Citation: Tusk Energy Inc., et al, 2004 ABASC 1053 20041102

In the Matter of
the Securities Legislation of
Alberta, British Columbia, Saskatchewan,
Manitoba, Ontario, Quebec, New Brunswick,
Prince Edward Island, Newfoundland and Labrador,
Nova Scotia, the Yukon Territory, the Nunavut Territory
and the Northwest Territories

and

In the Matter of
The Mutual Reliance Review System
For Exemptive Relief Application

and

In the Matter of
Tusk Energy Inc., Tusk Energy Corporation and TKE Energy Trust

MRRS Decision Document

Background

1. The local securities regulatory authority or regulator (the "Decision Maker") in each of Alberta, British Columbia, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Nova Scotia, the Yukon Territory, the Nunavut Territory and the Northwest Territories (the "Jurisdictions") has received an application from TUSK Energy Inc. ("TUSK"), TUSK Energy Corporation ("TUSKEx") and TKE Energy Trust (the "Trust") (collectively, the "Filers") for a decision under the securities legislation of the Jurisdictions (the "Legislation") that:

1.1 the requirement contained in the Legislation to be registered to trade in a security and to file and obtain a receipt for a preliminary prospectus and a final prospectus (the "Registration and Prospectus Requirements"), except in Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan where the legislation provides equivalent relief, shall not apply to certain trades made by TUSK, TUSKEx and the Trust in connection with a proposed plan of arrangement (the "Arrangement") under Section 193 of the Business Corporations Act (Alberta) ("ABCA") involving TUSK, TUSKEx, the Trust and the securityholders of TUSK (the "Arrangement Relief");

1.2 with respect to the successor of TUSK ("AmalgamationCo") on its amalgamation with TUSK AcquisitionCo Inc. ("AcquisitionCo") in those Jurisdictions (which do not include Nova Scotia, Prince Edward Island, Northwest Territories and Saskatchewan) in which it becomes a reporting issuer or the equivalent under the Legislation, the requirements contained in the Legislation to issue a news release and file a report with the Jurisdictions upon the occurrence of a material change, file an annual report, where applicable, file interim financial statements and audited annual financial statements with the Jurisdictions and deliver such statements to the securityholders of AmalgamationCo, file and deliver an information circular or make an annual filing with the Jurisdictions in lieu of filing an information circular, file an annual information form, file a business acquisition report if required, and provide management's discussion and analysis of financial condition and results of operations, all as more particularly set out in National Instrument 51-102 Continuous Disclosure Obligations ("NI 51-102") (the "Continuous Disclosure Requirements") shall not apply to AmalgamationCo (the "Continuous Disclosure Relief");

1.3 the Registration and Prospectus Requirements shall not apply to the distribution of trust units of the Trust ("Trust Units") by way of distribution reinvestment and/or optional cash payments for additional Trust Units pursuant to the distribution reinvestment plan of the Trust (the "DRIP"), or, as applicable, the first trade of the Trust Units issued pursuant to the DRIP (collectively, "DRIP Units") (the "DRIP Relief")

(the Arrangement Relief, Continuous Disclosure Relief and DRIP Relief are collectively referred to as the "Requested Relief").

2. Under the Mutual Reliance Review System for Exemptive Relief Applications (the "MRRS"):

2.1 the Alberta Securities Commission is the principal regulator for this application, and

2.2 this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

3. Defined terms contained in National Instrument 14-101 Definitions have the same meaning in this decision unless they are defined in this decision.

Representations

4. This decision is based on the following facts represented by the Filers:

4.1 TUSK is a corporation incorporated under the ABCA and is headquartered in Calgary, Alberta. Its business is the acquisition, exploration, development and

production of petroleum and natural gas primarily in Western Canada. It is, and has been for a period of time in excess of four months, a reporting issuer or the equivalent in the provinces of British Columbia, Alberta, Manitoba, Ontario and Québec. The common shares of TUSK ("TUSK Shares") are listed and posted for trading on the Toronto Stock Exchange (the "TSX") under the trading symbol "TKE".

4.2 TUSK will hold a special meeting of securityholders ("TUSK Securityholders") on October 28, 2004 for the purpose of approving the Arrangement (the "Meeting"). The information circular for the Meeting (the "Information Circular") will contain (or to the extent permitted, will incorporate by reference) prospectus level disclosure in respect of TUSK, the Trust and TUSKEx and a detailed description of the Arrangement. Holders of TUSK Shares ("TUSK Shareholders") will have the right to dissent from the Arrangement under Section 191 of the ABCA.

4.3 Pursuant to the Arrangement, TUSK will be reorganized into the Trust and TUSKEx. At the date on which the Arrangement becomes effective under the ABCA (the "Effective Date"), the Arrangement would result in TUSK Shareholders exchanging each of their TUSK Shares for, at their election where eligible, either 0.50 of one Trust Unit or 0.50 of one share of AcquisitionCo. exchangeable into a Trust Unit ("Exchangeable Share"), plus 0.50 of one common share of TUSKEx ("TUSKEx Share"). The exchange ratio effectively consolidates the Trust Units and the TUSKEx Shares on a two-for-one basis.

4.4 The Trust will be an open-ended, unincorporated investment trust governed by the laws of Alberta, pursuant to a trust indenture to be entered into between Computershare Trust Company of Canada ("Computershare"), as trustee, and TUSK (the "Trust Indenture"), and will be headquartered in Calgary, Alberta. Its mandate will be to generate stable monthly distribution to holders of Trust Units ("Unitholders"). Its authorized capital will consist of an unlimited number of Trust Units and an unlimited number of special voting units ("Special Voting Units"). As a result of the implementation of the Arrangement, the Trust will become a successor reporting issuer to TUSK or the equivalent in one or more of the Jurisdictions. The Trust will also apply to list the Trust Units on the TSX.

4.5 TUSKEx will be incorporated under the ABCA and headquartered in Calgary, Alberta. As a result of the implementation of the Arrangement, TUSKEx will acquire certain assets ("TUSKEx Assets") from TUSK in exchange for TUSKEx Shares, which will then, through operation of the Arrangement, be distributed to TUSK Shareholders. Also, TUSKEx will apply to list the TUSKEx Shares on the TSX.

4.6 As part of the Arrangement, a limited number of Exchangeable Shares, which number shall be less than the total number of Trust Units issuable, will be made available for issuance at the election of eligible TUSK Shareholders. In the event

that more Exchangeable Shares are requested than those available, the Exchangeable Shares will be prorated and TUSK Shareholders will receive Trust Units in lieu of Exchangeable Shares. Holders of Exchangeable Shares will not receive cash distributions from TKE Trust or AmalgamationCo in respect of distributions on Trust Units. In lieu of monthly cash distributions, the exchange value of the Exchangeable Shares will increase based on the amount of distributions paid to Unitholders and decrease based on the amount of dividends paid to holders of Exchangeable Shares. TUSK Shareholders which are non-resident or tax exempt will not be eligible to receive Exchangeable Shares.

4.7 As part of the Arrangement, TUSK will amalgamate with AcquisitionCo, a wholly-owned subsidiary of the Trust, to form AmalgamationCo and all of the common shares and unsecured, subordinated promissory notes ("Notes") issuable in conjunction with the operation of the Arrangement by AcquisitionCo, pursuant to a note indenture to be entered into between AcquisitionCo and Computershare, will be owned by the Trust.

4.8 A Special Voting Unit will be created and issued to a trustee (the "Voting and Exchange Agreement Trustee") under a voting and exchange trust agreement (the "Voting and Exchange Trust Agreement") and will entitle the Voting and Exchange Agreement Trustee to exercise at each meeting of Unitholders the number of votes equal to the number of Trust Units into which the Exchangeable Shares are then exchangeable multiplied by the number of votes to which the holder of one Trust Unit is then entitled. By furnishing instructions to the Voting and Exchange Agreement Trustee, holders of Exchangeable Shares will be able to exercise the same voting rights with respect to the Trust as they would if they exchanged their Exchangeable Shares for Trust Units.

4.9 The Exchangeable Shares are exchangeable by the holder thereof into Trust Units. The exchange ratio used to determine how many Trust Units a holder of Exchangeable Shares is entitled to receive upon an exchange of such shares (the "Exchange Ratio") will initially be one-to-one. The Exchange Ratio will then be cumulatively adjusted by: (i) increasing the Exchange Ratio based in part on the amounts of the distributions paid on the Trust Units; and (ii) decreasing the Exchange Ratio based in part on the amounts of the dividends paid on the Exchangeable Shares. The Exchange Ratio will also be adjusted in the event of certain other reorganizations or distributions in respect of the Trust Units as necessary on an economic equivalency basis.

4.10 Upon implementation of the DRIP, Unitholders may, at their option, reinvest their cash distributions to purchase DRIP Units by directing Computershare to apply distributions on their existing Trust Units to the purchase of DRIP Units or by making optional cash payments. Optional cash payments may be submitted monthly, quarterly or annually by the participants.

4.11 DRIP Units will be acquired based on the treasury purchase price, being the arithmetic average of the daily volume weighted average trading prices of the Trust Units on the TSX for the trading days in the period of successive trading days commencing on the second business day after the distribution record date and ending on the second business day immediately prior to the distribution payment date (provided however that if such period exceeds 10 trading days, then the 10 successive trading days preceding the second business day prior to the distribution payment date) on which at least a board lot of Trust Units is traded, appropriately adjusted for certain capital changes (including Trust Unit subdivisions, Trust Unit consolidations, certain rights offerings and certain distributions).

4.12 Subsequent to the financial year of the Trust ending December 31, 2004, the aggregate number of DRIP Units that may be issued under the cash payment option in any financial year of the Trust will be limited to 2% of the number of Trust Units issued and outstanding at the start of such financial year.

4.13 The Arrangement will be effected by way of a plan of arrangement pursuant to Section 193 of the ABCA. The Arrangement will require (i) approval by not less than two-thirds of the votes cast by the TUSK Securityholders (present in person or represented by proxy) at the Meeting, and, thereafter, (ii) approval of the Court.

4.14 The Meeting will be held on October 28, 2004 and it is anticipated that upon receipt of the required approvals at the Meeting, the Arrangement will be submitted for final approval by the Court on October 28, 2004.

4.15 There are numerous trades, potential trades and transactions involving TUSK Shares, TUSKEx Shares, Exchangeable Shares (including the Ancillary Rights as defined below), Notes, Trust Units, and rights to acquire Trust Units which will occur pursuant to the Arrangement (collectively, such trades, potential trades and transactions are referred to herein as the "Trades").

4.16 While in most Jurisdictions a large portion if not all of the Trades fit within existing statutory registration and prospectus exemptions provided for in the Legislation, a number of Trades do not or may not because of the technical requirements of the exemptions and the precise mechanics of the various issuances and exchanges. Exemptions from the Registration and Prospectus Requirements of the Legislation in certain Jurisdictions do not provide for securities of any entity other than a company or a corporation to be issued in connection with a plan of arrangement. Notwithstanding that such latter Trades may not meet the technical requirements of an exemption, all Trades are of types that are within the spirit and intent of one or more exemptions.

4.17 Certain rights of exchange, redemption, retraction and liquidation (the "Ancillary Rights") to be granted by the Trust on the Arrangement through the

mechanisms of the Voting and Exchange Trust Agreement will be included in the bundle of rights attributable to the Exchangeable Shares and will not be securities separate from the Exchangeable Shares. These rights will either be held by the Voting and Exchange Agreement Trustee under the Voting and Exchange Trust Agreement for the benefit of the holders of Exchangeable Shares and cannot be exercised by any other person, or will not be traded separately from the Exchangeable Shares and, as such, cannot be considered to be securities separate and apart from the Exchangeable Shares themselves. These rights will not only be contained in the share provisions of the Exchangeable Shares but will also be specified in the Voting and Exchange Trust Agreement in order to provide priority with the Trust.

4.18 Upon completion of the Arrangement, AmalgamationCo will become a reporting issuer under the Legislation of Alberta, British Columbia, Manitoba, Ontario and Québec, due to the fact that its existence will continue following the exchange of securities in connection with the Arrangement.

4.19 Upon becoming a reporting issuer under the Legislation, an issuer must comply with the Continuous Disclosure Requirements. However, application of the Continuous Disclosure Requirements to both the Trust and AmalgamationCo would be costly but provide no real benefit to investors, for the following reasons. The Trust and AmalgamationCo will be very closely integrated. The Exchangeable Shares provide a holder with a security in an issuer (i.e. AmalgamationCo) having participation and voting rights which are, as nearly as practicable, equivalent to those of Trust Units and should allow certain TUSK Shareholders to receive the shares on a tax-deferred basis. The rights attaching to the Exchangeable Shares and Trust Units are practically equivalent and the value of the Exchangeable Shares and Trust Units is entirely dependent on the assets and operations of only the Trust, on a consolidated basis. Therefore, the only Continuous Disclosure Requirements relevant to a holder of Exchangeable Shares (or Trust Units) are Continuous Disclosure Requirements relating to the Trust. Holders of Exchangeable Shares effectively have a participating interest in the Trust and do not have a participating interest in AmalgamationCo and, therefore, it is the information furnished under the Continuous Disclosure Requirements relating to the Trust that is directly relevant to the holders of both Exchangeable Shares and Trust Units. Only the Trust, as the sole holder of the outstanding common share(s) of AmalgamationCo, not the holders of Exchangeable Shares or Trust Units, will have a direct participating interest in AmalgamationCo.

4.20 A distribution of securities by any issuer to its securityholders pursuant to a dividend or distribution reinvestment and optional cash payment plan or similar arrangement is subject to the Registration and Prospectus Requirements of the Legislation unless appropriate exemptions are available. The distributions that will be paid to the Unitholders under the DRIP will include royalty income in relation to the income that the Trust receives from AmalgamationCo on oil and gas properties.

4.21 Legislation in some of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for distribution reinvestment plans. Such exemptions are not available to the Trust in certain of the Jurisdictions because such exemptions are generally with respect to the distribution of one or more of the following: (i) dividends; (ii) interest; (iii) capital gains; or (iv) earnings or surplus.

4.22 Legislation in some of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for optional cash payments provided, however, that in any financial year of an issuer the aggregate number of securities issued pursuant to this component of the plan does not exceed 2% of the issued and outstanding securities as at the commencement of each financial year. The Trust's financial year will commence as at the Effective Date, at which time there will only be one Trust Unit issued and outstanding, and therefore the relief would not be available for the Trust's first financial year.

4.23 Legislation in some of the Jurisdictions provides exemptions from the Registration and Prospectus Requirements for reinvestment plans of mutual funds. Such exemptions are unavailable to the Trust since it is a royalty trust and does not fall within the definition of a "mutual fund" contained in the Legislation of the relevant Jurisdictions.

Decision

5. Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

6. The decision of the Decision Makers under the Legislation is that the Requested Relief is granted in that:

6.1 except in Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan, the Registration and Prospectus Requirements contained in the Legislation shall not apply to the Trades provided that the first trade in securities distributed under this Decision (other than first trades which are themselves Trades) shall be deemed to be a distribution or primary distribution to the public;

6.2 the Prospectus Requirement shall not apply to the first trade in Trust Units, Exchangeable Shares or TUSKEx Shares acquired by TUSK Securityholders under the Arrangement and the first trade of the Trust Units acquired on the exercise of all rights, automatic or otherwise, under such Exchangeable Shares, provided that, in Manitoba and Yukon, the conditions in subsection (3) of section 2.6 of MI 45-102 are satisfied and, for the purposes of determining the period of time that TUSKEx or the Trust has been a reporting issuer under section 2.6 of MI 45 102, the period of time that TUSK was a reporting issuer in at least one of the

jurisdictions listed in Appendix B of MI 45-102 immediately before the Arrangement will be included;

6.3 in Québec, the Registration and Prospectus Requirements contained in the Legislation shall not apply to the first trade in Trust Units, Exchangeable Shares or TUSKEx Shares acquired by TUSK Securityholders under the Arrangement and the first trade of the Trust Units acquired on the exercise of all rights, automatic or otherwise, under such Exchangeable Shares, provided that:

> 6.3.1 the Trust or TUSKEx, as applicable, is and has been a reporting issuer in Québec for the 4 months immediately preceding the trade and, for the purposes of determining the period of time that the Trust or TUSKEx has been a reporting issuer in Québec, the period of time that TUSK was a reporting issuer in Québec immediately before the Arrangement will be included;
>
> 6.3.2 no extraordinary commission or consideration is paid to a person or company in respect of the trade;
>
> 6.3.3 no unusual effort is made to prepare the market or create a demand for the securities that are the subject of the trade; and
>
> 6.3.4 if the selling security holder is an insider of the Trust or TUSKEx, as applicable, the selling security holder has no reasonable grounds to believe that the Trust or TUSKEx, as applicable, is in default of securities legislation;

6.4 except in Nova Scotia, Prince Edward Island, Northwest Territories and Saskatchewan, the Continuous Disclosure Requirements shall not apply to AmalgamationCo for so long as:

> 6.4.1 the Trust is a reporting issuer in at least one of the jurisdictions listed in Appendix B of MI 45-102 and is an electronic filer under National Instrument 13-101 SEDAR;
>
> 6.4.2 the Trust concurrently sends to all holders of Exchangeable Shares resident in the Jurisdictions all disclosure material furnished to the Unitholders under the Continuous Disclosure Requirements;
>
> 6.4.3 the Trust complies with the requirements of the Legislation and of the TSX, and of any other market or exchange on which the Trust Units are or come to be quoted or listed, in respect of making public disclosure of material information on a timely basis;
>
> 6.4.4 the Trust files with each Decision Maker copies of all documents required to be filed by it pursuant to NI 51-102;

6.4.5 AmalgamationCo is in compliance with the requirements of the Legislation to issue a news release and file a report under the Legislation upon the occurrence of a material change in respect of the affairs of AmalgamationCo that is not also a material change in the affairs of the Trust;

6.4.6 the Trust includes in all future mailings of proxy solicitation materials to holders of Exchangeable Shares a clear and concise statement explaining the reason for the mailed material being solely in relation to the Trust and not to AmalgamationCo, such statement to include a reference to the similarities between the Exchangeable Shares and Trust Units and the right to direct voting at meetings of the Unitholders;

6.4.7 the Trust remains the direct or indirect beneficial owner of all of the issued and outstanding voting securities of AmalgamationCo; and

6.4.8 AmalgamationCo has not issued any securities, other than the Exchangeable Shares, securities issued to the Trust or its affiliates, or debt securities issued to banks, loan corporations, trust corporations, treasury branches, credit unions, insurance companies or other financial institutions;

6.5 the Registration and Prospectus Requirements contained in the Legislation shall not apply to distributions by the Trust of DRIP Units under the DRIP, including pursuant to optional cash payments, provided that:

6.5.1 except in Alberta and Saskatchewan, no sales charge is payable by DRIP participants in respect of the distributions;

6.5.2 except in Alberta and Saskatchewan, the Trust has caused to be sent to the person or company to whom the DRIP Units are traded, not more than 12 months before the trade, a statement describing:

(A) their right to elect to participate in the DRIP on a monthly basis to receive DRIP Units instead of cash on the making of a distribution by the Trust and how to terminate such participation; and

(B) instructions on how to make the election referred to in (A);

6.5.3 for the 2004 financial year of the Trust ending December 31, 2004, the aggregate number of DRIP Units issuable under the

optional cash payment portion of the DRIP does not exceed 2% of the Trust Units issued and outstanding immediately after the Effective Date, and, thereafter, the aggregate number of DRIP Units issuable under the optional cash payment portion of the DRIP does not exceed 2% of the issued and outstanding Trust Units as at the commencement of the particular financial year of the Trust; and

6.5.4 except in Alberta and Saskatchewan, at the time of the trade, the Trust is a reporting issuer or the equivalent in at least one of the Jurisdictions and is not in default of any requirements of the Legislation;

6.6 except in Québec, the first trade or resale of DRIP Units acquired pursuant to the DRIP in a Jurisdiction shall be deemed a distribution or primary distribution to the public under the Legislation, unless the conditions set out in paragraphs 2 through 5 of subsection 2.6(3) of Multilateral Instrument 45-102 are satisfied; and

6.7 in Québec, the first trade (alienation) of DRIP Units acquired pursuant to the DRIP shall be deemed to be a distribution or primary distribution to the public unless:

6.7.1 at the time of the first trade, the Trust is and has been a reporting issuer in Québec for the 4 months immediately preceding the trade, and, for the purposes of determining the period of time that the Trust has been a reporting issuer in Québec, the period of time that TUSK was a reporting issuer in Québec immediately before the Arrangement will be included,

and is not in default of any of the requirements of securities legislation in Québec;

6.7.2 no unusual effort is made to prepare the market or to create a demand for the DRIP Units;

6.7.3 no extraordinary commission or other consideration is paid to a person or company other than the vendor of the DRIP Units in respect of the first trade; and

6.7.4 the vendor of the DRIP Units, if in a special relationship with the Trust, has no reasonable grounds to believe that the Trust is in default of any requirement of the securities legislation in Québec.

" Original signed by"
Glenda A. Campbell, Q.C., Vice-Chair
Alberta Securities Commission

"Original signed by"
Stephen R. Murison, Vice-Chair
Alberta Securities Commission

Headnote
Mutual Reliance Review System for Exemptive Relief Applications – relief from registration and prospectus requirements for trades made in connection with a proposed plan of arrangement and a distribution reinvestment plan; relief from continuous disclosure requirements;

Applicable Alberta Statutory Provisions
Securities Act, R.S.A., 2000, c.S-4, section 144(1)
National Instrument 51-102 Continuous Disclosure Obligations