreements, Appendix IIA - Process Summary (p16) provides for a high speed link between Boca and Redmond with a mirror version of the master source library maintained in Redmond. Appendix IIA is not applicable to OS/2 2.X and 3.X. Sec 14.9 of these agreements provides that "The parties shall agree on the timing and mechanism for such access, but each party shall have the right to access it no less frequently than monthly." The Windows agreement has similar language in Sec. 2.4(iii). In the past, we have provided them Windows sources via tape. I don't think this issue is particularly controversial. Both parties should decide on one mechanism and the frequency for accessing code.

(b) **Content of code.** [Billp] The only additional point I would raise here is whether we have to provide access to the Windows 3.1 source code prior to GA. Subsec. 2.4(iii) says IBM shall have access to the Code described in Subsec. 2.4(i) on an ongoing basis. Parties shall agree on timing but no less frequently than monthly. The important point here is that 2.4(i) deals with enhancements to the ITEMS; whereas Windows 3.1 is one of the defined ITEMS.

(c) **DCR and PTR information.** DCR is defined in the "Definitions" of each of the the Phase II agreements as "the reporting mechanism used to document design changes during the development process." Access to the reporting mechanism would seem to be implied by inference.

Section 8.2 of each of the Phase II agreements references Appendix III - OS/2 Maintenance Process. The primary feature of this process is the

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reporting and fixing of PTRs via IDSS (Integrated Development Support System). Arguably, access to IDSS is critical to the fulfillment of our maintenance obligations for OS/2.

DCRs and PTRs are not defined in the Windows agreement. Section 7.0 of the the agreement provides for Product Warranty, Maintenance and Support. This section provides a response requirement for Sev 1 and non-Sev 1 errors. MS is also required to provide an electronic bulletin board at IBM's request. We have given them a free On-line account to meet this obligation.

**MS' Position.** With respect to the OS/2 X.X agreements, while we could make an argument that all code under development (assuming its licensed under the agreements) should be accessible on at least a monthly basis, I don't think we want this with respect to NT. With OS/2 1.3 we have the final code we need for Tiger with the exception of some PTRs. We should be able to work these out. With OS/2 2.0 we should require that they provide us their golden master releases so we can make them available to OEMs and follow their position on the monthly drops of code, i.e., we only get what is defined in Section 3.0. We can agree to provide them with the OS/2 3.0 beta when available and will give them monthly drops of the code defined in the NT-OS/2 Design Workbook dated 6/25/90 referenced in Section 3.0 of the 3.X agreement.

2. Workplace Shell. [Billp]

3. WABCC.

(a) Is WLO WABCC. [Billp]

(b) Is IBM's code WABCC. Section 3.1.3 of the Phase II/4 is unequivocal about who determines WABCC, "...in a form to be determined by MS in consultation with IBM..." Even IBM agrees with this point. IBM is arguing that Steve agreed at the March 21, 1991 meeting in Redmond to their WABCC plan. Steve was clear in this meeting, as he had been in the February 14/15 meeting, that this was not to be a WABCC discussion as that term is defined under Phase II/4. If IBM wanted to present a plan for running Windows under OS/2 he would listen. He sent mail to this effect to Billp and I following the 3/21 meeting. All correspondence, oral and written, leading up to this meeting had consistently stated that MS viewed WLO as meeting its WABCC obligation (a fair amount of documentation exists). The only slightly confusing correspondence is a letter from Steve to Tommy Steele stating that "It is our opinion that the contract is fulfilled by both our Windows Libraries for OS/2 (WLO) approach and our work to implement DPMI 0.9 in OS/2 2.0." This letter goes on to specifically reject IBM's "plan for extending

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the Windows in a VDM with DPMI approach to include the ability to run Windows applications in separate VDMs with their windows appearing in the PM screen group" as "a considerable effort" and not required by the contract.

Section 14.5 of Phase II/4 provides that "During the Delivery Period, the parties also will use a checkpoint process to review IBM's plans and MS' requests for each Licensed Release and document any agreed plan..." Something as critical and obviously controversial, based on all prior correspondence, as WABCC certainly would require documentation following the 3/21 meeting if agreement has actually been reached. Our action items from the meeting merely state that MS will respond to IBM's request for assistance on Windows seamless solution. (IBM's action items call for MS response on request for assistance on WABCC plan.)

In summary, IBM has a very weak argument at best.

(c) Schedule of Microsoft delivery. [Billp]

(d) Access to IBM code [Billp]

(e) Access to WLO code. [Billp]

#### 4. Source Code for Windows Device Drivers. [Billp]

5. OS/2 Device Driver Request. IBM has requested that we provide them with all of the device drivers we plan to make available with our Tiger product, this is essentially the LADDR drivers with the exception of a few PM drivers. They believe this is required by Subsection 3.2.1 of Phase II/2. This subsection states that "...MS intends to acquire from third parties additional Device Drivers that support use of various non-IBM hardware input/output devices with OS/2 1.2. MS shall promptly notify IBM in writing of each such Device Driver as to which MS acquires sufficient right and interest to provide them as MS Code and which MS intends to distribute at no separate charge to MS licensees of MS Product Offering 1.2..." (Note this same language appears in the Phase II/4, Subsection 3.4 and will be an issue if we intend to put LADDR on OS/2. 2.0)

MS has licensed numerous TSDs, VSDs and BIDs from third parties that it intends to ship with Tiger at the present time. Our licenses with these third parties provide for object only in some cases and object and source in other cases. In addition, MS has developed some TSDs, VSDs and BIDs as well as the IOS (Input/Output Supervisor). The IOS is necessary for any of the LADDR drivers to work.

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Its clear that where we have obtained sufficient rights from the third parties, i.e., both source and object code, that we have to provide these drivers to IBM. The critical issue here is whether we have to provide them with the IOS. A literal reading of the agreement would argue for providing only the third party drivers. The question we have to answer is are the third party TSDs, VSDs and BIDs "Device Drivers that support the use of various hardware input/output devices with OS/2..." without the IOS? We should provide them only the third party drivers at least for the time being and see if they push us on this issue.

They have also requested that we provide them the LADDR code and docs as described in the Hydroplane specs and referenced in Subsection 3.1.1. This subsection actually only requires MS to hand over all of the work in process within one month after signing the agreement for the items referenced. We did this with LADDR according to Davidma.

#### **6. LAN Manager Contract - Modifications or New Functions.**

IBM has taken the position that 4 items: (i) Windows 3.1 support, (ii) DOS 5.0 support, (iii) OS/2 2.0 redirector support and (iv) NDIS Protocol Manager 2.01, are modifications under the LAN Manager agreement and as such licensed to them. They are basing this on their interpretation of the agreement as well as correspondence they received from Hansw on March 22, 1991. Hansw later sent IBM a letter (4/29/91) informing them that he had been mistaken and that these items were to be treated as New Functions. I confirmed our position in a subsequent letter to Lee Reiswig.

IBM has since shipped an OS/2 2.0 redirector with their EEP which we believe to be a derivative of our redirector. They received this code in one of the LM drops which had the code "IFDEF" in light of the imminent release of Cruiser. OS/2 redirector support licensed to IBM under the LM agreement covers OS/2 1.2 and earlier versions only; 2.0 redirector support hasn't been licensed to IBM under this agreement. Since Cruiser was not complete at the time we shipped LM 2.0 (and still isn't available) the 2.0 redirector was not included in any of our releases of this product. In fact, of the four items only DOS 5.0 support has been shipped with LM to date (LM 2.0c).

For purposes of the meeting tomorrow I think we should take the hardline position that IBM isn't licensed to this code and ask them how confirm if the 2.0 rediector is indeed derivative of our code and, if so, how they intend to rectify distributing it with their EEP.

#### **7. Jet BEUI Code - Use of Net BIOS Spec.**

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First, IBM legal claims that we wrote a SPECIFICATION DOCUMENT for our code which is itself an infringement of the IBM spec document. Second, IBM claims that our implementing the same interface(s)/protocol(s) is a "copyright" infringement, even though we never used any IBM code. This point is purely a legal one, but it represents a very extreme position on the reach of copyright law.

According to Brianv, we have no spec for our code (nothing you can remotely call a spec). Stevej and Henrysa never did one. Initially we shipped Net BEUI in LM 2.0 that didn't fully implement the IBM spec. There were some NCBs that we did not implement. In the convergence effort with us, IBM made us implement all of the ones that we initially left out else they told us they would not accept our code. We even fought them on some of them, but we gave up and did them all to get them to accept our code.

Don't think they will get very far with this issue. It appears to be just an attempt to add issues so they will have additional "bargaining chips."

**8. Disclosure of Confidential Information - Terms of Our Agreements.**

They gave refused to give us any additional information on this until the meeting tomorrow.

**9. Source Code Access for Contractors. [Billp]**

**10. IBM Systems Definition.**

Tom Cronan promised to send a letter on this issue but hasn't yet.

**11. MS' OS/2 2.0 Deliverables**

(a) 32 bit Resource Compiler. Jim Miller promised to send information on this and hasn't yet.

(b) Maintenance on C6.

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**MS Objectives with IBM**

<b>Objective</b>	<b>Billg's Priority</b>	<b>Steveb's Priority</b>
<b>1) Beat IBM in Windows vs OS/2 War.</b>		
a) Have IBM's seamless Windows solution for OS/2 2.0 licensed and royalties determined under the Windows agreement.		
b) Collect \$15M development fee/yr from IBM during the Delivery Period.		
c) Obtain IBM's OS/2 2.0 code for purposes of - Competitive analysis - Provide to OEMs		
d) Comply with the "letter" of our IBM agreements only.		
e) Provide Windows NT under the Windows agreement.		
f) Avoid giving IBM "interesting" Windows and NT code as long as possible.		
<b>2) Develop good working relationship with IBM again.</b>		
a) Have IBM continue to license DOS from us.		
b) Have IBM port NT to RS/6000.		
c) Ensure that our software runs well on their systems.		
d) Encourage IBM to sell Windows & extensions where appropriate, e.g, MPC, PS/1, etc.		
e) Work with IBM on long-term distributed computing model.		
f) Keep RoyC and his team in Redmond.		

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**Summary of MS/IBM Issues**

<b>Issue</b>	<b>Status</b>	<b>Plan</b>
1. Code Access	Open - IBM presented plan covering all OSs. We responded with a proposal s/t Billg/Steveb review.	????
2. Workplace Shell	Open - IBM was receptive to "minor code" proposal but still has issue with indemnification. Cronan preparing a proposal.	Hold our line.
3. WABCC	Open - each side presented position. IBM suggested possibility of making compromise proposal.	Fight to the death.
4. Source for Windows DDs	Resolved.	Follow up on amendment of 3rd party agreements and shipment of src to IBM. IBM will pursue Novell.
5. OS/2 DDs	Resolved.  Open - IBM proposed swapping BIOS patches for MS drivers and remaining 3rd party drivers (binaries only).	We will ship them all 3rd party drivers for which we have src rights.  ????

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6. LM Contract	Open - IBM presented PROFS note and Hansw letter supporting their position.	Concede their license to OS/2 2.0 redir that they have shipped with EEP (but refuse to provide any future mods) and DOS 5.0 support shipped with LM 2.0c. Reject license to other items.
7. Jet BEUI	Open - Cronan to present more info on this. IBM willing to pursue license without prejudging whether there was any infringement.	Hold firm - this isn't a strong issue for them.
8. Confidential Disclosure	Open - Cronan to provide add'l cites and we will provide cites where they have disclosed confidential information.	Send cites but otherwise "do nothing." This issue will eventually die.
9. Source Access for Contractors	Resolved.	Billp sent letter to Cronan.
10. MS Systems Definition	Open - MS to consider IBM position and get back to them.	Hold firm to our initial position.
11. MS OS/2 Deliverables	Resolved.	IBM to provide list of PTRs for Resource compiler and C6_386 compiler. Provided list of PTRs on OS/2 for which we haven't received a response (44).
12. "Better Windows than Windows"	Open - Cronan to review and respond.	Hold firm. Billp sent letter.

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Summary of MS/IBM Issues

Issue	Status	Plan
1. Code Access	Open - IBM presented plan covering all OSs. We responded with a proposal s/t Billg/Steveb review.	???? <i>Paulson would prefer to keep simple only beta code exchanged w/ monthly drops of beta build!</i>
2. Workplace Shell	Open - IBM was receptive to "minor code" proposal but still has issue with indemnification. Cronan preparing a proposal.	Hold our line.
3. WABCC	Open - each side presented position. IBM suggested possibility of making compromise proposal.	Fight to the death.
4. Source for Windows DDs	Resolved.	Follow up on amendment of 3rd party agreements and shipment of src to IBM. IBM will pursue Novell.
5. OS/2 DDs	Resolved.  Open - IBM proposed swapping BIOS patches for MS drivers and remaining 3rd party drivers (binaries only).	We will ship them all 3rd party drivers for which we have src rights.  ???? <i>No</i>

*No LA00R drivers*

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6. LM Contract	Open - IBM presented PROFS note and Hansw letter supporting their position.	Concede their license to OS/2 2.0 redir that they have shipped with EEP (but refuse to provide any future mods) and DOS 5.0 support shipped with LM 2.0c. Reject license to other items.
7. Jet BEUI	Open - Cronan to present more info on this. IBM willing to pursue license without prejudging whether their was any infringement.	Hold firm - this isn't a strong issue for them.
8. Confidential Disclosure	Open - Cronan to provide add'l cites and we will provide cites where they have disclosed confidential information.	Send cites but otherwise "do nothing." This issue will eventually die.
9. Source Access for Contractors	Resolved.	Billp to send a letter to Cronan.
10. MS Systems Definition	Open - MS to consider IBM position and get back to them.	Hold firm to our initial position.
11. MS OS/2 Deliverables	Resolved.	IBM to provide list of PTRs for Resource compiler and C6_386 compiler.
12. "Better Windows than Windows"	Open - Cronan to review and respond.	Hold firm.

*OK*

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### MS Objectives with IBM

Objective	Billg's Priority	Steveb's Priority
<b>1) Beat IBM in Windows vs OS/2 War.</b>		
a) Have IBM's seamless Windows solution for OS/2 2.0 licensed and royalties determined under the Windows agreement.		
b) Collect \$15M development fee/yr from IBM during the Delivery Period.		
c) Obtain IBM's OS/2 2.0 code for purposes of - Competitive analysis - Provide to OEMs		
d) Comply with the "letter" of our IBM agreements only.		
e) Provide Windows NT under the Windows agreement.		
f) Avoid giving IBM "interesting" Windows and NT code as long as possible.		
<b>2) Develop good working relationship with IBM again.</b>		
a) Have IBM continue to license DOS from us.		✓
b) Have IBM port NT to RS/6000.		
c) Ensure that our software runs well on their systems.		✓
d) Encourage IBM to sell Windows & extensions where appropriate, e.g, MPC, PS/1, etc.		✓
e) Work with IBM on long-term distributed computing model.		
f) Keep RoyC and his team in Redmond.		✓

*ALLS*

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### MS Objectives with IBM

Objective	Billg's Priority	Steveb's Priority
<b>1) Beat IBM in Windows vs OS/2 War.</b>		
a) Have IBM's seamless Windows solution for OS/2 2.0 licensed and royalties determined under the Windows agreement.	1	
b) Collect \$15M development fee/yr from IBM during the Delivery Period.		
c) Obtain IBM's OS/2 2.0 code for purposes of - Competitive analysis - Provide to OEMs		
<i>yes</i> d) Comply with the "letter" of our IBM agreements only. <i>YES</i>		
e) Provide Windows NT under the Windows agreement.		
f) Avoid giving IBM "interesting" Windows and NT code as long as possible.		
<b>2) Develop good working relationship with IBM again.</b>		
a) Have IBM continue to license DOS from us.		
<del>b) Have IBM port NT to RS/6000.</del>		
c) Ensure that our software runs well on their systems.		
d) Encourage IBM to sell Windows & extensions where appropriate, e.g, MPC, PS/1, etc. - ACIS -		
<del>e) Work with IBM on long-term distributed computing model.</del>		
f) Keep RoyC and his team in Redmond.		

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### Summary of MS/IBM Issues

Issue	Status	Plan
1. Code Access	Open - IBM presented plan covering all OSs. We responded with a proposal s/t Billg/Steveb review.	????
2. Workplace Shell	Open - IBM was receptive to "minor code" proposal but still has issue with indemnification. Cronan preparing a proposal.	Hold our line.
3. WABCC	Open - each side presented position. IBM suggested possibility of making compromise proposal.	Fight to the death.
4. Source for Windows DDs	Resolved.	Follow up on amendment of 3rd party agreements and shipment of src to IBM. IBM will pursue Novell.
5. OS/2 DDs	Resolved.  Open - IBM proposed swapping BIOS patches for MS drivers and remaining 3rd party drivers (binaries only).	We will ship them all 3rd party drivers for which we have src rights.  ????

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6. LM Contract	Open - IBM presented PROFS note and Hansw letter supporting their position.	Concede their license to OS/2 2.0 redir that they have shipped with EEP (but refuse to provide any future mods) and DOS 5.0 support shipped with LM 2.0c. Reject license to other items.
7. Jet BEUI	Open - Cronan to present more info on this. IBM willing to pursue license without prejudging whether their was any infringement.	Hold firm - this isn't a strong issue for them.
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10. MS Systems Definition	Open - MS to consider IBM position and get back to them.	Hold firm to our initial position.
11. MS OS/2 Deliverables	Resolved.	IBM to provide list of PTRs for Resource compiler and C6_386 compiler. Provided list of PTRs on OS/2 for which we haven't received a response (44).
12. "Better Windows than Windows"	Open - Cronan to review and respond.	Hold firm. Billp sent letter.

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### MS Objectives with IBM

Objective	Billg's Priority	Steveb's Priority
<b>1) Beat IBM in Windows vs OS/2 War.</b>		
a) Have IBM's seamless Windows solution for OS/2 2.0 licensed and royalties determined under the Windows agreement.		
b) Collect \$15M development fee/yr from IBM during the Delivery Period.		
c) Obtain IBM's OS/2 2.0 code for purposes of - Competitive analysis - Provide to OEMs		
d) Comply with the "letter" of our IBM agreements only.		
e) Provide Windows NT under the Windows agreement.		
f) Avoid giving IBM "interesting" Windows and NT code as long as possible.		
<b>2) Develop good working relationship with IBM again.</b>		
a) Have IBM continue to license DOS from us.		
b) Have IBM port NT to RS/6000.		
c) Ensure that our software runs well on their systems.		
d) Encourage IBM to sell Windows & extensions where appropriate, e.g, MPC, PS/1, etc.		
e) Work with IBM on long-term distributed computing model.		
f) Keep RoyC and his team in Redmond.		

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Summary of MS/IBM Issues

Issue	Status	Plan
1. Code Access	Open - IBM presented plan covering all OSs. We responded with a proposal s/t Billg/Steveb review.	????
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4. Source for Windows DDs	Resolved.	Follow up on amendment of 3rd party agreements and shipment of src to IBM. IBM will pursue Novell.
5. OS/2 DDs	Resolved.  Open - IBM proposed swapping BIOS patches for MS drivers and remaining 3rd party drivers (binaries only).	We will ship them all 3rd party drivers for which we have src rights.  ????

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6. LM Contract	Open - IBM presented PROFS note and Hansw letter supporting their position.	Concede their license to OS/2 2.0 redir that they have shipped with EEP (but refuse to provide any future mods) and DOS 5.0 support shipped with LM 2.0c. Reject license to other items.
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c) Ensure that our software runs well on their systems.		
d) Encourage IBM to sell Windows & extensions where appropriate, e.g. MPC, PS/1, etc.		
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f) Keep RoyC and his team in Redmond.		

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**Summary of MS/IBM Issues**

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4. Source for Windows DDs	Resolved.	Follow up on amendment of 3rd party agreements and shipment of src to IBM. IBM will pursue Novell.
5. OS/2 DDs	Resolved.  Open - IBM proposed swapping BIOS patches for MS drivers and remaining 3rd party drivers (binaries only).	We will ship them all 3rd party drivers for which we have src rights.  ????

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6. LM Contract	Open - IBM presented PROFS note and Hansw letter supporting their position.	Concede their license to OS/2 2.0 redir that they have shipped with EEP (but refuse to provide any future mods) and DOS 5.0 support shipped with LM 2.0c. Reject license to other items.
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MS	IBM
<p><b>I. Contractual Issues</b></p> <ol style="list-style-type: none"> <li>1. Definition of OS/2 3.0</li> <li>2. Delivery of "Windows code" for OS/2 2.0 source</li> <li>3. DOS royalty for shipment of QBasic on clone systems</li> <li>4. Definition of "IBM systems" under the agreements</li> <li>5. "Better Windows than Windows"</li> <li>6. Delivery of Workplace Shell without disclaimer</li> </ol>	<p><b>I. Contractual Issues</b></p> <ol style="list-style-type: none"> <li>1. WABCC</li> <li>2. Delivery of Win 3.1 and Windows NT source code</li> <li>3. Maintenance for OS/2 2.0 SDK</li> <li>4. Delivery of LM code as "modifications"</li> <li>5. Disclosure of confidential information  <i>6. Hiring IBM employees</i>  <del>7. <i>License of OEM business</i></del></li> </ol>
<p><b>II. Global Goals</b></p> <ol style="list-style-type: none"> <li>1. Obtain patent/copyright immunity for Apple suit  <i>New terms for</i></li> <li>2. Rescind OS/2 3.X agreement</li> <li>3. Port PM and ES to NT</li> <li>4. Maintain strong DOS relationship/discourage IBM's sale of PC-DOS on non-IBM systems</li> <li>5. Avoid bundling OS/2 or DR-DOS on IBM systems</li> <li>6. Support for Windows where appropriate within IBM, e.g., PS/1, AS/400 and host connectivity, MM systems</li> <li>7. Develop relationship with hardware labs</li> <li>8. Improve MM relationship</li> <li>9. Develop Pen Windows machine  <i>(IBM: refusal to license creates fodder for press)</i></li> <li>10. Sell LM box in "Novell style" arrangement</li> </ol>	<p><b>II. Global Goals</b></p> <ol style="list-style-type: none"> <li>1. MS develop 32 bit OS/2 apps and development tools</li> <li>2. MS provide strong ISV/OEM support for OS/2 2.0</li> <li>3. MS develop great PM subsystem in NT P1  <i>(MS will cooperate)</i></li> <li>4. Discontinue public attacks on IBM and OS/2</li> <li>5. License to LADDR code  <i>6. Plans for NT</i>  <i>7. Get MS out of 2.0 OEM biz?</i></li> </ol>

*\* Make Windows great 32-bit operating system*  
*What MS wants / what IBM is willing to give*

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