Another comment indicated that, in order to avoid challenges as to whether legal or factual circumstances have changed, the Department should modify § 215.3(d)(3) so that it will consider an objection to be sufficient when: (ii) the objection "concerns legal or factual issues relating to the terms proposed to be certified that may materially affect the rights or interests of employees.' The current proposed language requires that the Department consider an objection to be sufficient when: (ii) the objection concerns changes in legal or factual circumstances that materially affect the rights or interests of employees.

In response to this comment, the Department has determined that there is a need to clarify § 215.3(d)(3)(ii) and accordingly we have added the word "may" before "materially affect."

E. Definition of the Term "Appropriate" in § 215.3(b)(3)

One comment noted that this section sets forth procedures where there is a new applicant or where the previous arrangements are "not appropriate to the current projects" without providing guidance as to what would be considered "appropriate." This section further specifies that the Department will refer such grants to the parties based on terms and conditions similar to either the Model Agreement for operating projects or the Special Warranty for capital projects.

There are several situations in which it would not be appropriate to refer a project on the basis of previously certified arrangements. It is not possible to anticipate all the factual circumstances where the current terms would no longer be appropriate. However, referral on the basis of existing arrangements is not appropriate in a situation where the Department is aware that the terms and conditions of the existing arrangements do not satisfy the conditions of the statute in the circumstances presented, perhaps because of a change in the state law or a change in the manner in which the transit system is operated (e.g., the public body decides to operate services previously provided through a management company drawing into question how specific protections required by the statute will be provided). Another situation might be one in which the parties have, for instance, negotiated a capital agreement, but have not developed an agreement for application to operating assistance projects.

F. Standards for Operating and Capital Grants Where Protections Do Not Already Exist

One comment noted that the "Model Agreement was developed to provide a template for parties who wished to use it, but was never intended to be a 'standard' or 'default' option.'' It was further suggested that the details of the protective arrangements should be largely left to the parties. Another comment noted that the proposed § 215.3(b)(3)(i) references "terms and conditions similar to those of the Model Agreement," and questioned which "similar" terms and conditions would be specified by the Department. Other questions included: Will the parties be given the opportunity to negotiate? Will the Department abrogate a party's right to withdraw from the Model Agreement?

Although the Model Agreement was not originally developed for application to all operating assistance grants, the agreement has been certified as meeting the requirements of the statute, and is applied with the agreement of the parties in the majority of operating assistance projects. The Department intends to expedite the certification process by basing its initial referral of operating assistance grants on terms and conditions similar to those of the Model Agreement when no other existing arrangement is applicable. As with referrals for applicants with previously certified arrangements, the parties will have 15 days from the date of the referral and notification letters to submit objections to the referred terms. The parties will be afforded the opportunity to negotiate alternative terms if the Department determines an objection to be sufficient in accordance with § 215.3(d)(3)

The Department will not "abrogate" the right of any party to withdraw from the Model Agreement in a timely manner. However, if a party withdraws from the Model Agreement, referral of the next operating project involving that party, in accordance with $\S 215.3(b)(3)(i)$, will be based on terms and conditions "similar" to the Model Agreement because there will be no previously certified arrangements 'appropriate to the current project." The parties will then need to negotiate terms and conditions, under the procedures and timeframes outlined in the guidelines, to substitute for those which they object to from the Model Agreement.

Another comment suggested that, in order to make the standards for protections required under capital grants and operating grants conform

with each other, § 215.3(b)(3)(i) should be redrafted to require that for operating grants, the terms and conditions will be based on arrangements no less protective than those of the Model Agreement. The Department has concluded that such consistency could more appropriately be obtained by including language in § 215.3(b)(3)(ii), which indicates that "for capital grants, the terms and conditions will be based on arrangements similar to those of the Special Warranty applied pursuant to section 5311." This language affords the Department greater latitude in incorporating the language of prior Departmental determinations into referrals.

One comment noted that "one of the paragraphs ((b)(3)(ii)) cited as being applicable to (b)(1) projects specifically states that it applies to grants other than those referenced in (b)(1)." We have deleted the phrase "other than those for replacement equipment or facilities referenced in paragraph (b)(1) of this section," from § 215.3(b)(3)(ii) to clarify that the Special Warranty will be used for new applicants which apply for routine replacement of equipment and/or facilities of like kind and character.

Comments also questioned using the Special Warranty as the basis for certification of capital grants. As with the Model Agreement, the Special Warranty has been previously certified by the Department as meeting the requirements of the statute and will serve as a starting point for the parties to develop protections should sufficient objections be submitted to the proposed terms. This will expedite the processing of section 5333(b) certifications while continuing to ensure the right of the parties to negotiate appropriate protective arrangements.

G. Interim Certifications Under § 215.3(d)(7)

Several comments noted that the court has held that the Department does not have the statutory authority to issue conditional certifications. These comments suggest that the proposed interim certification would be a conditional certification. The conditional certifications rejected by the courts in Amalgamated Transit Union v. Donovan, 767 F.2d 939 (D.C. Cir. 1985), however, were not statutorily sufficient because they did not ensure that all requirements of the statute were satisfied prior to certification. In those instances, the Department had issued certifications which were lacking mandatory terms and conditions. The interim certification provided for in these guidelines will fully satisfy the requirements of the statute based upon