



# MISS DIG System, Inc. <sup>1</sup> Membership Agreement

## General Terms and Conditions

A. Member must submit to MISS DIG all the necessary maps for the cities and/or townships in which Member has facilities<sup>1</sup> in accordance with the mapping requirements set forth in this Agreement and/or MISS DIG's policies and procedures, as amended from time to time. Furthermore, it is the Member's responsibility to keep information for notifying Member updated as changes occur with the Member.

B. Member agrees to comply with and be bound by the MISS DIG MASTER RULES AND PROCEDURES and/or MISS DIG's other policies and procedures, by-laws and/or articles of incorporation, inclusive of current forms and future amendments to any of the foregoing, all of which are incorporated by reference herein.

C. Member understands, acknowledges and agrees that the function of MISS DIG is limited to the receipt and transmittal of (i) "dig notices," as defined in MCL 460.723 (j), and in accordance with the policies and procedures established by MISS DIG, and (ii) "design tickets" as defined in MCL 460.726a. MISS DIG is not responsible for either receiving or transmitting any other type of information, including, but not limited to (a) information pertaining to a member's facilities not on file with MISS DIG, and (b) information pertaining to a non-member's facilities.

1. **LIABILITY OF MISS DIG.** MISS DIG, its directors, officers, employees, agents, members and/or contractors shall not be liable to the Member as a result of any action or failure to act by MISS DIG (or its directors, officer, employees, agents, members and/or contractors) in carrying out any of the provisions of this Membership Agreement or in establishing and/or operating the Notification System unless such actions or failures to act constitutes gross negligence. This provision shall survive the expiration and/or termination of this Membership Agreement. To the extent that this provision conflicts with § 3.01 of the Master Rules and Procedures, or any other provision of this Membership Agreement or the Master Rules and Procedures, this provision shall control.

2. **GOVERNING LAW.** This Membership Agreement shall be construed in accordance with and governed by the laws of the State of Michigan. In the event that any provision of this Membership Agreement, or application of any such provisions to any party or circumstance, shall be held to be invalid or unenforceable, the remainder of this Membership Agreement, or the application of such provision to the parties or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby. Any waiver at any time by any party hereto with respect to any matter arising in connection with this Membership Agreement shall not be considered a waiver with respect to any subsequent default or matter. Any amendment of this Membership Agreement shall be in writing and signed by both parties. This Membership Agreement shall become effective on the date executed by both parties.

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<sup>1</sup> "Facilities" is as defined in MCL 460.723(o), and in any regulations adopted and publications promulgated pursuant thereto.



# MISS DIG System, Inc.<sup>1</sup> Membership Agreement

3. **SCOPE OF WORK.** In furtherance of and limited to the obligations imposed by the MISS DIG Act, MISS DIG will receive and transmit (i) design ticket requests and (ii) dig notices with respect to planned or proposed excavation or blasting that might affect the Member's facilities on file with MISS DIG. Member's participation with MISS DIG and/or status as an Member shall not relieve Member of any responsibilities it now has or hereafter may have with respect to any federal, state or local law or regulation; MISS DIG DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, WITH REGARD TO MEMBER'S MEMBERSHIP WITH MISS DIG, THE RECEIPT AND/OR TRANSMITTAL OF NOTICE OF PLANNED OR PROPOSED EXCAVATION OR BLASTING, AND WHETHER SUCH MEMBERSHIP AND/OR NOTICE SATISFIES THE MEMBER'S COMPLIANCE WITH ANY STATE, FEDERAL OR LOCAL LAW OR RULES.

4. **NOTICE.** In addition, Member acknowledges and agrees that MISS DIG will provide a ticket<sup>2</sup> to the Member with respect to (i) design ticket requests, and (ii) planned or proposed excavation or blasting that may take place within 24 hours of MISS DIG's receipt of the planned or proposed excavation or blasting. Accordingly, Member acknowledges and agrees that it shall either (x) cause its facilities to be staked prior to the scheduled excavation or blasting that might affect the Member's facilities or (y) in the case of design tickets only, otherwise provide written notification of the location of the Member's facilities.

5. **TERM OF AGREEMENT.** This Membership Agreement shall become effective as of the first date Member pays its annual fees to MISS DIG, and shall automatically renew, inclusive of amendments hereto, on January 1 of each succeeding year unless it is terminated by either party by giving written notice to the other no less than 60 days before the automatic renewal date but not more than 120 days before the automatic renewal date.

6. **AGREEMENT PRICE AND PAYMENTS.** For each year that this Membership Agreement is in effect, Member agrees to pay and MISS DIG agrees to accept the amount set forth in MISS DIG's annual invoice to Member, payable 30 days after MISS DIG submits to Member an invoice therefore.

MISS DIG may change the annual charge by posting notice of proposed fee changes on the MISS DIG website. Member further agrees that such change shall be automatically effective unless Member terminates this Membership Agreement in accordance with the above Section 2.

Member acknowledges and agrees that MISS DIG may charge Members a special assessment during the calendar year if MISS DIG's Board of Directors determines that MISS DIG is projected to not be able to operate and fulfill its requirements as set forth in by the MISS DIG Act without a special assessment to members; provided, however, that such special assessment shall be in an amount reasonably necessary to fund MISS DIG's operations for the remainder of the then current fiscal year for MISS DIG.

7. **INDEPENDENT CONTRACTOR STATUS.** In the performance of the work hereunder, MISS DIG shall be an independent contractor and shall perform said work with and according to its own equipment, means and methods, which shall belong to and be and remain in the exclusive charge and control or supervision by MISS DIG; nothing herein shall be construed to constitute MISS DIG and Member as partners.

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<sup>2</sup> As defined in MCL 460.723(dd).



# MISS DIG System, Inc. <sup>1</sup> Membership Agreement

8. **LEGAL REQUIREMENTS.** Member shall secure all licenses or permits required by law and shall comply with all ordinances, laws, orders, rules and regulations pertaining to the Member's facilities and the marking of such facilities, made by any governmental authority or public regulatory body.

9. **CONFIDENTIALITY AND NON-DISCLOSURE.** For all purposes of this Agreement, the term "Confidential Information" shall collectively refer to all plans, drawings, layouts, or similar information or material showing the location of a member's facilities (as that term is defined in the MISS DIG Act) provided to MISS DIG or MISS DIG's affiliates, directors, officers, employees, agents or representatives in writing, pursuant to Member's obligations under the MISS DIG Act as a facility owner in any form, including electronic or optical data storage and retrieval mechanisms regardless of whether any such information is protected by applicable trade secret or similar laws. Confidential Information also includes any notes, analyses, compilations, studies or other material or documents prepared by MISS DIG and/or a member which contain, reflect or are based, in whole or in part, on the Confidential Information, and all MISS DIG generated information and/or data, computer and other systems, software and/or software systems, plans, drawings, layouts, or similar information or material.

The provisions of this Agreement regarding Confidential Information shall not apply to information or material that (i) is publicly available or becomes publicly available (other than information that becomes publicly available through the action or fault of any party in violation of the terms of this Agreement), (ii) was or is obtained by any either party from a third party, provided, that such third party, to the knowledge of the party, was not bound by a contractual, legal or fiduciary obligation of confidentiality to a member or any other party with respect to such information or material; or (iii) MISS DIG or Member is required to provide under the MISS DIG Act.

a. **RESTRICTIONS ON DISCLOSURE.** MISS DIG and Member do hereby covenant and agree with the following:

1) **NON-DISCLOSURE.** MISS DIG and Member shall keep strictly confidential and shall not disclose, or cause or permit to be disclosed, to any person or entity, the Confidential Information, except to the party's directors, officers, employees, managers, members, partners, representatives or agents, including, without limitation, its attorneys, consultants ("Representatives") to whom disclosure is reasonably necessary in connection with compliance with the MISS DIG Act. MISS DIG and Member shall take all actions reasonably necessary to ensure that the Confidential Information remains strictly confidential and is not disclosed by either party to any person or entity except in accordance with the terms of this Agreement.

In the event that MISS DIG or Member, or their Representatives, are requested or required (by applicable law, rule or regulation or oral questions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand or FOIA request or other similar process) to disclose any of the Confidential Information, the party shall provide the other party with prompt notice of any such request or requirement so that the party may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. If, in the absence of a protective order or other remedy or the receipt of a waiver by the party, the other party or its Representatives are nonetheless, in the opinion of its outside legal counsel, legally compelled to disclose Confidential Information, the party or its



# MISS DIG System, Inc. <sup>1</sup> Membership Agreement

Representatives may without liability hereunder disclose only that portion of the Confidential Information which such counsel advises the party or its Representatives are legally required to be disclosed, provided that the party or its Representatives, as the case may be, shall use all reasonable efforts to preserve the confidentiality of the confidential Information, including, without limitation, by cooperating with the efforts of the other party (at the other party's expense) to obtain an appropriate protective order or other reliable assurance that confidential treatment will be afforded the Confidential Information by such tribunal.

b. **OWNERSHIP.** The Confidential Information supplied by Member is owned solely and exclusively by the Member, shall remain the exclusive property of the Member, and neither MISS DIG nor any other member shall have any right, title or interest in or to any of the Confidential Information or any material developed therefrom. Likewise, the Confidential Information supplied by MISS DIG is owned solely and exclusively by the MISS DIG, shall remain the exclusive property of the MISS DIG, and neither Member nor any other member shall have any right, title or interest in or to any of the Confidential Information or any material developed therefrom.

c. **REPRESENTATIVES.** All of MISS DIG's and Member's subsidiaries, directors, officers, employees, shall be included within the definition of the term "MISS DIG" and/or "Member" for purposes of this Agreement and shall be bound by the terms and conditions of this Agreement. MISS DIG and Member shall be responsible for any failure to observe the terms of this Agreement by any of its Representatives, inclusive of directors, officers, and employees.

d. **EQUITABLE REMEDIES.** MISS DIG and Member hereby agrees that its failure to perform any obligation or duty which it has agreed to perform under this Agreement will cause irreparable harm to the other party (or another member), which harm cannot be adequately compensated for by money damages. It is further agreed by MISS DIG and Member that an order of specific performance or for injunctive relief against the other party in the event of a breach or default under the terms of this Agreement would be equitable and would not work a hardship on other party. Accordingly, in the event of a breach or default by a party hereunder, the other party, without any bond or other security being required and in addition to whatever other remedies are or might be available at law or in equity, shall have the right either to compel specific performance by, or to obtain injunctive relief against the other party with respect to the failure of the other party to perform any obligation or duty herein.

## **10. INDEMNIFICATION AND HOLD HARMLESS AGREEMENT**

a. **INDEMNITY.** If MISS DIG (its directors, officer, employees, agents, members and/or contractors) is made a party, or is threatened to be made a party, to or is otherwise involved (including, without limitation, as a witness) in any Proceeding (as defined below), Member, individually and collectively, shall defend, hold harmless and indemnify MISS DIG from and against any and all losses, claims, damages, liabilities or expenses, including, without limitation, attorneys' fees, judgments, fines, witness fees, amounts paid in settlement and other expenses incurred in connection with such Proceeding (collectively, "Damages").

b. **DEFINITION OF PROCEEDING.** For purposes of this Indemnification Provision ("Provision"), "Proceeding" shall mean any actual, pending, threatened or completed action, suit, demand,



# MISS DIG System, Inc. <sup>1</sup> Membership Agreement

claim or proceeding, whether civil, criminal, administrative or investigative (including an action by or in the right of Member) and whether formal or informal, in which MISS DIG is, was or becomes involved by reason of or related to dig notice of a planned or proposed excavation or blasting that might affect the Member's facilities, whether the basis of such proceeding is alleged action (or inaction) by MISS DIG. Further, Member expressly acknowledges and agrees that included in this definition of Proceedings are any actions, suits, demands, claims or proceedings for damages, of any form, that are the result of any receipt and/or transmittal of a (i) design ticket, or (ii) dig notice of a planned or proposed excavation or blasting that might affect the Member's facilities that were unknown, unforeseen, unforeseeable, or otherwise unanticipated by Member at the time of entering into this Agreement and/or Provision. Additionally, Member expressly acknowledges and agrees that indemnity under this Provision is for any and all damages, including, without limitation, claims of personal or bodily injury and/or property damage.

c. SCOPE. Member agrees to defend, hold harmless and indemnify MISS DIG to the full extent permitted by law, notwithstanding that the basis for such indemnification is not specifically enumerated in this Provision, the Bylaws of the MISS DIG, any statute or otherwise.

d. NON-EXCLUSIVITY. The indemnification provided by this Provision shall not be deemed exclusive of any rights to which MISS DIG may be entitled under any agreement, statute or otherwise.

e. COOPERATION. MISS DIG shall give Member such information and cooperation as it may reasonably request and as shall be within MISS DIG 's power, in the event that this Provision is triggered pursuant to subparagraphs a and b above.

f. ATTORNEYS' FEES AND EXPENSES. In the event MISS DIG is required to bring an action against Member for compliance with this Agreement, inclusive of this Provision, Member shall pay all of MISS DIG 's fees and expenses in bringing and pursuing such action (including attorneys' fees at any stage, including on appeal); provided, however, that Member shall not be required to provide such payment for such attorneys' fees or expenses if a court of competent jurisdiction determines that each of the material assertions made by MISS DIG in such action was not made in good faith.

g. NOTIFICATION AND DEFENSE OF CLAIM.

1.) NOTIFICATION. Promptly after receipt by MISS DIG of notice of any Proceeding, MISS DIG shall notify Member of such notice; but the omission to so notify Member will not, however, relieve Member from any liability which it may have to MISS DIG under this Agreement unless and only to the extent that such omission can be shown to have irreparably prejudiced Member's ability to defend the Proceeding.



# MISS DIG System, Inc. <sup>1</sup> Membership Agreement

2.) DEFENSE OF CLAIM. With respect to any such Proceeding as to which MISS DIG notifies Member of the commencement thereof:

a.) Member may participate therein at its own expense;

b.) Member, jointly with any other party similarly notified, shall assume the defense thereof, with counsel satisfactory to MISS DIG. After notice from Member to MISS DIG of its assumption of the defense thereof, Member shall not be liable to MISS DIG under this Provision for any legal or other expenses (other than reasonable costs of investigation) subsequently incurred by MISS DIG in connection with the defense thereof unless:

(1) the employment of counsel by MISS DIG has been authorized by Member,

(2) MISS DIG shall have reasonably concluded that there may be a conflict of interest between Member (or any other person or persons included in the joint defense) and MISS DIG in the conduct of the defense of such action, or

(3) Member shall not, in fact, have employed counsel to assume the defense of such action, in which case the fees and expenses of MISS DIG's counsel shall be at Member's expense.

Member shall not be entitled to assume the defense of any Proceeding brought by or on behalf of Member or as to which MISS DIG shall have reasonably made the conclusion provided for in (ii) above.

c.) Member shall not be liable to MISS DIG under this Agreement for any amounts paid in settlement of any Proceeding effected without Member's written consent.

d.) Member shall not settle any action or claim in any manner that would impose any penalty or limitation on MISS DIG without MISS DIG's written consent; and

e.) Neither Member nor MISS DIG shall unreasonably withhold its consent to any proposed settlement, provided that MISS DIG may withhold consent to any settlement that does not provide a complete release of MISS DIG.

h. SEVERABILITY. Nothing in this Provision is intended to require or shall be construed as requiring Member to do or to fail to do any act in violation of applicable law. Member's inability, pursuant to court order, to perform its obligations under this Provision shall not constitute a breach of this Agreement. This Provision shall be severable from this Agreement and if any portion of the Agreement hereof shall be invalidated on any ground by any court of competent jurisdiction,



# MISS DIG System, Inc. <sup>1</sup> Membership Agreement

Member shall nevertheless indemnify or make contribution to MISS DIG to the full extent permitted by this Provision that has not been invalidated, and the balance of this Provision not so invalidated shall be enforceable in accordance with its terms.

i. **BINDING EFFECT; AMENDMENT AND TERMINATION.** (a) This Provision shall be binding on MISS DIG and on Member and their successors, assigns, next of kin, and children, and shall inure to the benefit of MISS DIG and MISS DIG's assigns and to the benefit of Member and its successors and assigns; and (b) No amendment, modification, termination or cancellation of this Provision shall be effective unless in writing signed by both parties hereto. This Provision shall survive the expiration or termination of this Agreement.

j. **NOTICES.** All notices, claims and other communications hereunder shall be in writing and made by hand delivery, registered or certified mail (postage prepaid, return receipt requested), facsimile or overnight air courier guaranteeing next-day delivery.

**11. INSURANCE REQUIREMENTS.** For the protection of MISS DIG, Member shall secure and maintain in force during the term of this Membership Agreement, comprehensive general liability insurance, with minimum limits of \$1,000,000 bodily injury and \$1,000,000 property damage per occurrence or a combined single limit for bodily injury and property damage of \$1,000,000 per occurrence. Such insurance shall be in such form and with such companies as may be acceptable to MISS DIG; MISS DIG acknowledges and agrees that provided Member secures insurance substantially similar to the insurance it has in place as of the date of this Membership Agreement, such insurance shall be deemed "reasonably acceptable" under this provision. Member shall provide certificate(s) evidencing the required insurance to: MISS DIG, Attention: Administrative Department, 3285 Lapeer Road West, Auburn Hills, MI 48326, within 15 days from the date hereof. Such certificate(s) shall provide evidence that the policies of such insurance have been endorsed so as to provide a minimum of 30 days' notice of cancellation or change thereof to the MISS DIG office at the address set forth above in this section.

**12. MODIFICATION OF AGREEMENT.** The terms of this Membership Agreement shall not be changed, superseded or supplemented, except in writing, signed by the CEO of MISS DIG. Notwithstanding the foregoing, the annual charge for the work hereunder shall be changeable in accordance with the above Section 3.

**13. GOVERNING LAW.** This Membership Agreement shall be deemed a Michigan contract and shall be construed in accordance with and governed by the laws of the State of Michigan.

**14. ENTIRE AGREEMENT.** With respect to the subject matter hereof, this Membership Agreement (as supplemented by the MISS DIG Master Rules and Procedures and/or MISS DIG's policies and procedures, MISS DIG's by-laws and/or articles of organization) supersedes all previous representations, understandings and negotiations, either written or oral, between the parties hereto or their representatives, and constitutes the entire Agreement between the parties.



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# MISS DIG System, Inc. <sup>1</sup> Membership Agreement

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THIS MEMBERSHIP AGREEMENT WAS ADOPTED BY THE MISS DIG BOARD OF DIRECTORS ON SEPTEMBER \_\_, 2019 AND SUPERCEDES AND/OR REPLACES ALL PREVIOUS MEMBERSHIP AGREEMENTS.