

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate increase in Marion, Orange, Pasco, Pinellas, and Seminole Counties by Utilities, Inc. of Florida.

DOCKET NO. 020071-WS
ORDER NO. PSC-03-0903-PCO-WS
ISSUED: August 6, 2003

ORDER ON DISCOVERY MOTIONS AND THIRD
ORDER REVISING ORDER ESTABLISHING PROCEDURE

On October 3, 2003, Utilities, Inc. of Florida (UIF or utility) completed the minimum filing requirements for a general rate increase in Docket No. 020071-WS, and that date was established as the official filing date for this rate case. The utility has requested that this case be scheduled directly for hearing. Moreover, on June 4, 2002, the Office of Public Counsel (OPC) filed a protest to Order No. PSC-02-0657-PAA-WU, issued May 14, 2003, in Docket No. 991890-WU. By Order No. PSC-02-1467-PCO-WS, issued October 25, 2003, in both dockets, the dockets were consolidated and Docket No. 991890-WU was closed. Order No. PSC-02-1495-PCO, issued October 31, 2002, established the procedures which govern this docket. Orders No. PSC-02-1808-PCO-WS, issued December 20, 2002, and Order No. PSC-03-0389-PCO-WS, issued March 20, 2003, revised certain aspects of the controlling dates established by Order No. PSC-02-1495-PCO-WU. This docket is currently set for an administrative hearing on August 20-21, 2003.

On June 12, 2003, OPC filed its Motion to Compel requesting that the Prehearing Officer compel UIF to respond to its Interrogatory Nos. 149 and 170, and to produce the documents requested in its Request for Production of Documents No. 83. UIF filed its Response to OPC's Motion to Compel on June 19, 2003.

On June 10, 2003, OPC served its Fifteenth Set of Interrogatories (Nos. 190-199) and Fifteenth Set of Request for Production of Documents (Nos. 105-109) on UIF. On June 20, 2003, UIF filed its Objections to and Motion to Strike Citizen's Fifteenth Set of Interrogatories and Fifteenth Requests for Production of Documents. OPC did not file a Response to UIF's Motion to Strike. Instead, on July 17, 2003, OPC filed its Motion for a Finding that Citizens' Current Outstanding Discovery is

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Within the Limits Set by Order No. PSC-02-1495-PCO-WS (Order Establishing Procedure), or in the Alternative, Motion for Modification of Order No. PSC-02-1495-PCO-WS. Also on July 17, 2003, OPC filed its Motion to Compel Responses to Citizens' Fifteenth Set of Interrogatories and Fifteenth Set of Document Production Requests. On July 22, 2003, UIF filed its Responses to both OPC's Motion to Compel Responses, and OPC's Motion for a Finding that Citizens' Current Outstanding Discovery is Within the Limits Set by Order No. PSC-02-1495-PCO-WS, or in the Alternative, Motion for Modification of Order No. PSC-02-1495-PCO-WS.

Rule 28-106.211, Florida Administrative Code, grants broad authority to the prehearing officer to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Based upon this authority, and having considered the Motions and Responses, the rulings are set forth below.

I. OPC's Motion to Compel Interrogatory Nos. 149 and 170, and Request for Production of Document No. 83

OPC seeks an order compelling UIF to respond to Interrogatory Nos. 149 and 170, and to produce documents requested in Production of Documents No. 83. Each of OPC's arguments, UIF's response, and the attendant rulings are addressed below.

(a) Interrogatory No. 149 and Request for Production No. 83

Both Request for Production No. 83 and Interrogatory No. 149 request information related to the termination of Mr. Andrew N. Dopuch, a former employee of UIF.

Specifically, Request for Production No. 83 asks UIF to:

Provide copies of all documents associated with the termination of Andrew N. Dopuch and subsequent legal action or threatened legal action by either Mr. Dopuch and/or his counsel and the Company. This should include, but not be limited to, any lawsuits, the letter mentioned in the November 21, 2001 BOD meeting minutes, and any other documents related to such claims in the Company's possession.

UIF's objection states:

None of the costs attributable to the termination of Mr. Dopuch were passed on to rate payers. Therefore, the information sought is not relevant to this matter and not reasonably calculated to lead to the discovery of admissible evidence. -

With respect to Request for Production No. 83, OPC maintains that notwithstanding UIF's statement, OPC has the right to verify for itself whether these costs were passed on to the company's rate payers. OPC argues that Mr. Dopuch was a high-ranking employee of UIF, and that upon his termination, he had either filed a lawsuit or threatened to file a lawsuit. According to OPC, the documentation that it seeks will set forth the circumstances of the employee's termination, and will include documents related to any lawsuits or threatened lawsuits. OPC states that it is entirely possible that the actions relating to the termination of the employee may impact other employees, which could potentially affect costs included in the UIF's test year. These legal costs, as well as ancillary personnel costs associated with the employee's termination, should be identified and evaluated to determine whether they should be borne by the ratepayers. Furthermore, to the extent that Mr. Dopuch was terminated based on alleged illegal activities, OPC maintains that it should have the right to discovery of this information in order to evaluate the extent to which it may impact test year results. OPC further notes that prior to the termination of this employee, a portion of his salary was allocated to the company's systems from Water Services Corporation (WSC), which is UIF's service affiliate.

OPC's Interrogatory No. 149 provides:

Please explain, in detail, the reason for Andrew Dopuch's termination, which was authorized in the May 16, 2001 Board meeting. If the reason for his termination has any impact on historic test year rate base, expenses, or revenues, identify the impact and the associated accounts.

UIF's Objection to this interrogatory states:

The Board of Directors of UIF terminated the employment of Mr. Dopuch for business reasons. None of the costs associated with his termination, if any, were passed on to rate payers. Therefore, the information sought is not relevant to this matter and not reasonably calculated to lead to the discovery of admissible evidence. His termination did affect historic test year rate base and expenses in that, after his termination, Mr. Dopuch's salary and costs of his benefits and other associated expenses were no longer allocated to rate payers.

In its Motion to Compel, OPC argues that the information sought by this interrogatory is relevant to this case and is reasonably calculated to lead to the discovery of admissible evidence. Despite UIF's assurance that none of the costs associated with this employee's termination were passed on to the rate payers, OPC believes that it should have the right to ascertain for themselves the reasons for his termination and whether those reasons may impact the rate payers, and only upon learning this information will OPC know whether or not to pursue to the issue further.

In its response to OPC's Motion to Compel Interrogatory No. 149 and Request for Production of Documents No. 83, UIF states that it has already effectively responded to these requests, and that if OPC is asking it to disclose whether rate payers would be bearing any part of the burden of the employee's termination, the answer would still be "no." If OPC is trying to discover facts which legitimately affect the permissible scope of this rate case, UIF maintains that they already have all the information they need and are entitled to have. Further, if OPC is trying to uncover facts which are outside the scope of this rate case and the permissible scope of their inquiry, they are choosing an improper forum to do so.

In response to OPC's argument that it has the right to determine for itself whether any of the costs relating to the employee's termination were passed on to UIF's ratepayers, UIF states that OPC has already obtained copies of the relevant books and records of UIF and has had ample opportunity to inspect them to

discover this information. Further, OPC has received a copy of the staff audit that was conducted and could have confirmed that UIF's statement that none of the costs have been passed to the rate payers is correct.

According to UIF, it has already provided substantial evidence that none of the costs were passed on to the rate payers and OPC has had this evidence since March of this year. Further, any motivation for OPC to now assert that they need additional proof that such costs were not passed on to rate payers is not valid and can only be deemed a fishing expedition for something that OPC either has not requested or has no evidence of, both of which, UIF alleges, are outside the scope of this rate case. UIF further states that there is no additional information that it could provide OPC that would be material or relevant to OPC's case. To now assert that there is anything else that UIF is withholding, particularly on the grounds that Mr. Dopuch was guilty of some sort of malfeasance which UIF is covering up, is both slanderous and outside the scope of this rate case. For these reasons, UIF maintains that OPC's requests should be denied, and requests that further attempts to require information on these matters should be stricken.

Pursuant to Rule 1.280(b)(1), Florida Rules of Civil Procedure, "[i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Upon review of the pleadings and consideration of the arguments, OPC's motion to compel UIF to respond to Interrogatory Nos. 149 to produce the documents requested in Request for Production of Documents No. 83 is granted. OPC's discovery request may lead to admissible evidence. Therefore, OPC shall respond to OPC's Interrogatory No. 149 and shall produce documents requested in Production of Document No. 83 by the close of business on August 13, 2003.

(b) Interrogatory No. 170

OPC's Interrogatory No. 170 asks UIF to:

- (a) Please identify each sale of a water or wastewater system, or portion of a water or wastewater system,

- including customer base, that Utilities, Inc. has made in the past ten years.
- (b) Please provide the date of the sale and dollar value of each transaction identified in response to (a).
 - (c) Please identify the Utilities, Inc. operating company that sold each system or portion of a system identified in (a).
 - (d) Please identify the state, county, or other regulatory agency that had jurisdiction over each sale identified in (a).
 - (e) Please describe the treatment of the gain (loss) on each sale identified in (a) approved by the relevant regulatory agency.

UIF's objections states:

UIF objects to this interrogatory because it purports to answers [sic] with respect to each sale of a water or wastewater system by Utilities, Inc. anywhere in the world. This information is overly broad, irrelevant and not reasonable calculated to lead to the discovery of admissible evidence. Utilities, Inc., if required will answer such interrogatory with respect to transactions occurring within the State of Florida. Further, this interrogatory purports to require information relating to transactions which occurred over the past 10 years. UIF can not reasonably be expected to either retain or produce information relating transactions which occurred over the past 10 years. UIF can not reasonably be expected to either retain or produce information relating to such transactions, if any, that occurred this long ago. In addition, information of this age can have very little, if any, relevance to the issues in this case.

In its motion to compel a response to this interrogatory, OPC states that this information is relevant to this proceeding, as one of the issues in this case involves the treatment of the gain on sale for Druid Isle and Green Acres. OPC states that UIF is incorrect to suggest that this information is not relevant if it concerns sales and gains involving its parent company, Utilities,

Inc., rather than Utilities, Inc. of Florida. OPC states that it has the right to know what sales have taken place in other jurisdictions and to use such information to support its case.

OPC maintains that the information sought is relevant, and to support this, points to the fact that this Commission often looks at what other state commissions have done in similar situations to help guide its deliberations. OPC further argues that because Commission staff has conducted a survey of several states to determine how gain on sale was treated in other jurisdictions, the information sought through this interrogatory can be used to supplement data already collected by staff.

In response to UIF's objection that this request is overly broad because it seeks information about systems anywhere in the world, OPC explains that its intent is to include only systems in the United States, and that the purpose of this request is to provide a comparison of the sales of other systems by Utilities, Inc., with the sales of Druid Isles and Green Acres. Moreover, the requested time frame of ten years was included in order to ensure that a broad representation of sales would be included in the information provided.

In response to OPC's motion to compel a response to its Interrogatory No. 170, UIF states that requiring it provide information concerning systems without geographical or time limitation is overly broad, burdensome, and excessive. With respect to OPC's argument that the Commission needs this information in order to determine how it should treat the gain on sale issue, UIF responds that the Commission is capable of determining this issue by using its own expertise in the area and without requiring any guidance from other jurisdictions. UIF maintains that there is no valid reason for OPC to require this information, in particular at this late stage of this proceeding. Accordingly, for the foregoing reasons, OPC's Motion to Compel should be denied, and further attempts to require information on this matter should be stricken.

Upon review of the pleadings and consideration of the arguments, OPC's motion to compel UIF to respond to Interrogatory No. 170 is granted. Accordingly, UIF shall respond to UIF's interrogatory No. 170 by the close of business on August 13, 2003.

However, the request shall be limited to information relating to sales made by Utilities, Inc. in the past ten years, and only in the United States.

II. Motion for Modification of Order No. PSC-02-1495-PCO-WS-Order Establishing Procedure -

On June 10, 2003, OPC served its Fifteenth Set of Interrogatories (Nos. 190-199) and Fifteenth Set of Request for Production of Documents (Nos. 105-109) on UIF. On June 20, 2003, UIF filed its Objections to and Motion to Strike Citizen's Fifteenth Set of Interrogatories and Fifteenth Requests for Production of Documents. In addition to other objections, UIF argues that the fifteenth set of discovery propounded by OPC exceeds the maximum number as set forth in the Order Establishing Procedure in this docket, which, according to UIF, limited the number of interrogatories and requests for production to 250 per party. According to UIF, OPC has served UIF with 14 sets of interrogatories, consisting of over 400 interrogatories, including the subparts, and 14 sets of production of documents, all of which are over the amount mandated by the Order Establishing Procedure.

In its Motion, UIF states that it has not previously objected to the excessive number of interrogatories in the spirit of cooperation. According to UIF, it even withdrew its previous objections to OPC's Thirteenth set of interrogatories as part of an agreement to assist OPC in their evaluation of the huge amount of data supplied by UIF in response to discovery requests propounded by OPC and the Commission staff. Furthermore, OPC has not sought a modification of the Order Establishing Procedure, and therefore, UIF objects to the OPC's Fifteenth set of discovery in its entirety as being in excess of the limit prescribed by the Order Establishing Procedure.

Rather than file a response to UIF's Motion to Strike, on July 17, 2003, OPC filed its Motion for a Finding that Citizens' Current Outstanding Discovery is Within the Limits Set by Order No. PSC-02-1495-PCO-WS, or in the Alternative, Motion for Modification of Order No. PSC-02-1495-PCO-WS. In its Motion, OPC is seeking to resolve the question of whether the current discovery exceeds the amount allowable by the Commission by one of two ways; either through a finding by the Commission that the current discovery is

within the limits set by the Order Establishing Procedure, or for a modification of that Order.

In support of its argument that the current discovery is within the limits set by the Commission, OPC asserts that its Fifteenth set of interrogatories extends from No. 190 through 199, and its Fifteenth set of document requests extends from No. 105 through 109. Accordingly, they are within the limit of the 250 limit, including subparts, imposed by the Order Establishing Procedure. However, UIF asserts that the current number of OPC's interrogatories exceeds 400, primarily because UIF and OPC vastly differ on the definition of "subpart." In its motion, OPC illustrates by example how parties can differ on what constitutes a "subpart" to an interrogatory, but also states that it has no desire to request the Commission undertake an examination of all the previous discovery that has been propounded in this case. Accordingly, as an alternative, OPC seeks to a modification of the Order Establishing Procedure to allow the discovery in question. In support of this request, OPC notes that the multiplicity of systems and counties involved in this proceeding has turned this into several combined rate cases. Furthermore, UIF's multiple filings of its MFR and its E-Schedules has contributed to the need for additional discovery. UIF asserts that almost all of the discovery contained in its Fifteenth set is being sought as follow-up and clarification to answers that UIF provided in earlier discovery, and the remaining discovery is carefully designed to obtain the type of information the Commission will need in order to make an informed decision on issues at the hearing. OPC maintains that it has not sought frivolous, needless or burdensome information; rather the information is necessary to illuminate central issues for the Commission's edification.

UIF filed its Response to OPC's Motion, stating that while it may be true that OPC's interrogatories only number 199, they are composed of numerous subparts. According to UIF, some of these subparts are simple and straightforward, but many require the assimilation of information from different and diverse sources, and therefore must be counted as different interrogatories. UIF goes on to illustrate this argument by listing a few examples of OPC's previous interrogatories which include subparts. UIF maintains that most, if not all of OPC's discovery requests, are made up of

complex, multi-part questions, and that OPC is up to its fifteenth set and shows no sign of stopping.

In response to OPC's claim that it seeks follow-up and clarification to earlier responses, UIF maintains that OPC should have objected to those previous responses and required more complete answers at that time. Because discovery has been in progress since September of 2003, many of these discovery requests could, and should have been, made a long time ago if they are merely requests for clarification of what has already been provided. UIF argues that it is inappropriate to be searching for information when testimony has been filed and the relevant issues should have already been decided.

UIF further states that it does not know why OPC is requiring this information, as OPC has not stated that it needs this information to make its case. Further, UIF contends it would be prejudicial to UIF to be surprised now that the issues are ripe for hearing. According to UIF, OPC's assertion that it is providing this information for the benefit of the Commission is invalid. The Commission staff has been provided with all the documents and discovery responses given to OPC, and is in a superior position to know and understand what the Commission needs to make informed decision on issues relevant to the hearing. UIF maintains that OPC's discovery requests are numerous, require multiple answers from multiple sources, and far exceed the limit set by the Commission. UIF argues that it is too late now for OPC to be searching for information to make its case, and it is unreasonable for OPC to continue to require further discovery now. For these reasons, UIF requests that OPC's motion be denied.

Upon review of the pleadings and consideration of the arguments, OPC's Motion to for Modification of Order No. PSC-02-1495-PCO-WS is granted. The number of interrogatories and requests for production of documents, including all subparts, shall be increased to 450. Order No. PSC-02-1495-PCO-WS shall be affirmed in all other respects. Absent good cause shown, no further modifications shall be permitted.

III. OPC's Motion to Compel Responses to its Fifteenth Set of Interrogatories and Fifteenth Set of Document Production Requests

OPC's Fifteenth Set of Interrogatories (Nos. 190-199) and Fifteenth Set of Document Production Request (Nos. 105-109) were served on UIF on June 10, 2003. The responses were due on July 15, 2003, and have not been received. By its Motion to Compel, OPC seeks an order compelling UIF to respond to this outstanding discovery.

OPC notes that UIF objected to its Fifteenth set of discovery by raising several points of contention. Primarily, UIF objected on the grounds that OPC had exceeded the number of discovery requests allowed by Order No. PSC-02-1495-PCO-WS, the Order Establishing Procedure. This objection has been addressed above; the remainder of UIF's objections, OPC's responses in its motion to compel, and UIF's response to the motion to compel are addressed and ruled upon below.

UIF raises several general objections to OPC's interrogatories. The first of which is that most, if not all, of the information sought by OPC could have been requested and provided last year. UIF states that the information solicited by OPC appears to be based on data provided pursuant to discovery requests to which UIF responded to before March of this year. In its Motion to Compel, OPC responds to this objection by stating that this vague assertion is not a valid objection, and that the time frame is certainly within relevant parameters.

UIF also objects on the basis that many of the requests are duplicative of requests to which UIF has already responded. As an example, UIF points to Production of Document Request No. 106 which requests all documentation on which UIF will rely on to support the amount of rate case expense. In its objection, UIF stated that these documents were supplied in connection with Staff Interrogatory Nos. 78-80. In response to the objection that many of its requests are duplicative, OPC states that this is a mischaracterization of its discovery requests. With respect to Production of Document Request No. 106, OPC states that UIF should be aware that its actual rate case expense is an ever-changing item throughout this proceeding, and that OPC was asking for the most current documentation at the time of its discovery request. In its

Response to OPC's Motion to Compel, UIF states that it had already provided rate case documentation in response to Staff's discovery request, and at the time of OPC's discovery request, the information provided to staff was the most current information available. Further, if OPC had reviewed the information provided to staff, it would have found that the documentation not only provided copies of rate case expense incurred, but also estimates of rate case expense to be incurred through the resolution of this case.

In response to OPC's Request for Production No. 107, which requires UIF to provide "all contracts between WSC or its affiliates and the systems that are provided contract services," UIF states that the information sought is not relevant to this matter, and is not reasonably calculated to lead to the discovery of admissible evidence, and the scope of the request is overly broad. In its Motion to Compel, OPC states that contrary to UIF's assertion, this information is relevant to this matter, and points out that OPC's prefiled testimony, as well as Staff's Audit, address WSC and its affiliates' contract services. OPC's discovery seeks contracts in order to further understand the services that are provided pursuant to the contract arrangements and in order to present the Commissions with additional evidence that supports OPC's position in this proceeding. Further, OPC argues that its request is not overly broad in that the request is precisely tailored to only those contracts between WSC or its affiliates and the specific systems to which they provide these contract services.

UIF also objects to OPC's Interrogatory No. 196 which requires UIF to explain why it used only water customers to allocate WSC rate base amounts in this case. UIF's objection is that the interrogatory is unclear and does not refer to a document or other reference point, and it does not understand the question and is therefore uncertain how to respond. OPC responds to this objection by stating that there is nothing unclear about the interrogatory which pointedly and unambiguously asks UIF to explain its use of only water customers to allocate WSC's rate base amount in this case. OPC states that if UIF is unable to answer why it has chosen a particular allocation method, then it should properly respond to this interrogatory, explaining any inability to do so. UIF responds by stating that if this is the type of answer that would

OPC seeks, then it is clear that OPC's motive does not conform to the Rules of Procedure relating to discovery.

In its objections to OPC's Fifteenth set of discovery, UIF further states that OPC will not be prejudiced by the Commission's refusal to require further discovery in this case as most of the information sought by OPC has already been provided or is not material to the issues in this case. To this, OPC responds by stating that if most of the information OPC has sought had already been provided, must provide the rest of the information sought. OPC maintains that UIF has not demonstrated that the information OPC has sought through discovery is duplicative. Rather, it contends that if any of its discovery requests appear to be duplicative, it is because UIF's earlier responses were inadequate. UIF responds that if its responses were indeed inadequate, OPC should have objected and sought more complete responses. UIF states that if many of these discovery requests were merely requests for clarification, such requests should have been made a long time ago.

Upon review of the pleadings and consideration of the arguments, OPC's Motion to Compel Responses to Citizen's Fifteenth Set of Interrogatories and Fifteenth Set of Document Production Requests is granted. UIF shall respond to OPC's Fifteenth Set of Interrogatories and Fifteenth Set of Document Production Requests by the close of business on Wednesday, August 13, 2003. To the extent that UIF has already provided information requested in OPC's Fifteenth Set of Interrogatories and Document Production Requests, UIF shall so state, and indicate the prior discovery request to which the information was already provided.

Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the Office of Public Counsel's Motion to Compel Utilities, Inc. of Florida to respond to Interrogatory Nos. 149 and 170, and to produce the documents requested in Request for Production of Documents No. 83 is granted. It is further

ORDERED that Utilities, Inc. of Florida shall produce responses to the Office of Public Council's Interrogatories 149 and

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170, and shall produce documents requested in Request for Production of Documents No. 83 by August 13, 2003. It is further

ORDERED that OPC's Motion for Modification of Order No. PSC-02-1495-PCO-WS is granted. The number of interrogatories and requests for production of documents, including all subparts, shall be increased to 450. Order No. PSC-02-1495-PCO-WS is affirmed in all other respects. It is further

ORDERED that the Office of Public Counsel's Motion to Compel Responses to Citizen's Fifteenth Set of Interrogatories and Fifteenth Set of Document Production Requests is granted. It is further

ORDERED that Utilities, Inc. of Florida shall respond to OPC's Fifteenth Set of Interrogatories and Fifteenth Set of Document Production Requests by the Wednesday, August 13, 2003.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 6th day of August, 2003.

 for Commissioner Braulio L. Baez

BRAULIO L. BAEZ
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice

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should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.