COMMENTS OF COMMISSIONER MICHAEL E. TONER
REGARDING THE DRAFT ELECTIONEERING COMMUNICATIONS NPRM
AUGUST 1, 2002

At the outset, I want to thank the General Counsel's Office for doing an outstanding job preparing this draft Notice of Proposed Rulemaking ("NPRM") on electioneering communications. As everyone knows, just last month we completed a rulemaking on soft money, which was one of the most challenging rulemakings in the Commission's history. For the Office of General Counsel to be here today – only weeks later -- with a comprehensive and carefully crafted NPRM on electioneering communications is a testament to the dedication and hard work of the General Counsel, Rosie Smith, Tony Buckley, and everyone on their great team.

I also want to thank the General Counsel for preparing a balanced NPRM, one that identifies and seeks comments on a number of very difficult issues that we face in this rulemaking. I am particularly appreciative of the General Counsel's Office including a number of regulations alternatives in the document. I think this is a model for how NPRMs should be presented. By offering the public a number of concrete regulation options – including specific regulations text – we give everyone the best chance to provide detailed comments on how we should proceed.

In the weeks ahead, we will have to address several critical issues regarding electioneering communications that could have a major impact on political discourse in this country. I wish to touch briefly on several of these issues.

First, the statute restricts communications that refer to a federal candidate within 30 days before a primary or caucus. A critical question, in terms of communications that refer to presidential candidates, is whether that 30-day black-out period applies only when an ad runs in a particular state that holds a primary within 30 days, or whether the black-out period applies nationwide if a primary occurs anywhere in the country within 30 days. If we adopt a national rule, it would result in a nationwide blackout on ads mentioning a presidential candidate for more than 240 days between mid-December of the year preceding the election and the election itself. This rule would also restrict ads that depict presidential candidates from being aired in a state even after that state has held its presidential primary. For example, it would impose a blackout on ads airing in New Hampshire in June, even though the New Hampshire primary was held four or five months earlier. I think it is very important that commentators address this issue, particularly as it appears that some of my colleagues may favor such an interpretation. Specifically, is a nationwide blackout required by BCRA? Or is such a result contrary to BCRA's statutory purpose and not required by the plain language of the legislation?

Second, we will decide whether groups and individuals will be required to file electioneering communications statements even before they air an advertisement, or whether the disclosure obligation only arises when an ad airs. This is a critical issue. Some are likely to view a disclosure requirement before an ad airs as a prior restraint, or

at the very least, as compelling the prior disclosure of sensitive and confidential political information. The narrative portion of the NPRM, starting at p. 38, does an excellent job of discussing the relevant statutory language, which some commentators are likely to argue is inconsistent on this point. However, anytime the federal government considers requiring people – under penalty of perjury - to notify the government before they engage in political speech, it is a very serious issue. We need comment on this.

Third, we will address whether the electioneering communications provisions impose duplicative reporting obligations on U.S. House and Senate candidates and other political committees. Specifically, we need to decide whether the electioneering communications reporting provisions – which require a disclosure statement within 24 hours – will apply to House and Senate candidates whenever they run an ad that depicts themselves or their opponent. If this is the case, a lot of members of Congress are going to be filing a lot of disclosure statements. The statutory language strongly suggests such duplicative reporting should not be required, because is exempts all "expenditures" from the definition of electioneering communications. In addition, BCRA is focused on requiring disclosure for groups that historically have not had any reporting obligations, as opposed to federal candidates, national parties, and state parties, that report regularly. I look forward to receiving comments on these reporting issues, particularly on whether the Commission should interpret BCRA to impose duplicative reporting obligations on political organizations that are already reporting their activity to the Commission or to state election boards.