

BEFORE THE COLORADO AIR QUALITY CONTROL COMMISSION

**IN THE MATTER OF THE COLORADO AIR QUALITY CONTROL COMMISSION'S
RULEMAKING PROPOSING MODIFICATIONS TO REGULATION NUMBER 20
TO ADOPT CALIFORNIA'S ZERO EMISSION VEHICLE STANDARDS**

REBUTTAL STATEMENT OF FREEDOM TO DRIVE INC.

Freedom to Drive Inc. ("FTD") by and through its undersigned counsel, and pursuant to the Colorado Air Quality Control Commission's ("Commission") May 10, 2019 Notice of Rulemaking Hearing and July 19, 2019 Prehearing Order, respectfully submits the following Rebuttal Statement in connection with the above captioned rulemaking proceeding proposing modifications to Regulation Number 20 to adopt California's Zero Emission Vehicle ("ZEV") Standards ("Proposed ZEV Rule" or "Proposed ZEV Rulemaking").

EXECUTIVE SUMMARY

FTD remains respectfully opposed to the Proposed ZEV Rulemaking, and submits that the Commission should decline to adopt the Proposed ZEV Rule put forward by the Colorado Department of Public Health ("CDPHE") – Air Pollution Control Division ("Division") for the following reasons:

1. The Proposed ZEV Rule will violate the identicality requirement of the federal Clean Air Act if it incorporates either of the alternate proposals providing for a Proportionality Credit or an Early Action Credit;
2. Energy Ventures Analysis's evaluation of the Proposed ZEV Rule (FTD – PHS, EX-E ("EVA Study")) and Energy Ventures Analysis' Review of Prehearing Statements and Exhibits (REB EX-A, attached hereto) ("EVA Rebuttal Study") show that the Proposed ZEV Rule is not justified in Colorado, and will likely result in the following net emissions and costs to Colorado consumers and industry:
 - a. The Proposed ZEV Rule will result in an increased average cost of passenger vehicles of \$500, which is compounded by the costs imposed by the Commission's recent adoption of the Low Emission Vehicle ("LEV") Regulation Number 20, 5 CCR 1001-24 ("Regulation 20"), which EVA estimated would cost Colorado consumers an additional \$2,110 for model year 2021-2025 vehicles and \$2,098 for model year 2025 vehicles.

- b. The net present value of the regulation is negative when considering increased average vehicle costs and the fuel savings benefit – the present value of increased vehicle costs is \$880 million whereas the present value of fuel savings is \$307 million – resulting in a net cost of \$573 million;
 - c. Increased costs cause lower income consumers in Colorado to use older cars longer, which makes Colorado’s roads more dangerous and more polluted – which could cause emissions to increase by roughly 1 million tons of CO₂ through 2040 by encouraging consumers to stay in older, less efficient vehicles;
 - d. Displaced gasoline demand will cost the state \$25 million in lost gas tax revenues, this cost fall directly on truckers, farmers, and families utilizing Colorado’s roads.
 - e. Increased ZEV demand combined with state ZEV tax breaks will cost the state \$88 million a year in forgone tax revenue. At \$88 million a year, this tax credit exceeds state tax credits for “Earned Income Tax.” Such a loss in tax revenue is a clear transfer from lower and middle-income Colorado citizens to those who can afford to purchase ZEVs and receive a large tax credit;
 - f. Increased public safety expenditures to accommodate the complexities of battery fires will have a direct cost to the state of at least \$1.6 million;
 - g. The Suncor refinery, Colorado’s only refinery, provides roughly 360 jobs with a potential average annual salary of \$98,000, which the Proposed ZEV Rule may force to close. The economic impact of a closure of the Suncor refinery would be significant, leading to an increase in gasoline and diesel costs by as much as 11 cents per gallon. This cost would be levied on all non-ZEV drivers;
 - h. The electricity infrastructure build-out required to support the ZEV regulation could raise retail rates by 0.073 cents (or 7.3%) per kilowatt hour;
 - i. The total incremental energy cost of the Proposed ZEV Rule to Colorado farmers is estimated to be \$22.6 million per year, accounting only for increased energy costs for diesel, gasoline, and electricity;
3. The Final Economic Impact Analysis (“FEIA”) prepared by CDPHE is fundamentally flawed in that it:
- a. Fails to comply with the statutory requirements for an EIA under C.R.S. § 25-7-110.5(e);
 - b. Fails to consider the Proposed ZEV Rule in context with the interlinking policies of Regulation 20, including:
 - i. Ignoring scientific literature that suggests that the Proposed ZEV Rule, when paired with Colorado LEV Regulation 20, may result in an increase in greenhouse gas (“GHG”) and criteria pollutant emissions;
 - c. Fails to address the significant costs to Colorado consumers and industry as required by C.R.S. § 25-7-110.5(e) and as discussed *supra* in #2 including:
 - i. Failing to quantify the impact of income tax credits for ZEV vehicles;
 - ii. Failing to quantify the impact of reduced gas tax revenues on the Colorado Department of Transportation’s Budget;

- iii. Failing to quantify infrastructure costs for the Proposed ZEV Rule that will be borne by Colorado’s taxpayers; and
 - iv. Failing to conduct a sensitivity analysis or quantify the many potential adverse impacts on Colorado’s citizens, including on employment; the impacts on industry, including automobile dealers, manufacturers, small business, and all industry reliant on gasoline for operations; and to economically disadvantaged communities.
 - d. Fails to consider many likely scenarios and risks outside of a “minimum compliance projection” which causes the FEIA to significantly underestimate the costs and overstate the benefits of the Proposed ZEV Rule;
- 4. The Commission continues to lack authority to promulgate motor vehicle emissions regulations until the prerequisite motor vehicle control studies required by Colorado law (C.R.S. § 25-7-130) have been completed and the Commission has made recommendations for establishing statewide minimum regulations based on those required studies;
- 5. The Proposed ZEV Rule is preempted by the federal Energy Policy and Conservation Act (“EPCA”);
- 6. The rulemaking continues to be inappropriate given three current actions at the Federal and State level, none of which have been fully concluded, and which may moot this current Proposed ZEV Rulemaking and result in an enormous waste of all parties, taxpayers, and Colorado’s resources. Specifically:
 - a. The ongoing rulemaking effort by the United States Environmental Protection Agency (“EPA”) in the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021 – 2026 Passenger Cars and Light Trucks (83 Fed. Reg. 42986) (“SAFE Vehicles Rule”) that may modify current national motor vehicle emissions standards and withdraw California’s federal Clean Air Act waiver for motor vehicle emission standards;
 - b. The pending litigation in *The Colorado Automobile Dealers Association v. The Colorado Department of Public Health and Environment et. al*, 2019CV30343 (Denver Dist. Ct., Filed January 28, 2019); 2019CA1386 (Colorado Court of Appeals, Filed July 26, 2019) (“CADA Litigation”); and
 - c. The litigation in *Defend Colorado v. The Colorado Air Quality Control Commission and Governor Jared Polis*, 2019CV31577 (Denver Dist. Ct., Filed April 23, 2019) (“Defend Colorado Litigation”), for which the time for appeal has not concluded.

7. Finally, the rulemaking continues to be forced through on a rushed schedule that denies participating parties meaningful due process, as required by the Colorado Constitution, the Colorado Administrative Procedure Act (“APA”), and the Colorado Air Pollution Prevention and Control Act (“Colorado Air Act”).

Finally, FTD requests an additional sixty (60) minutes for rebuttal presentation of testimony at the hearing for the Proposed ZEV Rule. This request is necessary: in light of the voluminous Prehearing Statements filed in this rulemaking; in order to devote adequate time to discussing and rebutting the two alternative proposals presented jointly by the Colorado Energy Office (“CEO”) and the Colorado Department of Transportation (“CDOT”), and the Alliance of Automobile Manufacturers (“Alliance”) and the Association of Global Automakers (“Global”); and to allow sufficient time for FTD to accommodate the rebuttal witnesses identified in this Rebuttal Statement.

STATEMENT OF REBUTTAL LEGAL, POLICY, AND FACTUAL ISSUES

I. The Proposed ZEV Rule Will Violate the Identicality Requirement of the Federal Clean Air Act if it Adopts Either of the Alternative Proposals in Whole, in Part, or in Combination

Section 177 of the federal Clean Air Act allows States to adopt California’s motor vehicle emission control standards so long as those standards are “*identical* to the California standards for which a waiver has been granted for such model year.” 42 U.S.C. § 7507(1) (emphasis added). The alternative proposals suggested separately by CEO and CDOT, and the Alliance and Global, will violate this identicality requirement if adopted by the Commission in whole or in part, and thus will render the entire Proposed ZEV Rulemaking facially invalid.

The CEO and CDOT have proposed that the Commission adopt the Proposed ZEV Rule with the addition of an Early Action Credit that would allow motor vehicle manufacturers to accrue ZEV credits from any model year 2020, 2021, or 2022 ZEV vehicles sold in Colorado leading up to the implementation of the Proposed ZEV Rule in 2023.

Separately, the Alliance and Global have proposed that the Commission adopt the Proposed ZEV Rule with the addition of a Proportional Credit that would allow motor vehicle manufacturers to receive a one-time starting credit balance when the Proposed ZEV Rule is implemented in Colorado. The one-time proportional credit balance would be based on the manufacturers existing California ZEV credit bank, as that credit balance is proportional to new vehicle sales in Colorado (calculated by dividing that manufacturer’s new vehicle sales in Colorado by that manufacturer’s new vehicle sales in California for the relevant time period).

Neither the Early Action Credit nor the Proportional Credit are included in California's ZEV regulations. Both alternative proposals would allow manufacturers to meet California's ZEV standards with motor vehicle fleet makeups that are materially different than under the California's ZEV standards. For example, under the Proportional Credit proposal, manufacturers would be given credits based on California vehicle sales, when those same sales would historically be unachievable in Colorado due to the unique needs of Coloradans and the very different fleet composition in Colorado. Similarly, under the Early Action Credit proposal, manufacturers could begin to compile credits for model years 2021 and 2022, *while not being required to apply any of those credits to compliance in those same model years*. Contrastingly, manufacturers amassing credits in California over the same time period cannot simply "bank" all those credits into future compliance years, but rather must still meet ZEV standards in 2021 and 2022.

Therefore, both alternate proposals go beyond simply suggesting an alternate enforcement mechanism for California's ZEV Standards, and instead create a regulatory scheme that materially changes the actual ZEV percentages that manufacturers must comply with under the Proposed ZEV Rule. Therefore, both alternate proposals act to create a materially different ZEV *standard* in Colorado by allowing automobile manufacturers to meet California ZEV percentages with entirely different fleet makeups in Colorado – based on arbitrarily set Proportional and Early Action Credits.

If the Commission chooses to adopt either alternative proposal, in whole, in part, or in combination, it will substantively violate the identity requirement in the federal Clean Air Act, resulting in any such Proposed ZEV Rule being unlawful. Because the Commission's ultimate decision on adopting either alternative proposal is currently unknown, FTD reserves the right to provide additional rebuttal testimony at the Proposed ZEV Rulemaking hearing on this topic.

II. The Proposed ZEV Rulemaking Adopting California's ZEV Regulations is Not Justified in Colorado.

As of the submission of this Rebuttal Statement, CDPHE has not submitted its completed CBA or RA for this Proposed ZEV Rule, thus depriving the parties of an opportunity to fully understand, review or comment on the environmental, technical, and economic justifications for this rule that might be claimed by CDPHE. FTD's analysis of CDPHE's justification for the Proposed ZEV Regulation therefore must solely be based on CDPHE's IEIA and FEIA.

As a threshold note, CDPHE's FEIA is nearly indistinguishable from the IEIA submitted with CDPHE's Proposed ZEV Rule package. Therefore, the same analyses put forward in FTD's Prehearing Statement, and in the EVA Study, apply to the FEIA. A review of the FEIA prepared by CDPHE reveals that, just as in its IEIA, CDPHE has failed to evaluate the adverse impacts the proposed rule will have on citizens and business in Colorado; has vastly understated

the costs and overstated savings benefits of the proposed rule, and has not based its evaluation of the Proposed ZEV Rule on the facts and conditions unique to Colorado.

A. CDPHE’S FEIA is Statutorily Deficient and Fails to Quantify Cumulative Costs on Colorado Businesses and Industries

The Colorado Air Act requires that any EIA completed by CDPHE follow one of three analyses contained C.R.S. § 25-7-110.5(4)(c). CDPHE’s FEIA identifies that it chose to undertake the analysis require by C.R.S. § 25-7-110.5(4)(c)(I) (CDPHE – PHS, EX-B, (“FEIA”), at 3):

- I. Cost-effectiveness analyses for air pollution control that identify:
 - (A) The cumulative cost including but not limited to the total capital, operation, and maintenance costs of any proposed controls for affected business entity or industry to comply with the provisions of the proposal;
 - (B) Any direct costs to be incurred by the general public to comply with the provisions of the proposal;
 - (C) Air pollution reductions caused by the proposal;
 - (D) The cost per unit of air pollution reductions caused by the proposal; and
 - (E) The cost for the division to implement the provisions of the proposal; .

As noted in FTD’s Prehearing Statement, CDPHE’s IEIA failed to quantify the statutorily required “cumulative” costs of the Proposed ZEV Rule on businesses and industries in Colorado. Those same legal omissions are carried forward into CDPHE’s FEIA. For example, CDPHE’s IEIA admitted that “[t]he costs associated with vehicle leases and vehicle loans have not been quantified in this Initial EIA,” and that “the Final EIA *may* account for such factors. IEIA, at 3-4 (emphasis added). CDPHE’s Final EIA removes any mention of vehicle leases and loans, and therefore fails to quantify those costs.

Further, CDPHE also noted in the IEIA that potential marketing, advertising, and vehicle incentive costs for manufacturers and dealers “have not been determined.” *Id.* at 13. CDPHE’s FEIA includes this same admission. FEIA, at 16. CDPHE’s IEIA noted that “new vehicle dealers may be under pressure from manufacturers’ obligations to meet ZEV sales requirements,” but fails to quantify the economic effects of that pressure. IEIA, at 13. CDPHE’s FEIA makes a cursory attempt to describe these significant burdens, only noting that the primary impact would be “reduced maintenance and repair revenue of new vehicles.” FEIA, at 16-17. However, CDPHE does not directly quantify these costs outside of referring the reader to tables calculating maintenance savings for *consumers* over the life of ZEV vehicles. *Id.* Maintenance savings for consumers do not directly correlate to the economic effects that will borne by new motor vehicle dealers, which go beyond consumer maintenance costs and include compliance obligations in Colorado and economic pressures from automobile manufacturers.

The CDPHE IEIA also noted that “[f]uel refiners, jobbers, and marketers would presumably be effected by reduced demand for gasoline,” and that a “loss in gasoline sales” would occur, but then fails to quantify those losses. Instead the CDPHE IEIA asserted (without supporting evidence) that any negative effects “are expected to negligible when compared to the overall fuel market” and that future expected population growth “would offset any loss in gasoline sales in the near future.”¹ IEIA, at 13. Now, in the FEIA, CDPHE attempts to quantify the loss in gasoline sales (and corresponding state tax revenues) by referring readers to its fuel cost savings tables. FEIA, at 17. However, CDPHE’s fuel cost savings tables fail to illustrate how future growth would offset any loss in gasoline sales. As shown in the EVA Study, the loss in gasoline sales instead will result in \$25 million in lost state tax revenues and the Proposed ZEV Rule will result in a corresponding increase in gasoline prices of up to 11 cents per gallon. *See* EVA Study, at 4.

Therefore, CDPHE’s FEIA fails to quantify the several acknowledged potential costs on businesses and industries of the Proposed ZEV Rule. This is a clear violation of the requirement in the Colorado Air Act that an EIA must contain a quantification of the “cumulative cost including but not limited to the total capital, operation, and maintenance costs of any proposed controls for affected business entity or industry to comply with the provisions of the proposal.” C.R.S. § 25-7-110.5(4)(c)(I). CDPHE’s bare acknowledgement that Colorado businesses and industries will be affected by the Proposed ZEV Rule simply does not alert the Commission, or the regulated public, as to the full costs of the rule because it fails to quantify those costs. Therefore, CDPHE cannot justify adoption of the Proposed ZEV Rule until those costs are properly quantified as required by the Colorado Air Act, and CDPHE’s FEIA is statutorily deficient.

Further, as demonstrated in Section II.B, *infra*, the costs on Colorado citizens, businesses, and industry that CDPHE ignores and fails to quantify are significant and material. When those costs are actually quantified, CDPHE’s claimed net savings for the Proposed ZEV Rule are negated, instead resulting in a net cost to Colorado as estimated in the EVA Study of \$573 million. EVA Study, at 18. That material cost disparity further demonstrate the statutory insufficiency of CDPHE’s FEIA.

B. CDPHE’s FEIA Contains Significant Methodological Flaws that Render CDPHE’s Cost-Benefit Conclusions Invalid

Instead of analyzing the required cumulative costs of the Proposed ZEV Rule on regulated businesses and industries in Colorado – namely car manufacturers and car dealerships – CDPHE arbitrarily frames the cumulative costs of the Proposed ZEV Rule solely on the basis

¹ Even if true, the fact that Colorado’s population will grow is in no way an offset to reduced fuel sales. Colorado’s population would be growing anyway and resulting in more gasoline sales in Colorado regardless of the Proposed ZEV Rule. The loss in gasoline sales (and associated taxes) is a completely separate issue.

of incremental vehicle costs as offset by fuel and maintenance savings. Further, CDPHE's analyses in its IEIA and FEIA are assumptions-driven, meaning that they specifically examined a scenario that supports a pre-determined outcome – namely that manufacturers are able to comply with the emissions standards in the Proposed ZEV Rule. However, as was demonstrated in the EVA Study, CDPHE's purported cost savings for the Proposed ZEV Rule are inaccurate and based on significant methodological flaws (such as failing to consider likely and possible scenarios where manufacturers cannot achieve compliance with the ZEV standards) that render CDPHE's conclusions in the IEIA, and now FEIA, invalid.

In actuality, the Proposed ZEV Rule will result in a net cost of \$573 million to Colorado consumers. EVA Study, at 18. This \$573 million net cost of the Proposed ZEV Rule is drawn from a \$500 increase in the cost of passenger vehicles in Colorado, representing an upfront cost of \$880 million to Coloradans that is only offset by \$307 million in fuel savings. *Id.* Further, as demonstrated in the EVA Rebuttal Study attached to this Rebuttal Statement, those cost estimates remain true EVA Rebuttal Study, at 3.

- i. CDPHE (and other Parties) Fail to Account for Infrastructure Costs that are a Major Barrier to Consumer Acceptance of ZEVs and will Disproportionately Burden Colorado Citizens and Businesses that Never Purchase ZEV Vehicles.

A careful analysis of the expected infrastructure costs for the Proposed ZEV Rule demonstrates that the infrastructure build-out required to support the Proposed ZEV Rule in Colorado could raise electricity costs by roughly 7% in Colorado. EVA Study, at 4-5; EVA Rebuttal Study at 3. Further, the high cost of developing additional infrastructure to support the ZEV Rule, such as utility investments to the electric grid and to add charging stations for ZEV vehicles, will be levied on the citizens of Colorado and not ZEV owners. *Id.* Therefore, the costs of the Proposed ZEV Rule will be disproportionately levied on Coloradans who will never drive a ZEV Vehicle, while subsidizing wealthier Coloradan's who can afford ZEV vehicles.

A case study analysis of the implementation of California's ZEV Regulation in Sacramento found that the costs to upgrade the infrastructure resulted in a utility ratepayer subsidy of \$370 per electric vehicle on the road. EVA Rebuttal Study, at 6. EVA's analysis of the Proposed ZEV Rule shows that the per vehicle costs could be much higher the extent that the state has to underwrite investment in charging stations or to the extent that utilities are able to add infrastructure upgrades that are necessary to accommodating growing ZEV penetration to their rate-base. *Id.*

Further, Colorado's current infrastructure is likely not sufficient to encourage Colorado consumers to purchase ZEVs over conventional vehicles. *Id.* at 8. The Regional Air Quality Council's Prehearing Statement, Exhibit B notes that "over 80 percent of [Partial Electric Vehicle] owners in Colorado feel limited in their [ZEVs] use due to lack of public charging." *Id.*

at 6. As consumers that are already motivated to buy (or have already purchased) ZEVs are deterred by current Colorado EV infrastructure, the same effect is greatly multiplied when examining Colorado consumers not predisposed to purchasing ZEVs. CDPHE and other parties do not adequately examine these hurdles to consumer acceptance of ZEVs. Until these issues are adequately studied and quantified, any decision to adopt the Proposed ZEV Rule in Colorado would be unsupported by evidence, arbitrary and capricious, and would violate the Colorado Air Act.

ii. CDPHE (and other Parties) Fail to Adequately Address Expected Consumer Behavior, Which Limits Near-Term Market Penetration.

CDPHE and other parties in favor of the Proposed ZEV Rule have not adequately address expected consumer behavior in response to the Proposed ZEV Rule, instead assuming that the compliance goals of the rule will be met and that consumers will react positively to the regulation. As noted in the previous section, there are many aspects to consumer behavior that must be considered in order to adequately assess if the Proposed ZEV Rule is necessary and/or likely to be successful in Colorado.

An analysis of potential consumer responses to the Proposed ZEV Rule shows that there is a likely scenario in which the Proposed ZEV Rule will actually result in increased GHG emissions and decreased savings to Colorado consumers over a no-ZEV Rule scenario. EVA Rebuttal Statement, 9. In the contemplated scenario, consumers will purchase ZEV's but the average fleetwide vehicle prices will still increase due to manufacturers passed through costs for achieving fleet compliance, resulting in a higher use of existing, older higher polluting vehicles, which in turn will lead to increased GHG emissions and decreased savings. *Id.* This issue is further exacerbated when it is understood that primarily high earning households are those likely to purchase ZEVs, and that those households typically engage in "attribute substitution" whereby they will purchase an opposite, higher emitting SUV in order to have cars that can cover different desired functions (e.g. an efficient commuter and a less efficient vehicle for recreational activities). *Id.*

iii. CDPHE (and other Parties) Fail to Consider the Fact that Transpiration Sector Emissions of GHGs and Criteria Pollutants will Likely Increase under the Proposed ZEV Rule.

As noted in FTD's Prehearing Statement and the EVA Study, GHG and criteria pollutants will likely increase under the Proposed ZEV Rule. This analysis has not changed in EVA's Rebuttal Study. EVA Rebuttal Study, at 3; 9. In fact, recently peer reviewed work suggests that implementing a policy aimed at market penetration of ZEVs is at odds with goals of limiting GHG emissions. *Id.* at 9. Because ZEV regulations allow partial-ZEVs to count as full ZEVs, a manufacturer can then turn around and sell sever Internal Combustion Engine ("ICE") vehicles

and still have a lower GHG emissions average than if the manufacturer had simply sold one ICE vehicle. *Id.*

Instead of examining this scenario, CDPHE and other parties in support of the Proposed ZEV Rulemaking simply quantify all of the proposed emissions reductions benefits of the Rule in the context of an assumed compliance scenario, without taking into account potential vehicle mixes that are higher in partial-ZEVs, and without taking into account scenarios where compliance with the Proposed ZEV Rule is not achieved. Further, these claimed emissions reductions are considered in a vacuum, without the context of the corresponding LEV Regulation adopted in Colorado. Contrastingly, the EVA Study demonstrated that the Proposed ZEV Rule (when considered in the regulatory context of the parallel adopted LEV Rule), will result in the addition of a net 971,000 tons of CO₂ equivalent emitted to Colorado's air. EVA Study, at 18.

iv. CDPHE (and other Parties) Incorrectly Assume that ZEV and Battery Costs will Reduce Over Time.

As noted in FTD's Prehearing Statement and in the EVA Study, CDPHE failed to consider alternative scenarios where battery and ZEV costs do not go down significantly in future years. EVA Study, at 15. In fact, credible and plausible studies suggest that the cost of batteries will actually increase due to increased prices for lithium and cobalt. *Id.*, at 23-24. The potential for battery price increases are further exacerbated by existing trade tensions, the limited mining sources of lithium and cobalt, and China's control of a large percentage of midstream components. *Id.* Therefore, due to the uncertainties inherent in commodity markets, it is not guaranteed that EV costs, and specifically battery costs, will continue to fall. EVA Rebuttal Statement, at 11. The potential for battery prices to increase rebuts several of CDPHE's later assumptions that decreased battery prices will lead to more affordable ZEVs. CDPHE's FEIA continues the same erroneous assumptions of its IEIA that ZEVs (through decreased battery and technology costs) will reach parity with conventional vehicles. CDPHE's assumption that ZEV technology costs will decrease should be instead subject to a broader sensitivity analysis that considers a range of potential scenarios for battery prices. This would better allow CDPHE to determine if the Proposed ZEV Rule is justified across a range of plausible

v. CDPHE (and other Parties) Fail to Consider the Negative Effects on Low-Income, Rural, and Agricultural Communities.

CDPHE's FEIA fails to analyze the impact of the Proposed ZEV Rule on low-income, rural, or agricultural communities in Colorado. CDPHE's Prehearing Statement briefly mentions that it "is not imposing requirements on sectors such as agriculture and related farming equipment such as tractors," while simultaneously failing to analyze how the significant infrastructure improvements necessary to support the Proposed ZEV Rule will be borne by all Coloradans, including low-income, rural, and agricultural communities that are unlikely to purchase ZEVs or benefit from those costly expenditures. As shown in the EVA Study, the

Proposed ZEV Rule is estimated to result in \$25 million in reduced gas taxes revenues (which would fund infrastructure in *all* Colorado communities), up to a 7% increase in electricity rates, and up to a 11 cent per gallon increase in fuel costs, for a total estimated cost of \$573 million to all Colorado consumers. *See* FTD – PHS, at 15-16; EVA Study at 3-4. These effects will be felt disproportionately by low-income, rural, and agricultural communities that are less likely to purchase ZEVs, less likely to benefit from ZEV infrastructure, yet must bear the same increased costs as all Coloradans.

vi. The Operation of the Proposed Credit Programs in CDOE’s and CDOT’s, and the Alliance’s and Global’s Alternative Proposals is Unclear.

As noted in Section I, *supra*, two alternative proposals have been put forward by CEO and CDOT, and the Alliance and Global for an Early Action Credit and Proportional Credit, respectively. While it is unclear if either alternate proposal will be adopted at this time, EVA’s Rebuttal Report notes that administration of either credit program in Colorado could result in a credit program drastically different from that employed in Colorado’ effectively creating a materially different ZEV Standard in Colorado through drastically difference enforcement provisions. EVA Rebuttal Study, at 12. Such a materially different ZEV Standard in Colorado would violate the identicality requirements of Section 177 of the federal Clean Air Act. *See* Section I, *supra*.

C. The EVA Study and EVA Rebuttal Study Demonstrate that the Proposed ZEV Rule has Significant and Material Net Costs and is Not Justified in Colorado

As noted in FTD’s Prehearing Statement, the EVA Study, relying on peer reviewed literature, demonstrates that the Proposed ZEV Rule (when considered in the regulatory context of the parallel adopted LEV Rule) will result in an average increase in the cost of passenger vehicles of between \$1,500 and \$3,000. EVA Study, at 15. These conclusions still hold true in after Energy Ventures Analysis’s examination of CDPHE’s FEIA. EVA Rebuttal Study, at 2-3.

Therefore, EVA estimates an increase of \$500 per passenger vehicle under the Proposed ZEV Rule. EVA Study, at 16, 20. This increase represents an upfront cost to consumers of \$880 million. *Id.* at 18. Further, that cost is not offset by fuel savings of the Proposed ZEV Rule, which the EVA Study estimates at only \$307 million. Therefore, the Proposed ZEV Rule represents a net cost of the proposed ZEV Rule to Colorado consumers of \$573 million. *Id.* at 18.

Further, the EVA Study demonstrates that the Proposed ZEV Rule (again, when considered in the regulatory context of the parallel and previously adopted LEV portion of Regulation 20), will result in the addition of a net 971,000 tons of CO2 equivalent emitted to

Colorado's air. *Id.* Therefore, Coloradans will be paying \$590 for each ton of CO₂ equivalent *emitted* under the Proposed ZEV Rule, a far cry from CDPHE's estimated 3.2 million metric tons of GHG emissions reductions at a cost savings of \$334.07 per metric ton. *Id.* at 18; *see also* FEIA, at 21, 23.

These net costs of the Proposed ZEV Rule (based solely on increased vehicle costs and emission increases under the ZEV Standards) are separate from and do not encompass additional negative effects of the Proposed ZEV Rule such as: lost tax revenues of \$25 million in gas tax revenues; \$88 million a year in tax credit incentives for ZEVs paid by Colorado taxpayers (representing a potential \$233.2 in tax incentives from 2023-2025); increased public safety expenditures to deal with battery fires of \$1.6 million; 360 potential lost refinery jobs; an increase in the cost of gasoline and diesel by up to 11 cents per gallon; a cost to Colorado farmers of \$22.6 million from increases in the costs of diesel, gasoline, and electricity; and a raise in the retail rates of electricity by .073 cents per kilowatt hour (a 7.3% increase). *See id.* The Proposed ZEV Rule will be extremely costly to Coloradans.

IV. The Commission Still Has Failed to Satisfy the Statutory Prerequisites for Adopting the Proposed ZEV Rule

This Proposed ZEV Rulemaking continues to be in violation of fundamental statutory requirements in the Colorado Air Act that mandate the Division must complete statutorily prerequisite motor vehicle emission control studies, and the Commission then make statutorily required recommendations for statewide motor vehicle emission controls based on those studies and Colorado specific considerations. These actions have not taken place and the Commission and Division are instead allowing the Governor's January 17, 2019 executive order to displace their independent statutory authority by dictating the schedule and process for the Proposed ZEV Rulemaking

V. The Proposed ZEV Rule is preempted by the Energy Policy and Conservation Act

As noted in the American Fuel & Petrochemical Manufacturers' ("AFPM") Prehearing Statement, the EPCA preempts California's ZEV Standards as determined by the National Highway Traffic Safety Administration ("NHTSA"). *See* AFPM – PHS, at 7. FTD fully adopts the AFPM's arguments relating to the EPCA preempting the Proposed ZEV Rule as set forth in its Prehearing Statement, and urges the Commission to decline to adopt the Rule as it is in violation of the EPCA's express preemption provisions.

VI. The Potential Impacts of the SAFE Vehicles Rule Rulemaking, the CADA Litigation, and the Defend Colorado Litigation Continue to Weigh in Support of Continuing or Cancelling this Proposed ZEV Rulemaking

As noted in FTD’s June 28, 2019 Motion to Continue this Proposed ZEV Rulemaking and in FTD’s July 10, 2019 Prehearing Statement, the Commission is faced with the very real possibility that Regulation 20 and this current Proposed ZEV Rulemaking will be invalidated based on the forthcoming final SAFE Vehicles Rule, CADA Litigation, and Defend Colorado Litigation. *See*, FTD Motion to Continue, at 5, FTD – PHS, at 9. FTD hereby incorporates and reasserts those arguments in this Rebuttal Statement, but will not repeat them here in the interest of all parties’ time. However, FTD notes the following material development that weighs in favor of this Commission declining to continue with the Proposed ZEV Rulemaking and declining to adopt the Proposed ZEV Rule.

On July 26, 2019, the Colorado Automobile Dealers Association (“CADA”) filed a Notice of Appeal in the Colorado Court of Appeals, challenging the District Court’s Order finding that CADA lacked standing to challenge Regulation 20. *See* Notice of Appeal, 2019CA1386 (Colo. App., Filed July 26, 2019). Therefore, the CADA Litigation remains a live controversy that will very much affect the validity and legality of Regulation 20, which this Proposed ZEV Rule purports to modify. CADA’s complaint in the Regulation 20 LEV Rule litigation articulates several allegations concerning the validity of Regulation 20, which if demonstrated on the merits, will result in the invalidation of Regulation 20. One of the most significant allegations in the CADA Litigation, also noted in Section I of FTD’s Prehearing Statement, is that the CDPHE, through the Division, failed to comply with the statutory prerequisite of the Colorado Air Act under C.R.S. 25-7-130 to conduct motor vehicle emission control studies *before* proposing Regulation 20 to the Commission, and that the Commission, parties and public could not review those statutorily prerequisite motor vehicle emission control studies before Regulation 20 was adopted. FTD – PHS, at 10. (citing to CADA Litigation, Complaint, at ¶ 6, First and Second Claims for Relief). The same concerns apply to this Proposed ZEV Rulemaking, as the Division has again failed to complete statutory prerequisite motor vehicle emission control studies prior to submitting the Proposed ZEV Rule to this Commission. Therefore, this Proposed ZEV Rulemaking again faces a significant likelihood of being invalidated by a court of law in the CADA Litigation, and the public and private resources expended during this (and the prior Regulation 20) rulemakings will have been wasted.

As the CADA Litigation (and the pending federal SAFE Vehicles Rule and Defend Colorado Litigation) continue to undermine the statutory basis and validity of the Commission’s current actions, and may result in a waste of Colorado’s resources, party participants’ resources, and will result in several economic and regulatory harms to Colorado’s citizens and industries, the Commission should stay or vacate this Proposed ZEV Rulemaking until the three materially related proceedings have concluded.

VII. The Commission Continues to Truncate the Rulemaking Process in Violation of Due Process

The Commission continues to arbitrarily truncate the current rulemaking process in violation of applicable due process considerations and the Colorado APA, which will result in an unlawful final rule and necessitates that the Commission vacate or extend the schedule of the current Regulation 20 Rulemaking proceeding to avoid wasting valuable state and party resources.

A. The Commission Has Not Allowed Parties Sufficient Time to Respond to CDPHE's Cost Benefit Analysis and Regulatory Analysis

Prehearing Statements were due on July 10, 2019, just over one month after the Commission granted party status applications on June 7, 2019 in this Proposed ZEV Rulemaking. Further, Prehearing Statements were required to be submitted before CDPHE issues its FEIA on July 10, 2019, and thus parties could not provide an analysis of the FEIA in their Prehearing Statements. Rebuttal Statements are due today, July 29, 2019, just over two weeks after all parties were provided CDPHE's FEIA, and two weeks before CDPHE's CBA and RA are due on August 2nd and 8th, respectively.² The Proposed ZEV Rulemaking hearing will be held from August 13-16, 2019, just three months after the Commission's initial vote to move forward with this rulemaking.

Further, Commissioner and Hearing Officer Peter Butler issued a Prehearing Order on July 19, 2019, that sets forth the following updated schedule for this Proposed ZEV Rulemaking:

1. July 29: Rebuttal statements due by 5:00 p.m.
2. August 2: CBA from the Division is due by 12:00 p.m.
3. August 2: Hearing officer intends to issue an order establishing order of testimony and time allocations.
4. August 5: Parties shall identify any witness who has provided written testimony but whom that party does not intend to produce as a witness during oral testimony.
5. August 7: Any parties wishing to pool or donate time shall submit a plan for agreed upon modifications to the time allocations.
6. August 7: If any party intends to cross-examine a witness identified under (F)(4) above, notice of the intent to do so must be submitted to the Commission office and all parties by this date.
7. August 8: RA from the Division is due by 5:00 p.m.
8. August 9: Any party desiring to use a PowerPoint presentation or other, similar electronic version of their presentation shall submit by 5:00 p.m. on this date.

² As noted in FTD's Prehearing Statement, FTD has requested that CDPHE complete its CBA and RA as expediently as possible in order to allow all parties sufficient time to review those analyses – as of the filing of this Rebuttal Statement no CBA or RA has been released.

9. August 12: Any party wanting to respond to information in the cost benefit analysis or the regulatory analysis may submit a sur-rebuttal limited to information from those documents only by 12:00 p.m. on this date. In addition, if any revisions are needed to PowerPoint presentations in response to the regulatory analysis or cost benefit analysis, those must also be submitted by the same date and time.

Just as parties were denied the opportunity to review or comment on the FEIA, CBA or RA in their Prehearing Statements, this updated schedule denies all parties the ability to substantively comment on the Division's final CBA and RA prior to the rulemaking hearing. CDPHE's CBA is due August 2nd and RA is due August 8th. However, Parties must submit any Sur-Rebuttals to the CBA and RA by August 12th at 12:00 p.m. This gives parties just six business days for the CBA, and one-and-a-half business days for the RA to substantively analyze CDPHE's two critical analyses that will be used to purportedly justify adoption of the Proposed ZEV Rule. Further, that time period is further constrained by parties' additional concurrent deadlines to create any power point demonstratives for submission to the Commission by August 9th, 2019 (with updates by August 12, 2019 at 12:00 p.m.) and to prepare for the Proposed ZEV Rulemaking hearing.

Parties are thus being denied the opportunity to conduct a full and deliberate review of CDPHE's CBA and RA and submit comprehensive substantive comments for the record. Making these important documents available very shortly before the Commission's public rulemaking hearing ensures that parties will not have adequate time to develop the rulemaking record, and deprives the Commission of a complete record. Intentionally imposing a schedule that shields from party (and public) review and comment on key regulatory analyses that are required by law, particularly on a rulemaking that all of the parties and regulators involved agree is complex and important, violates due process, the Colorado Constitution, the Colorado Air Act, the Colorado APA, and common sense.

ISSUES TO BE RESOLVED BY THE COMMISSION

FTD requests that the Commission resolve the issues listed and detailed in its Prehearing Statement in the Statement of Legal, Policy, and Factual Issues, as further detailed in the Exhibits to the same, and to resolve the additional issues listed and detailed in this Rebuttal Statement and in any eventual Sur-Rebuttal to CDPHE's final CBA and RA. In particular, FTD requests that the Commission conclude that the Proposed ZEV Rulemaking: will violate the federal Clean Air Act's identity requirements if either alternative credit proposal is adopted; is not justified as cost effective under CDPHE's FEIA; is in excess of its statutory authority until the prerequisite motor vehicle emission control studies and recommendations based on the same required by statute have been completed; is preempted by the EPCA; is inappropriate in light of the pending Final SAFE Vehicles Rule which will modify Tier 3 vehicle emissions standards and

revoke the federal Clean Air Act's Section 177 waiver, the CADA Litigation, and the Defend Colorado Litigation; and violates parties' right to due process.

REBUTTAL EXHIBITS TO BE INTRODUCED AT THE HEARING

- A. Review of the Prehearing Statements and Exhibits Filed in the Colorado Zero Emission Vehicle Regulation (ZEV) Proceeding, prepared by Energy Ventures Analysis (July 29, 2018) ("EVA Rebuttal Study").

REBUTTAL WITNESSES AND DESCRIPTION OF TESTIMONY

1. All witnesses listed in FTD's Prehearing Statement may be called as Rebuttal Witnesses to rebut the issues raised other parties' Prehearing and Rebuttal Statements, exhibits, alternate proposals, and CDPHE's FEIA, CBA, and RA.
2. Brad Erker, Executive Director of the Colorado Association of Wheat Growers. The Colorado Association of Wheat Growers is a member of FTD and Mr. Erker will testify on behalf of the Colorado Association of Wheat Growers and FTD as a rebuttal witness. Mr. Erker will testify as to how CDPHE's FEIA (and other parties' Prehearing Statements) fails to take into account the negative effects of the Proposed ZEV Rule on agricultural communities in Colorado, and will rebut claims from CDPHE and other parties to this Proposed ZEV Rulemaking that the Proposed ZEV Rule will not negatively impact the agriculture sector solely because it does not impose requirements on farming equipment such as tractors. Mr. Erker will further testify rebutting claims that the Proposed ZEV Rule will not negatively impact Coloradans, and will outline how increased gas and electricity prices will disproportionately affect the agricultural community, forcing that community to bear the cost of the Proposed ZEV Rule while wealthier Coloradan's who can afford to purchase ZEV vehicles bear the benefits.
3. Tony Gagliardi, National Federation of Independent Business ("NFIB") State Director. The NFIB is a member of FTD, and Mr. Gagliardi will testify on both entities behalf. Mr. Gagliardi will testify to rebut the assumptions in CDPHE's FEIA (and other parties' Prehearing Statements) that the Proposed ZEV Rule will result in a cost savings in Colorado, and will specifically testify as to the economic and regulatory harms that the Proposed ZEV Rule will cause to independent businesses in Colorado and how those harms were not considered or addressed in CDPHE's FEIA and in other parties' Prehearing Statements. Mr. Gagliardi is primarily available for testimony on August 15th, 2019, and FTD will attempt to use its time to accommodate his availability.

4. Jeff Rector, Rio Blanco County Commissioner and member of the Associated Governments of Northwest Colorado (“AGNC”) which is a member of FTD. Mr. Rector will testify to rebut the final assumptions in CDPHE’s FEIA (and other parties’ Prehearing Statements) that the Proposed ZEV Rule will result in a cost savings in Colorado, and will specifically testify as to the economic and regulatory harms that the Proposed ZEV Rule will cause to citizens and businesses in the AGNC, and how those harms were not considered or addressed in CDPHE’s FEIA.
5. Gary Moyer, Rio Blanco County Commissioner and member of the AGNC which is a member of FTD. Mr. Moyer will testify to rebut the final assumptions in CDPHE’s FEIA (and other parties’ Prehearing Statements) that the Proposed ZEV Rule will result in a cost savings in Colorado, and will specifically testify as to the economic and regulatory harms that the Proposed ZEV Rule will cause to citizens and businesses in the AGNC, and how those harms were not considered or addressed in CDPHE’s FEIA.
6. Dianna Orf, Orf & Orf, P.C., who represents the AGNC which is a member of FTD. Ms. Orf will testify to rebut the final assumptions in CDPHE’s FEIA (and other Parties Prehearing Statements) that the Proposed ZEV Rule will result in a cost savings in Colorado, and will specifically testify as to the economic and regulatory harms that the Proposed ZEV Rule will cause to citizens and businesses in the AGNC, and how those harms were not considered or addressed in CDPHE’s FEIA.

WRITTEN REBUTTAL TESTIMONY

FTD does not plan to submit any written rebuttal testimony

ECONOMIC IMPACT ANALYSIS

FTD submits the EVA Study and EVA Rebuttal Study, together, as its Economic Impact Analysis for the purpose of this Rebuttal Statement. FTD reserves the right to supplement its Economic Impact Analysis with its Sur-Rebuttal to CDPHE’s final CBA and RA, including with additional economic studies from EVA.

CONCLUSION

Based on the information contained in its Prehearing Statement and in this Rebuttal Statement, FTD urges the Commission to vacate this Proposed ZEV Rulemaking and conclude that: (1) this rulemaking will be in violation of the identity requirements of Section 177 of the Clean Air Act if either alternative proposal introducing alternate credit systems is adopted in whole, in part, or in combination; (2) the Proposed ZEV Rule is not economically, socially, or

environmentally justified in Colorado; (3) this rulemaking is beyond the Commission's statutory authority until the statutory prerequisites required by C.R.S. § 25-7-130 have been met; (4) this rulemaking is preempted by the EPCA; (5) this rulemaking, at a minimum, should not proceed until the administrative record for the parallel Federal SAFE Vehicles Rule rulemaking has closed; and (6) this rulemaking is on a truncated schedule that violates participating parties' right to due process under the Colorado Constitution, Colorado APA, and the Air Pollution Control Act.

Respectfully submitted on this 29th day of July, 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 2019, this **REBUTTAL STATEMENT OF FREEDOM TO DRIVE INC.** was served by electronic mail to:

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