

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR 8080

DATE COMPLAINT FILED: 10/14/2022

DATE OF NOTIFICATIONS: 10/21/2022

DATE OF LAST RESPONSE: 03/07/2023

DATE ACTIVATED: 08/16/2023

EXPIRATION OF SOL: 06/25/2027

ELECTION CYCLE: 2022

COMPLAINANT:

Mario Nicolais

RESPONDENTS:

Pericle Communications Company
 For Colorado’s Future and Paul Kilgore
 in his official capacity as treasurer

**RELEVANT STATUTE
AND REGULATION:**

52 U.S.C. § 30119(a)(1), (a)(2)

11 C.F.R. § 111.4(d)

11 C.F.R. § 115.2

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Pericle Communications Company (“Pericle”), a wireless engineering services company, that held a federal government contract, made a \$25,000 contribution to an independent expenditure-only political committee (“IEOPC”), For Colorado’s Future and Paul Kilgore in his official capacity as treasurer (the “Committee”).¹ The Complaint further alleges that Pericle and the Committee may have violated provisions of the Federal

¹ Compl. at 1 (Oct. 14, 2022).

1 Election Campaign Act of 1971, as amended (the “Act”) that prohibits federal contractors from
2 making, and any person from knowingly soliciting, such contributions.²

3 Pericle, in response, acknowledges having a federal contract at the time that it made the
4 June 2022 contribution but contends that the Commission should dismiss the Complaint based on
5 its lack of knowledge of the federal contractor ban and the Committee’s prompt refund of the
6 contribution.³

7 The Committee, in response, asserts that its actions demonstrate that it did not knowingly
8 solicit a federal contractor contribution in violation of the Act or Commission regulations; and
9 that it refunded the June 2022 contribution upon learning of the Complaint and federal contractor
10 status of Pericle.⁴ In addition, the Committee contends that the federal contractor contribution
11 prohibition is unconstitutional as applied to its contributions to independent-expenditure only
12 political committees.⁵

13 As explained below, Pericle’s arguments for dismissal are either unconvincing or are
14 more appropriately viewed as arguments for mitigation. Accordingly, we recommend that the

² *Id.*; see also 52 U.S.C. § 30119(a)(1), (a)(2).

³ Pericle Resp. at 2 (Dec. 8, 2022). In its Response, Pericle, also noted that it "wishes to bring the following information to the Commission's attention" the fact that the Complainant publicly disclosed the existence of the complaint. Pericle Resp. at 2. According to Pericle, Mr. Jacobsmeyer was contacted by Colorado Public Radio prior to its receipt of the Complaint and requested that he respond to a news article regarding the Complaint published on October 21, 2022. Pericle Resp. at 2-3; see also Andrew Kenney, *Local Company Faces FEC Complaint Over \$25,000 Donation in Support of Erik Aadland*, CPR NEWS (Oct. 21, 2022), <https://www.cpr.org/2022/10/21/pericle-communications-erik-aadland-fec-complaint/> (last visited on Dec. 6, 2023).

However, the Commission has previously determined that § 30109(a)(12) does not prohibit a complainant from disclosing its own complaint, any information contained in the complaint or related to the subject matter of the complaint as long as it does not disclose any information relating to any notification of findings by the Commission or any action taken by the Commission in an investigation until the case is closed or the respondent waives the right to confidentiality. See 52 U.S.C. § 30109(a)(12)(A); Advisory Opinion (“AO”) 1994-32 at 2-3 (Gasink); AO 1995-1 (Fulani/Newman); see also Guidebook for Complainants and Respondents on the FEC Enforcement Process at 7, FEC (May 2012), https://www.fec.gov/resources/cms-content/documents/policy-guidance/respondent_guide.pdf.

⁴ Committee Resp. at 2 (Mar. 7, 2023).

⁵ *Id.* at 3-5.

1 Commission find reason to believe that Pericle violated 52 U.S.C. § 30119(a)(1) and 11 C.F.R.
2 § 115.2(a) by making a prohibited \$25,000 contribution to the Committee in June 2022 and that
3 the Commission enter pre-probable cause conciliation (“PPCC”) with Pericle.

4 There is insufficient information available to assess whether the Committee knowingly
5 solicited the contribution. We therefore recommend, consistent with past matters in which there
6 is insufficient information regarding a potential solicitation, that the Commission take no action
7 at this time as to the Committee pending the development of additional information during
8 conciliation.

9 **II. FACTUAL BACKGROUND**

10 Pericle is a wireless engineering services company based in Colorado Springs, Colorado.⁶
11 Jay Jacobsmeyer is the President & Owner of Pericle.⁷ Federal spending data confirms that
12 Pericle was the recipient of a purchase order contract, beginning on September 21, 2021 and
13 concluding on August 31, 2022, and totaling \$1.2 million, with the National Institute of
14 Standards and Technology, U.S. Department of Commerce.⁸

15 On June 24, 2022, Pericle, while holding the above-referenced federal government
16 contract, made one \$25,000 contribution to the Committee.⁹ Neither Pericle nor the Committee

⁶ See Company Overview, Pericle Communications Company, <https://www.pericle.com/company/> (last visited on Dec. 6, 2023).

⁷ See Our People, Pericle Communications Company, <https://www.pericle.com/company/our-people/> (last visited Dec. 6, 2023).

⁸ Compl. at 2; see also USAspending.gov, Recipient Profile Pericle Communications Co., <https://www.usaspending.gov/recipient/95844a6e-dec0-8311-46d1-eef5d507701c-C/latest> (last visited Oct. 25, 2023). The website, when filtered for Fiscal year 2021, indicates a one-year “purchase order” contract with the Department of Commerce with a start date of September 21, 2021, an end date of August 31, 2022, and a current total value of \$1.2 million, and showing the recipient as Pericle Communications Company. *Id.*; see also USAspending.gov, Purchase Order, PIID I 333ND2 I PNB 67 0M7, <https://www.usaspending.gov/search/?hash=296f4f2a672b3f3c94474fbd2b98b0f4> (last visited on Dec. 6, 2023).

⁹ For Colorado’s Future, July 2022 Quarterly Report at 6 (July 13, 2022) (“July 2022 Quarterly Report”), <https://docquery.fec.gov/pdf/581/202207139518412581/202207139518412581.pdf>; Compl. at 1.

1 have provided information regarding whether or how the Committee may have solicited the
2 contribution or the circumstances under which the contribution was made.¹⁰ On November 5,
3 2022, approximately two weeks after the Commission notified Respondent of the Complaint in
4 this matter, Pericle received a refund of the \$25,000 contribution back from the Committee.¹¹

5 The Complaint contends that Pericle made a prohibited government contractor
6 contribution to the Committee.¹² Pericle acknowledges that it was a government contractor at
7 the time of the June 2022 contribution but asks that the Commission nonetheless exercise its
8 prosecutorial discretion and dismiss this matter or allow it to enter into pre-probable cause
9 conciliation.¹³ In addition, Pericle states that its sole owner and president, Mr. Jacobsmeyer, was
10 unaware of the prohibition on federal contractor contributions at the time that the federal contract
11 was active.¹⁴ According to Pericle, upon learning of the federal contractor ban in late October
12 2022, it received, on November 5, 2022, a refund of the June 2022 contribution from the
13 Committee.¹⁵ In its Response, Pericle also provided additional information concerning a second
14 contribution that it made to the Committee during a time period when it did not have a federal
15 contract as well as a later contribution made by Mr. Jacobsmeyer individually.¹⁶

¹⁰ See generally Pericle Resp.

¹¹ Pericle Notif. Letter at 1 (Oct. 21, 2022); Committee Notif. Letter at 1 (Oct. 21, 2022); Pericle Resp., Attach. (copy of Committee's refund check); For Colorado's Future, 2022 Post-General Report at 9 (Dec. 8, 2022), <https://docquery.fec.gov/pdf/927/202212089547539927/202212089547539927.pdf> (reporting a refund disbursed on Nov. 2, 2022).

¹² Compl. at 1.

¹³ Pericle Resp. at 2.

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ Pericle Resp. at 2; For Colorado's Future, October 2022 Quarterly Report at 7 (Oct. 15, 2022) ("October 2022 Quarterly Report"), <https://docquery.fec.gov/pdf/901/202210159532653901/202210159532653901.pdf>; For Colorado's Future, 2022 Pre-General Report at 6 (Oct. 27, 2022) ("2022 Pre-General Report"), <https://docquery.fec.gov/pdf/069/202210279541896069/202210279541896069.pdf>. The Complaint does not

1 The Committee, in its Response, asserts that the Complaint does not name or allege that it
2 knowingly solicited a federal contractor contribution in violation of the Act or Commission
3 regulations.¹⁷ The Committee's Response states that it learned of Pericle's federal contractor
4 status in October 2022, upon notification of the Complaint, and thereafter promptly refunded the
5 June 2022 contribution.¹⁸ The Committee further contends that the current treasurer has no
6 potential liability as he was not the treasurer of record during the time period that the June 2022
7 contribution was received.¹⁹ Lastly, the Committee contends that the federal contractor
8 contribution prohibition is unconstitutional as applied to its contributions to IEOPCs.²⁰

9 **III. LEGAL ANALYSIS**

10 **A. The Commission Should Find Reason to Believe that Pericle** 11 **Violated the Federal Contractor Prohibition**

12 The Act and the Commission's regulations prohibit contributions to political committees
13 by any person who enters into a contract with the United States or its departments or agencies for
14 "furnishing any material, supplies, or equipment," if payment on such contract "is to be made in
15 whole or in part from funds appropriated by Congress."²¹ Such contributions are barred for the
16 period between (1) the earlier of commencement of negotiations or when requests for proposal
17 are sent out, and (2) the later of the completion of performance on or termination of negotiations
18 for the contract.²² The prohibition covers contributions to any political party, political

address either of these contributions, both of which appear to be permissible on their face, and their permissibility is not at issue in this matter. Accordingly, we do not make any recommendations concerning these contributions.

¹⁷ Committee Resp. at 2 (Mar. 7, 2023).

¹⁸ *Id.*

¹⁹ Committee Resp. at 2.

²⁰ *Id.* at 2-5.

²¹ 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2(a).

²² 11 C.F.R. § 115.1(b).

1 committee, federal candidate, or “any person for any political purpose or use.”²³ The Act also
2 bars any person from knowingly soliciting a contribution from a federal contractor during the
3 prohibited period.²⁴

4 Pericle acknowledges holding an active purchase order federal contract with the
5 Department of Commerce between September 1, 2021, and August 31, 2022, and making a
6 contribution to the Committee on June 22, 2022, while the contract was active.²⁵ Accordingly, it
7 appears that Pericle made a \$25,000 prohibited contribution on June 22, 2022, while serving as a
8 federal contractor in violation of section 30119(a)(1) of the Act.

9 Pericle’s argument in favor of dismissal is not persuasive given the facts in this matter.
10 The Commission has exercised prosecutorial discretion to dismiss allegations under the federal
11 contractor ban in certain unique circumstances, but those conditions are not met here. In MUR
12 6403 (*Alaskans Standing Together, et al.*), the Commission exercised its prosecutorial discretion
13 when the relevant contractors did not ordinarily contract with the government, such that their
14 officers responsible for the contributions were not aware of the contracts; the companies did not
15 seek the contracts but were approached by the federal government; and the amounts paid for the
16 contracts were relatively small considering the contractors’ other income and assets.²⁶ The
17 available information indicates that Pericle was not a first time contractor and that Mr.

²³ *Id.* § 115.2(a).

²⁴ 52 U.S.C. § 30119(a)(2); 11 C.F.R. § 115.2(c).

²⁵ Pericle Resp. at 1. Federal spending data confirms that it held one active purchase order contract totaling \$1.2 million at the time the contribution. See [USAspending.gov](https://www.usaspending.gov), Purchase Order, PIID I 333ND2 I PNB 67 0M7, <https://www.usaspending.gov/search/?hash=296f4f2a672b3f3c94474fbd2b98b0f4> (last visited on Dec. 6, 2023).

²⁶ *See, e.g.*, Factual & Legal Analysis (“F&LA”) at 4, 10, MUR 6403 (*Ahtna, Inc. and NANA Regional Corp., Inc.*); F&LA at 8, MUR 6403 (*Arctic Slope Regional Corp.*). *But see* F&LA at 4, MUR 7099 (*Suffolk Construction Co., Inc.*) (concluding that respondent’s argument that its federal contract work represented a “small fraction” of its business did not negate the company’s status as a federal contractor, and noting that “[w]hile Suffolk may consider its federal contract work a “*de minimis*” portion of its overall work, its \$200,000 in contributions to the Committee are not *de minimis*.”).

1 Jacobsmeier, as its sole owner, would have been aware of the current federal contract; and there
2 is no information to suggest that the federal government approached Pericle to be a contractor or
3 that the contract amount (\$1,188,000) is relatively small considering its other income and assets
4 (average \$1,200,000 in sales annually).²⁷ Therefore, Pericle does not satisfy any of the unique
5 circumstances present in the matters where the Commission exercised its prosecutorial
6 discretion.

7 Pericle contends that dismissal is merited because the Committee, upon learning of the
8 potential impermissibility of the contributions, promptly issued a refund of the June 2022
9 contribution. Although the Commission has dismissed at least two matters where the
10 impermissible contribution was promptly refunded, in those matters, the Commission's dismissal
11 was predicated, in part, on the relatively modest amounts at issue (\$1,000 in one case and
12 approximately \$1,600 in the other).²⁸ Here, the amount in violation (\$25,000) is more similar to
13 the size of the federal contractor contributions in matters where the Commission has pursued
14 enforcement.²⁹

²⁷ See <https://www.usaspending.gov/search/?hash=296f4f2a672b3f3c94474fbd2b98b0f4> (reflecting previous federal contracts held by Pericle in 2008 and 2018); D&B FIN. ANALYTICS, LIVE REPORT: PERICLE COMMUNICATIONS COMPANY (Nov. 15, 2023).

²⁸ See F&LA at 3-4, MUR 7394 (O'Donnell for Congress, *et al.*) (dismissal citing the modest amount in violation and "remedial actions taken"); F&LA at 3, MUR 7338 (Rick for Congress, *et al.*) (same).

²⁹ See *e.g.*, F&LA at 3, MUR 7569 (3M) (Commission approved reason to believe finding for \$50,000 prohibited government contractor contribution); Cert. ¶ 1 (Oct. 13, 2021), MUR 7569 (3M); F&LA at 4, MUR 7451 (Ring Power) (same); Cert. ¶ 1 (May 9, 2019), MUR 7451 (Ring Power). The total verified activity also would meet the referral threshold of \$25,000 for typical referrals to the Office of General Counsel. See also Enforcement Prioritization System Approved Rating Sheet ¶ A.2.g, MUR 8080 (Pericle Communications Co. *et al.*).

1 Accordingly, we recommend that the Commission find reason to believe that Pericle
2 violated 52 U.S.C. § 30119(a) and 11 C.F.R. § 115.2(a) by making a prohibited contribution
3 totaling \$25,000 to the Committee.³⁰

4 **B. The Commission Should Take No Action at This Time as to**
5 **the Committee**

6 As noted above, the Act prohibits any person from knowingly soliciting a federal
7 contractor contribution.³¹ The Committee correctly asserts that the Complaint in this matter does
8 not expressly allege that it knowingly solicited a federal contractor in violation of the Act or
9 Commission's regulations.³² Further, the Committee responds that it had no knowledge that
10 Pericle was a federal contractor at the time of the June 2022 contribution.³³

11 The Committee also contends that barring federal contractor contributions is
12 unconstitutional.³⁴ However, no court has made such a ruling,³⁵ and under those circumstances

³⁰ Although the Committee asserts that its current treasurer has no liability since he was not the treasurer at the time of the prohibited contribution, the Commission's general policy, where a political committee is involved in an enforcement proceeding, is to name the committee and its current treasurer in his or her official capacity as respondents in the matter. *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005), *available at* <https://www.fec.gov/resources/cms-content/documents/notice2004-20.pdf> (stating that "when a complaint asserts sufficient allegations to warrant naming a political committee as a respondent, the committee's current treasurer will also be named as a respondent in his or her official capacity" and reason-to-believe findings against the committee will also be accompanied by findings against the current treasurer in his or her official capacity). Accordingly, the current treasurer was appropriately named as treasurer in his official, but not his personal capacity.

³¹ 52 U.S.C. § 30119(a)(2); *see also* 11 C.F.R. § 115.2(c).

³² Committee Resp. at 2. Recipient committees have routinely been notified as respondents in similar matters. *See, e.g.*, Notif. Letters, MUR 8022 (MEI Services, Inc.) (July 6, 2022); Notif. Letters, MUR 8010 (Medical Place) (June 8, 2022); Notif. Letters, MUR 7887 (Hamilton) (Mar. 22, 2021); Notif. Letters, MUR 7886 (Astellas Pharm.) (Mar. 24, 2021); Notif. Letters, MUR 7568 (Alpha Marine Services) (Feb. 25, 2019); Notif. Letters, MUR 7451 (Ring Power) (Aug. 6, 2018); Notif. Letters, MUR 7450 (Ashbritt) (Aug. 8, 2018).

³³ Committee Resp. at 2.

³⁴ *Id.* at 3-4.

³⁵ *Id.* The Committee points to dicta questioning the federal contractor ban as applied to IEOPCs at the district court level in *Wagner v. FEC*, 901 F. Supp. 2d 101, 107 (D.D.C. 2012). *Id.* However, the D.C. Circuit, sitting *en banc* in *Wagner v. FEC*, upheld the validity of the federal contractor ban and did not address the ban specifically as applied to contributions made to IEOPCs. 793 F.3d 1 (D.C. Cir. 2015).

1 the Commission has continued to enforce the ban as to IEOPCs, even where respondents have
2 made similar arguments about the constitutionality of the federal contractor prohibition.³⁶

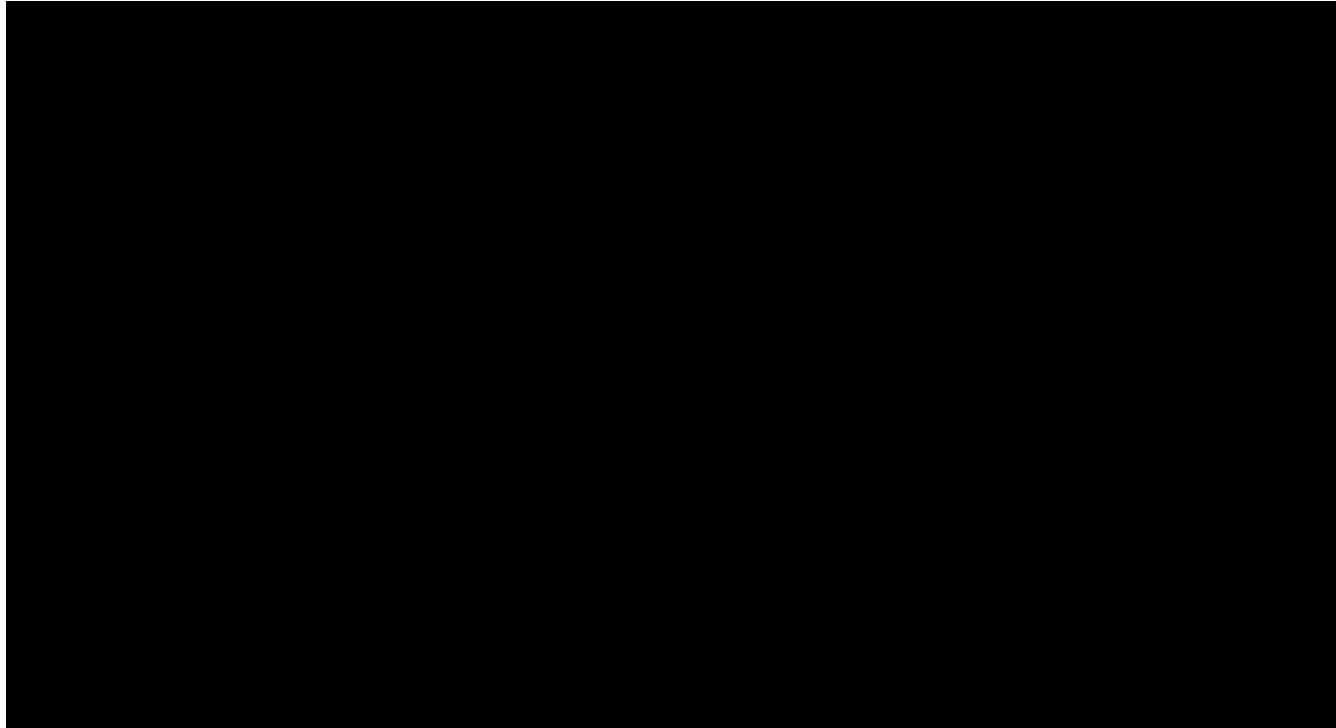
3 The available information is not sufficient to fully assess whether the Committee solicited
4 the June 2022 contribution and if so, the circumstances under which it may have solicited the
5 contribution. However, discussion toward a possible resolution of this matter during pre-
6 probable cause conciliation with Pericle may reveal additional information about the
7 circumstances of the contribution, including any solicitation efforts by the Committee. In similar
8 circumstances in other federal contractor matters, the Commission has taken no action against
9 the recipient committee.³⁷ Accordingly, we recommend that the Commission take no action at
10 this time as to the Committee regarding the allegation that it knowingly solicited a prohibited
11 federal contractor contribution.

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³⁶ See F&LA at 1, MUR 8010 (Medical Place *et al.*) (finding reason to believe that a federal contractor made a prohibited contribution to Alabama Conservatives Fund, an IEOPC); F&LA at 1, MUR 7886 (Astellas *et al.*) (finding reason to believe that a federal contractor made a prohibited contribution to the Senate Leadership Fund, an IEOPC).

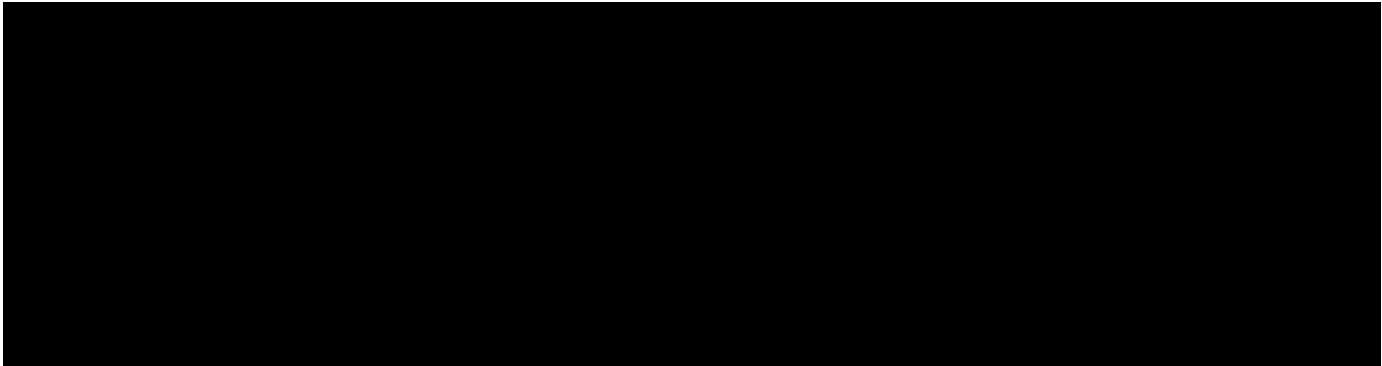
³⁷ See *e.g.*, First GCR at 5, MUR 7568 (Alpha Marine Services Holdings, LLC, *et al.*) (“[T]he available record does not include information regarding the making of the contribution, and the Committee’s denial is unsworn and did not include [the contractor’s] signed attestation.”); Cert. ¶ 2 (Aug. 19, 2019), MUR 7568 (Alpha Marine Services Holdings, LLC, *et al.*) (taking no action as to IEOPC).

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6 **V. RECOMMENDATIONS**

- 7 1. Find reason to believe that Pericle Communications Co. violated 52 U.S.C.
8 § 30119(a) and 11 C.F.R. § 115.2(a) by making a prohibited federal contractor
9 contribution in June 2022;
- 10 2. Enter into pre-probable cause conciliation with Pericle Communications Co.,
11 prior to a finding of probable cause to believe;
- 12 3. Take no action at this time as to For Colorado's Future and Paul Kilgore in his
13 official capacity as treasurer;
- 14 4. Approve the attached Factual and Legal Analysis;
- 15 5. Approve the attached proposed Conciliation Agreement; and
- 16 6. Approve the appropriate letter.



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